IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-318-2007**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
KARRIEM JENKINS,	**:**	
Appellant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's judgment of sentence dated July 11, 2008 and docketed July 17, 2008. The relevant facts follow.

Trooper Russell Burcher of the Pennsylvania State Police was utilizing a confidential informant (CI) to investigate drug activity and try to set up a controlled buy with the CI's supplier. The CI was facing drug delivery charges of his own and the police were trying to work their way up the supply chain. The CI was "consensualized," that is, he agreed to allow his phone conversations with his supplier to be recorded by the police. The CI informed the police he was obtaining his drugs from an individual known to him as "Batman" and that he could be reached a 570-777-6990.

On February 4, 2005, the CI agreed to contact Batman for the purpose of purchasing a pound of marijuana. A call was placed to 570-777-6990, but Batman did not answer and the call went to voice mail. As Trooper Burcher was explaining on the tape recording that the call was not answered, the CI's cell phone received an incoming call from 777-6990. The details of the transaction were not discussed during the phone call. However,

the CI knew Batman lived on the second floor of 1524 Memorial Avenue and he told Batman he "would be up," meaning he would meet him at his residence.

Trooper Burcher then searched the CI to make sure he did not possess any money, controlled substances or contraband and gave him $1400 in pre-recorded funds to purchase a pound of marijuana.[1] Trooper Burcher drove the CI to an alley in the rear of 1524 Memorial Avenue. The CI went to the second floor of that address and Trooper Burcher observed him go inside. Once inside, the CI gave Batman $1300. Batman left the room. When he returned several minutes later, he handed the CI a chip bag containing a Ziploc bag of marijuana. About 10-15 minutes after the CI first entered the residence, the CI left the apartment and returned to Trooper Burcher's vehicle. He gave Trooper Burcher a Lays potato chip bag containing a gallon Ziploc bag of suspected marijuana and returned $100 of the pre-recorded funds. The substance in the Ziploc bag was weighed and tested at the crime lab. The results showed the Ziploc bag contained 454 grams of marijuana.[2] Ultimately, the police identified Appellant as Batman.

The police filed a criminal complaint against Appellant, charging him with delivery of a controlled substance, possession of a controlled substance with the intent to deliver it, possession of a controlled substance, and criminal use of a communication facility. A jury trial was held March 4-5, 2008. In addition to the testimony of Trooper Burcher and the CI regarding the controlled buy, the CI identified Appellant as Batman and the

1 Trooper Burcher recorded the serial numbers on the money by photocopying it.
2 There are 28.35 grams in an ounce and 16 ounces in a pound. Therefore, the bag contained about one pound of marijuana (454 ÷28.35÷16 = 1.00088).

Commonwealth presented two photographs of Appellant depicting a bat tattoo on his back and a tattoo of the word Batman on his arm. The jury found Appellant guilty of all four charges.

The Court scheduled Appellant for sentencing on April 24, 2008, but he did not appear and a bench warrant was issued for his arrest. Appellant was brought before the Court on the bench warrant on May 23, 2008. The Court rescheduled Appellant's sentencing hearing for July 11, 2008.

On July 11, 2008, the Court sentenced Appellant to 14 months to 5 years incarceration in a state correctional institution for delivery of a controlled substance and a consecutive 4 months to 2 years for criminal use of a communication facility, for an aggregate sentence of 18 months to 7 years.[3]

Although Appellant wished to appeal, his attorney left the public defender's office during the appeal period and no appeal was filed. On September 3, 2008, another member of the public defender's office filed a motion to reinstate appeal rights nunc pro tunc, which the Court treated as a petition under the Post Conviction Relief Act (PCRA). On October 9, 2008, the Court granted the motion, permitted the defense to orally assert a post-sentence motion pursuant to ***Commonwealth v. Liston***, 941 A.2d 1279 (Pa.Super. 2008), summarily denied the post-sentence motion and reinstated Appellant's appeal rights, directing counsel to file a notice of appeal within 30 days. Unfortunately, defense counsel again failed to file a notice of appeal, so on December 4, 2008 the Court entered a stipulated order that basically reissued the October 9 Order and reinstated Appellant's appeal rights.

Defense counsel filed a notice of appeal on December 5, 2008. In his

statement of errors on appeal, the defense raises three issues: (1) the verdict was against the weight of the evidence; (2) his sentence was excessive and should have run concurrent rather that consecutive; and (3) the sentence was an abuse of discretion.

Appellant first asserts that the verdict was against the weight of the evidence. An allegation that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. ***Commonwealth v. Sullivan***, 820 A.2d 795, 805-806 (Pa.Super. 2003). A new trial is awarded only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. ***Id***. at 806. The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. ***Id***. The issue is not whether there was evidence to support the verdict, but rather whether, notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or give them equal weight with all the facts is to deny justice. ***Id***.

The jury's verdict in this case did not shock the court's sense of justice. The CI placed a phone call to Batman's cell phone number, 777-6990. While Trooper Burcher was noting on the recording that Batman didn't answer, Batman called back. The CI testified that 777-6990 was Batman's cell phone number and he remembered it at trial three years after the transaction because he purchased drugs from him 20-30 times in the past. The CI testified he purchased a pound of marijuana for $1300 from Batman on February 4, 2005. Batman gave the CI the marijuana in a gallon Ziploc bag inside a Lays potato chip bag. The CI identified Appellant as Batman at trial. In addition, the Commonwealth presented photographs of Appellant showing tattoos of a bat and the word Batman on his back and arm,

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3 The possession with intent to deliver and simple possession convictions merged with the delivery in this case.

respectively. The chip bag, Ziploc bag and marijuana also were Commonwealth exhibits at trial. The defense stipulated to the lab report, which showed the substance in the Ziploc bag was 454 grams of marijuana.

Although the defense brought out some inconsistencies in the trial testimony, they were minor. For example, Trooper Burcher testified that he searched the CI inside his vehicle before the controlled buy, and the CI testified that the search occurred in the bathroom of a Sheetz minimarket. The only evidence presented in defense was testimony from defense counsel's paralegal who testified that the area where Trooper Burcher parked at the rear of 1524 Memorial Avenue was a few car lengths away, instead of one car length as testified by Trooper Burcher. The Court also notes that the "credibility of witnesses is a matter within the province of the trier of fact, which is free to believe all, some or none of the evidence." ***Commonwealth v. Bagari***, 397 Pa.Super. 84, 579 A.2d 942, 944 (Pa. Super. 1990).

Furthermore, although none of the pre-recorded funds were found on Appellant, it is not surprising in this case because Appellant was not arrested until nearly two years after this drug transaction occurred.

In short, under the facts and circumstances of this case, the Court was not at all shocked or surprised that the jury found Appellant guilty of all the charges.

Appellant also asserts his sentence was excessive or an abuse of discretion. Again, the Court cannot agree. The offense gravity score (OGS) was a five for both the delivery and the criminal use of a communication facility conviction. Appellant had a prior record score of four, which was based on two prior felony drug convictions and a simple assault. Appellant also had other convictions that did not count in his prior record score

because either the offense occurred or Appellant pleaded guilty after February 4, 2005, the offense date in this case. Those other convictions consisted of false reports, resisting arrest, simple assault and terroristic threats.

With an offense gravity score of 5 and a prior record score of 4, the standard sentencing guideline range for the minimum sentence was 9-16 months. For the delivery conviction, the Court imposed a sentence of state incarceration with a minimum of 14 months and a maximum of 5 years. Appellant received a consecutive 4 months to 2 years for criminal use of a communication facility. The Court believed some additional time was justified on this conviction because Appellant failed to appear for sentencing when he was originally scheduled despite being fully aware of his obligation to appear on that date and due to Appellant's criminal conduct that was not included in the prior record score.

In light of Appellant's prior two felony drug convictions, the Court found that a state sentence was justified and a county sentence was not appropriate. The Court made the minimum relatively short for a state sentence, but imposed an aggregate maximum of 7 years so that Appellant would be under supervision for a significant period of time, which would hopefully serve as a deterrent to future criminal activity as well as provide Appellant with some structure once he was released.

DATE: _____ By The Court,

_____
Kenneth D. Brown,
President Judge

cc: Mary Kilgus, Esquire (ADA)

William Miele, Esquire (PD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)