

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH

v.

**GRAY LEE NEAL, IV,
Defendant**

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No.: 851-2008

OPINION AND ORDER

Defendant filed a Post Sentence Motion on March 3, 2009. Argument on Defendant's Motion was held on April 3, 2009. Defendant raises four issues in his motion: (1) that the Court erred in denying his Motion to Suppress; (2) that evidence was insufficient to establish beyond a reasonable doubt that he possessed the controlled substances with the intent to deliver; (3) that the verdict was against the weight of the evidence; and (4) that his sentence was excessive. As a result, the Defendant requests a New Trial, Arrest of Judgment, or a reconsideration of his sentence. The Honorable Judge Kenneth D. Brown decided the Motion to Suppress and also sentenced the Defendant in this case. By way of separate opinion, Judge Brown will address those issues raised by the Defendant relating to the Suppression Motion and the sentencing.

Background

On May 6, 2008, Officer Norman L. Hager, II (Hager) and Officer Michael Engel (Engel) both of the Pennsylvania College of Technology Police Department were on patrol working a grant targeting liquor law violations and D.U.I. violations. Around 1:30 a.m., while traveling north in the 200 block of Park Street, a blue Dodge Dynasty pulled out of the Kimbel's Tin Cup Pub directly in front of the officers causing Hager to break and swing wide into the oncoming

lane of traffic. Based upon the time of night, the area the vehicle was coming from, and the type of patrol the officers were on, Hager and Engel affected a stop on the vehicle. As part of their investigation, the officers shone their alley spotlight so they could see inside the cab of the vehicle for hiding persons or any movement. Officers initially noticed furtive movements by the driver.

Officers made contact with the driver, a black male and lone occupant of the vehicle black male. The individual identified himself as Dasean Walker and provided a date of birth. Hager ran the driver's information through the Justice Network (JNet) computer system in his police cruiser, which showed a photograph of a different individual than that of the driver. Hager approached the vehicle a second time and informed the driver that he was not the individual he was claiming to be. The driver gave a second name of Malik Walker and a different date of birth. Engel went back to the police cruiser and ran the information. Again, the driver history came up showing a photograph of a different individual. While the Officers were attempting to determine the individual's identification, Hager became concerned as the Defendant was reaching over the back seat of the vehicle and making a lot of hand movement underneath the seats. Hager asked the Defendant repeatedly to stop moving around in his vehicle and to keep his hands on the wheel. Due to the furtive movements, Hager shone a flashlight on the floor of the rear of the vehicle. Within reach of the Defendant, Hager observed a \$20.00 bill, a Pennsylvania I.D. card for Grady Neal, and several small plastic baggies, which he believed contained narcotics on the floor. After observing the photo on the ID card, Hager believed it resembled the driver.

As Hager believed there were drugs in the rear of the vehicle, he had the driver step out and placed him under arrest. Hager conducted a pat down for weapons and placed the Defendant in the police cruiser. Hager then requested Officer Brian Womer (Womer) of the Williamsport

Bureau of Police (WBP) K-9 unit to the vehicle to see if he could get a hit for drugs on the vehicle. Womer brought K-9 Scott to the vehicle and he gave a positive aggressive alert at the rear passenger door which indicated there were drugs in the vehicle.

Once Womer was finished with the vehicle, the Defendant was transported back to police headquarters where a strip search was conducted in which \$641.00, consisting of twenty-eight \$20.00 bills, four \$10.00 bills, eight \$5.00 bills, and one \$1.00 bill were taken off the Defendant's person. In the meantime, the vehicle operated by the Defendant was secured in the WBP impound lot. A search warrant was then obtained and executed. The search of the rear passenger side floor of the vehicle uncovered two medium bags of suspected marijuana, one larger bag containing five smaller bags of suspected marijuana, one plastic bag containing several small bags of suspected cocaine and crack cocaine, Gray Neal's I.D. card, and one \$20.00 bill. A search of the front of the vehicle uncovered one \$20.00 bill, two \$10.00 bills, and, a Nokia cell phone.

The suspected controlled substances were sent to the Pennsylvania State Police laboratory. At the time of trial, the Commonwealth and Defense Counsel stipulated that the narcotics seized from the vehicle, including four plastic bags containing a chunky substance tested positive for crack cocaine, six plastic bags containing powder tested positive for powder cocaine, one plastic bag containing five plastic bags each containing vegetable matter tested positive for marijuana, and two plastic bags containing vegetable matter also tested positive for marijuana.

On January 15, 2009, a jury trial was held before this Court, at which the Defendant was found guilty of one count of Possession with the Intent to Deliver (powder cocaine) at 35 P.S. § 780-113(a)(30), one count of Possession with the Intent to Deliver (crack cocaine) at 35 P.S. §

780-113(a)(30), two counts of Possession with the Intent to Deliver (marijuana) at 35 P.S. § 780-113(a)(30), one count of Possession of a Controlled Substance (cocaine) at 35 P.S. § 780-113(a)(16), one count of Possession of a Controlled Substance (crack cocaine) at 35 P.S. § 780-113(a)(16), one count of Possession of a Controlled Substance (marijuana) at 35 P.S. § 780-113(a)(16), one count of Possession of Drug Paraphernalia at 35 P.S. § 780-113(a)(32), one count of False Identification to Law Enforcement Authorities at 18 Pa.C.S. 4914(a), and one count of Driving While Operating Privilege Suspended or Revoked at 75 Pa. C.S. 1543(a). On February 17, 2009, the Defendant was sentenced by Judge Brown who imposed upon the Defendant an aggregate sentence of five (5) to ten (10) years in a State Correctional Institution.

Discussion

There was insufficient evidence to sustain the jury's verdict

The Defendant alleges that the evidence presented was insufficient to establish beyond a reasonable doubt that he possessed the controlled substances with the intent to deliver them.

The test used to determine the sufficiency of the evidence in a criminal matter is “whether the evidence, and all reasonable inferences taken from the evidence, viewed in the light most favorable to the Commonwealth, as verdict-winner, were sufficient to establish all the elements of the offense beyond a reasonable doubt.” Commonwealth v. Maloney, 876 A.2d 1002, 1007 (Pa. Super. Ct. 2005) citing Commonwealth v. Lawson, 759 A.2d 1 (Pa. Super. Ct. 2000). In applying the sufficiency of the evidence test, the Court “may not weigh the evidence and substitute [it’s own] judgment for that of the fact-finder.” Commonwealth v. Lambert, 795 A.2d 1010, 1014 (Pa. Super. Ct. 2002). When applying “the above test, the entire record must be evaluated and all evidence actually received must be considered.” Id. at 1015.

The elements of a charge of Possession with the Intent to Deliver are the possession of a controlled substance and the specific intent to deliver said controlled substance to another. 35 P.S. § 780-113(a)(30). According to the Pennsylvania Supreme Court, the intent to deliver may be inferred from possession of a large quantity of controlled substances. Commonwealth v. Jackson, 645 A.2d 1366, 1368 (Pa. Super. 1994). However,

if the quantity of the controlled substance is not dispositive as to the intent, the court may look to other factors. Other factors to consider . . . include the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large sums of cash found in possession of the defendant.

Commonwealth v. Ratsamy, 934 A.2d 1233, 1237-38 (Pa. 2007) citing Jackson, 645 A.2d at 1368. Further, “[e]xpert opinion testimony is admissible concerning whether the facts surrounding the possession of controlled substances are consistent with an intent to deliver rather than with an intent to possess it for personal use.” Ratsamy, 934 A.2d 1238.

In the instant case, the Commonwealth introduced into evidence that the contraband found on the floor of the vehicle in which the Defendant was operating, consisted of four plastic bags containing crack cocaine, six plastic bags containing powder cocaine, one plastic bag containing marijuana, and two plastic bags containing marijuana. The Commonwealth’s narcotics expert, Agent Leonard A. Dincher (Dincher) testified that he believed the Defendant possessed the cocaine and the marijuana with the intent to deliver. Dincher explained that the four bags containing cocaine were in another knotted bag that’s called a distribution bag. N.T. 1/15/09 p. 68. Dincher also related that the Defendant had three different types of drugs, a cell phone, no legitimate source of income, and large amounts of cash in denominations commonly used to buy a bag of drugs, which are all factors used in determining the Defendant possessed cocaine and marijuana with the intent to deliver. Dincher further explained that it is not

uncommon for an individual in the business of selling narcotics to keep the money and drugs separate, or attempt to distance the money and drugs, and to borrow someone else's vehicle because the money and vehicle are forfeitable. Finally, he testified that the amount of drugs is not indicative of personal use and the Defendant did not have any personal use paraphernalia. Viewed in the light most favorable to the Commonwealth, the Court finds there was sufficient evidence for the jury to find the Defendant guilty of Possession with the Intent to Deliver cocaine.

The jury's verdict was against the weight of the evidence

Defendant also asserts that the jury's verdict was against the weight of the evidence.

"The question of weight of the evidence is one reserved exclusively for the trier of fact who is free to believe all, part, or none of the evidence and free to determine the credibility of witnesses." Commonwealth v. Solano, 906 A.2d 1180, 1186 (Pa. 2006) citing Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003). The test to determine whether the jury's verdict was against the weight of the evidence is not whether the trial judge, based on the same facts, would have arrived at the same conclusion. Commonwealth v. Edwards, 903 A.2d 1139, 1148 (Pa. 2006) (and cases cited therein). Rather the test is "whether the jury's verdict is so contrary to the evidence so 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.

Instantly, in light of the physical evidence and expert testimony, the jury's verdict does not shock the Court's sense of justice. Therefore, the Court suggests that the Defendant's contention that the jury's verdict of guilty was against the weight of the evidence is not justified.

Conclusion

Based upon the foregoing, the Court finds no reason upon which to grant Defendant's Post-Sentence Motion. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4)(a), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty days (30) of the date of this Order to the Pennsylvania Superior Court; "(b) the right to assistance of counsel in the preparation of the appeal; (c) the rights, if the defendant is indigent, to appeal in forma pauperis and to proceed with assigned counsel as provided in Rule 122; and (d) the qualified right to bail under Rule 521(B)."

ORDER

AND NOW, this ____ day of July 2009, based on the foregoing Opinion, it is hereby ORDERED AND DIRECTED that Defendant's Post Sentence Motion is DENIED.

By The Court,

Nancy L. Butts, Judge

xc: DA (PP)
PD (JL)
Trisha D. Hoover, Esq. (Law Clerk)
Gary Weber, Esq. (LLA)