IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1012-2008**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
GREGORY RICKS,	**:**	
Defendant	**:**	**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 March 13, 2009 and docketed March 23, 2009. The relevant facts follow.

During the second week of December 2006, David Lehman was the victim of an apparent burglary. His house was ransacked and numerous items were taken, including a Winchester Model 88 .308 caliber rifle and an Iver Johnson .22 caliber rifle. Mr. Lehman was living with Marion Diemer and her son. Ms. Diemer reported the burglary to the police.

Unbeknown to Mr. Lehman, Ms. Diemer actually took the items, because she had a crack cocaine habit and was trying to get rid of the items to obtain crack. Ms. Diemer placed the guns in her Jeep and drove to Appellant's residence at 1132 Park Avenue. Ms. Diemer told Appellant she had something for him and showed him she had cocaine. They got high together. Then she told him she had some guns in her Jeep and she could not take them back to her residence. Appellant got a blanket, went out to the Jeep, wrapped the guns in the blanket and took the guns inside his residence. Ms. Diemer testified that either that day or a few days later Appellant called someone about getting rid of the guns for crack

cocaine. Appellant traded one of the guns for crack cocaine, which he then provided to Ms. Diemer, who used it and got high.

In January 2007, the police interviewed Ms. Diemer and asked her if she was involved in the burglary. The police also questioned her about her former brother-in-law and Appellant. Ms. Diemer denied being involved in the burglary.

In April 2007, Appellant was evicted from his residence because he was behind on his rent and failed to pay a $2500 water bill. The failure to pay the water bill resulted in the water being shut off and the Codes officer placing a placard on the residence indicating it was unfit for habitation. Appellant's landlord, Harold Manley, had to pay Appellant's water bill before the water company would turn the water back on. Without water, Mr. Manley could not rent the residence. Mr. Manley told Appellant get his belongings out of the residence before April 28, 2007 or Mr. Manley would put them out on the porch.

Appellant did not retrieve his belongings so Mr. Manley entered the residence to begin moving Appellant's belongings to the porch. Initially, Mr. Manley discovered several pill bottles, a tube with a burnt end and several vials with white residue. Mr. Manley contacted the police, who came and retrieved the items. Later in the day, Mr. Manley discovered an Iver Johnson .22 rifle in a closet. Again, he called the police, who came and retrieved the rifle. The police examined the rifle, but initially could not determine its owner because it did not have any serial numbers. Officer James Douglas test-fired the gun and it was operable. The Iver Johnson .22 caliber rifle was admitted into evidence as Commonwealth Exhibit #1, and Mr. Lehman identified the rifle as one of his guns that was stolen from his residence in December 2006.

At trial, the defense questioned Mr. Manley about pending assault charges and the money Defendant cost him by failing to pay rent and failing to pay his water bill.

In March 2008, Agent Leonard Dincher of the Williamsport police and Lycoming County Detective Edward McCoy interviewed Marion Diemer. During this interview, Ms. Diemer admitted she took the rifles and other items from Mr. Lehman's residence. In April 2008, Agent Dincher and Detective McCoy again interviewed Ms. Diemer and she told them she took the guns to Appellant's residence. Ms. Diemer was never charged with false reports or theft of the items.

On or about April 1, 2008, Agent Dincher and Detective McCoy went to Appellant's residence to talk to him, but he was not at home. As they were leaving, Appellant arrived. Agent Dincher told Appellant they wanted to talk to him. Appellant indicated he had some things to do but would come down to the station in about 25 minutes. Agent Dincher and Detective McCoy returned to the police station and waited for an hour or so for Appellant to arrive. When Appellant did not show up, Agent Dincher and Detective McCoy got in Detective McCoy's vehicle and drove to the area of Appellant's residence. They saw Appellant walking in a direction toward the police station with his girlfriend. They asked Appellant if he needed a ride and he said "yeah." They drove Appellant and his girlfriend to City Hall. They took Appellant into an interview room and told him he was free to leave at any time; Appellant was not in custody. During the interview, Appellant told Agent Dincher and Detective McCoy that Ms. Diemer had come to his residence with some guns and that he traded one of the guns for crack cocaine. Appellant also indicated that he kept the .22 caliber rifle in a closet in his residence and his landlord probably had it because the gun was in his residence was he was evicted.

On April 24, 2008, Agent Dincher filed a criminal complaint against Appellant and obtained a warrant for his arrest. He charged Appellant with person not to possess a firearm, receiving stolen property, criminal use of a communication facility, delivery of a controlled substance, possession of a controlled substance with the intent to deliver it and possession of a controlled substance.

On April 29, 2008, Detective McCoy arrested Appellant and took him to the Williamsport police station. At the station, Agent Dincher read Appellant his Miranda rights, which Appellant waived. Agent Dincher showed Appellant the police report from his interview on April 1, 2008. Agent Dincher asked Appellant to sign the report if he agreed with his statements contained therein. Appellant adopted his statements contained in the report by signing and dating each page of the report. The signed report was Commonwealth Exhibit 6. Agent Dincher spoke to Appellant about some more things and Appellant gave further statements. Appellant told Agent Dincher he gave Marion Diemer crack cocaine for the .22 rifle, but he denied making a phone call and getting crack cocaine for the other gun. Agent Dincher wrote down what Appellant said and Appellant signed it. This second statement was admitted as Commonwealth's Exhibit 7.

A jury trial was held on January 20, 2009.

At trial, Appellant testified. Appellant denied telling the officers that he gave Marion Diemer crack cocaine for any rifle. He claimed it did not make sense for him to do that because he was an addict who would have no use for a rifle. Appellant claimed he initially denied giving Ms. Diemer cocaine for the .22 rifle in his statements to the police, but then he told Agent Dincher what he wanted to hear after Agent Dincher threw chairs and he became scared. Detective McCoy refuted this testimony when the Commonwealth recalled

him as a rebuttal witness.

The jury convicted Appellant of all the charges except criminal use of a communication facility.

On March 13, 2009, the Court sentenced Appellant to an aggregate term of incarceration in a state correctional institution of 7 years, 3 months to 14 years, 6 months.

Appellant filed post sentence motions challenging the sufficiency and weight of the evidence for the delivery conviction, and claiming the sentence was manifestly excessive, which the Court denied in an Order dated April 3, 2009.

On April 21, 2009, Appellant filed a notice of appeal.

Appellant asserts the evidence was insufficient to convict him of delivery of a controlled substance because Ms. Diemer testified that she brought cocaine with her to Appellant's residence on the date she took the guns. The Court cannot agree.

In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that can be drawn from the evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. ***Commonwealth v. Davido***, 582 Pa. 52, 60, 868 A.2d 431, 435 (Pa. 2005); ***Commonwealth v. Murphy***, 577 Pa. 275, 284, 844 A.2d 1228, 1233 (Pa. 2004).

To prove delivery of a controlled substance in this case, the Commonwealth needed to prove beyond a reasonable doubt that Appellant transferred crack cocaine to Marion Diemer. Although Ms. Diemer did testify that she brought cocaine to Appellant's residence and they smoked it, she also testified that later that day or a few days later Appellant traded a gun for crack cocaine, Appellant gave her the crack cocaine, she smoked

the cocaine and she got high. N.T., January 20, 2009, at pp. 26-27, 58-59. Appellant's statements to the police also show that he was guilty of delivery of a controlled substance. Appellant told the police he gave Ms. Diemer crack cocaine for the .22 caliber rifle. Though Appellant denied at trial that he gave Ms. Diemer crack cocaine for the .22 caliber rifle and claimed he only made such a statement to the police after he became scared from Agent Dincher throwing chairs and moving the table, the jury did not have to believe Appellant's trial testimony and, in fact, probably did not find Appellant's trial testimony credible. ***Commonwealth v. Cooper***, 596 Pa. 119, 130, 941 A.2d 655, 662 (Pa. 2007)(it is the "fact finder's province to weigh the evidence, determine the credibility of witnesses, and believe all, part, or none of the evidence submitted").

Appellant also claims the verdict of guilty for delivery of a controlled substance 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 jury's verdict in this case did not shock the Court's sense of justice. Appellant's trial testimony that he did not give Ms. Diemer crack cocaine was not credible. Appellant admitted that he got high on crack with Ms. Diemer about 8 times within a month's time. Appellant denied that Ms. Diemer ever brought him any guns at all, but Mr. Manley found Mr. Lehman's Iver Johnson .22 caliber rifle in the closet of Appellant's

residence after Appellant was evicted. In his direct testimony he claimed his relationship with Ms. Diemer was "no more than getting high partners," but when he was cross-examined by the prosecutor about how the officer would know his landlord evicted him or that Appellant left the .22 rifle in the closet of 1132 Park Avenue, Appellant claimed that basically was what a girlfriend told the officer in exchange for a deal. N.T., January 20, 2009 at pp. 95, 110. When the prosecutor asked to whom he was referring, Appellant replied "Marion had to tell him [Agent Dincher] that." ***Id***. at 110.

Appellant's final issue on appeal is that the court abused its discretion in imposing consecutive sentences for delivery and receiving stolen property, resulting in an aggregate sentence that was manifestly excessive.

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Anderson, 2003 PA Super 290, 830 A.2d 1013, 1018 (Pa.Super. 2003), *quoting* ***Commonwealth v. Rodda***, 1999 PA Super 2, 723 A.2d 212, 214 (Pa. Super. 1999)(en banc)(internal quotations and citations omitted). This discretion includes determining whether, given the facts of a particular case, a sentence should be consecutive to, or concurrent with, other sentences being imposed. *See* ***Commonwealth v. W.H.M.***, 2007 PA Super 249, 932 A.2d 155, 164 (Pa.Super. 2007), *quoting* ***Commonwealth v. Rickabaugh***, 706 A.2d 826, 847 (Pa.Super. 1997).

The Court does not believe it abused its discretion in imposing consecutive

sentences in this case. The Court did not base its decision on partiality, prejudice, bias or ill will, but rather on the facts and circumstances of this case. The Court reviewed the pre-sentence investigation and noted that Appellant was a 49 year old man with a significant criminal history.

The Court also considered the Sentencing Guidelines. Appellant's prior record score was capped at 5. The offense gravity score for the person not to possess a firearm conviction was a 9 because the firearm was not loaded, resulting in a standard minimum guideline range of 48 to 60 months. The Court imposed a sentence of 4 ½ to 9 years for this offense. The 4 ½ year minimum was directly in the middle of the standard range, and the 9 year maximum was the lowest maximum sentence possible with a 4 ½ year minimum sentence, see 42 Pa.C.S. §9756(b)(1). The offense gravity score for receiving stolen property was a 3, resulting in a standard minimum guideline range of 6 to 16 months. The Court sentence Appellant to a minimum of 1 year and a maximum of 2 years. The offense gravity score for delivery of a controlled substance was a 6, resulting in a standard minimum guideline range of 21 to 27 months. The Court imposed a minimum sentence of 21 months, which was at the bottom of the guideline range, and a maximum sentence of 42 months.

The Court ran these sentences consecutive to one another for several reasons. First, Appellant had a significant criminal history. Appellant had convictions for rape, burglary and aggravated assault in Philadelphia County (case number CP-51-CR-1222711-1979). The burglary and aggravated assault convictions did not count in Appellant's prior record score because he received an overlapping concurrent probation sentence on those offenses. He also had convictions for possession of a controlled substance, simple assault,

and possession of drug paraphernalia. Additionally, Appellant had numerous arrests in Philadelphia County for serious felonies, such as burglary, robbery, and aggravated assault, where the charges were either withdrawn or dismissed or for which there was no reported disposition. Given Appellant's criminal history and his drug addition, the Court believed Appellant posed a danger to the community and represented a risk of re-offending in the future.

Second, the offenses were separate and distinct.

Third, the other rifle Ms. Diemer provided to Appellant, which Ms. Diemer testified was traded for drugs, was subsequently used in a homicide. This wasn't just a situation where Mr. Lehman lost his property, but because of Appellant's subsequent acts the weapon ended up in the wrong hands and was used to kill another human being.

Finally, Appellant neither accepted responsibility for his conduct nor had any appreciation of the seriousness of his conduct. Appellant basically lied to the jury and to the Court. In his trial testimony, Appellant claimed Ms. Diemer never provided any weapons to him. Ms. Diemer's testimony, Appellant's statements to the police and the fact that Mr. Manley found the weapon in the closet of Appellant's residence, exactly where Appellant told the police it was when he was evicted, however, overwhelmingly showed otherwise. Appellant persisted in this denial by claiming at sentencing that African Americans only had a use for something automatic that they could conceal, not a rifle. He did not show any remorse, he claimed God was going to punish Ms. Diemer and Agent Dincher, and he didn't think he belonged in jail. N.T., March 13, 2009, at pp. 23-26.

The Court found these factors justified imposing consecutive sentences for delivery of a controlled substance and receiving stolen property.

DATE: _____ By The Court,

_____
Kenneth D. Brown, President Judge

cc: Mary Kilgus, Esquire (ADA)
Nicole Spring, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)