

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. CR – 1659 – 2007
:
vs. : CRIMINAL DIVISION
:
ANTONIO PETERSON, :
Defendant : Post-Sentence Motions

OPINION AND ORDER

Before the Court are post-sentence motions filed by Defendant on April 17, 2009. Argument on the motions was heard July 28, 2009.

Defendant was tried by a jury and convicted of two counts of delivery of a controlled substance, two counts of criminal use of a communications facility, one count of possession of a controlled substance and one count of criminal conspiracy. Defendant was sentenced to concurrent terms of incarceration aggregating to three to ten years. In his post-sentence motions, Defendant contends the Court erred in denying his request for a mistrial, in denying his motion for acquittal, and in denying a motion for dismissal after a previous motion for mistrial had been granted,¹ and also contends the Court abused its discretion in sentencing. These claims will be addressed seriatim.

With respect to the denial of Defendant’s motion for mistrial, the Court first notes that it is to base its ruling on such a motion on a determination of whether the complained of conduct was so prejudicial to Defendant as to affect the outcome of the trial. *See Commonwealth v. Savage*, 602 A.2d 309 (Pa. 1992). Here, the Commonwealth questioned a confidential informant regarding threats made to him by Defendant,² and after the informant testified regarding the incident, and indicated in response to a question that Defendant had left the scene of the threat, the assistant district attorney asked him “Did you have any further contact with [Defendant] after that incident?” and the witness replied, “No, just over at the jail, when I was

¹ Defendant’s conviction was the result of a second trial, the first having been aborted when a mistrial was granted.

² In addition to the drug charges of which he was convicted, Defendant was also being tried on charges relating to his allegedly having threatened the confidential informant who was assisting the Commonwealth in its prosecution of the drug charges. Defendant was found not guilty of those separate charges.

over at the jail.” Defense counsel then moved for a mistrial but the Court denied that request as it believed the statement to be harmless in light of the fact that the reference to Defendant’s incarceration implied that Defendant was incarcerated *after* having been arrested on charges of making the threats. Such does *not* constitute a reference to *other* criminal activity, which is ordinarily the basis for a finding that a reference to incarceration is prejudicial. *See Commonwealth v. Padilla*, 923 A.2d 1189 (Pa. Super. 2007). Further, the Court gave the jury a curative instruction that they were to “disregard any kind of reference or inference from the location of that contact” and that it was in no way to “have any kind of bearing or participation” in their deliberations, or “any weight whatsoever” in the outcome. After further review, the Court continues to believe the reference was not so prejudicial to Defendant as to require the granting of a new trial.³

Defendant’s motion for acquittal was based on the fact that the Commonwealth was not able to produce testimony to establish a complete chain of custody of the drugs as one of the officers who had handled the evidence envelope in which the drugs were contained was since deceased. The Commonwealth need not “discount every hypothetical possibility of tampering with the evidence”, however. *Commonwealth v. Jenkins*, 332 A.2d 490, 492 (Pa. Super. 1974). “Precision in developing the 'chain of custody' is not an iron clad requirement, and the fact of a 'missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material respect.” *United States v. Bokshoven*, 258 F.Supp.2d 397,400 (E.D. Pa. 2003), quoting *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir.), *cert. denied*, 459 U.S. 874 (1982). Considering the slight involvement of the officer in question in the instant case, the Court found the remaining evidence of chain of custody to be sufficient to prove that the drugs had not been altered or tampered with, and thus does not believe it was error to deny Defendant’s motion for acquittal.

³ At argument, defense counsel further propounded that a mistrial should have been granted because the Commonwealth elicited the same information as had been elicited at the first trial which resulted in the granting of a mistrial. The Court does not agree that the same information was elicited. In the first trial, the Commonwealth asked the confidential informant how he knew Defendant and the informant testified he met him while they were both in the Clinton County jail. That reference, to *previous* incarceration, *does* imply other criminal conduct, and is not the same as the reference in the instant case.

With respect to Defendant's motion to dismiss based on the granting of a mis-trial at the time of the first trial, the Court will simply rely on the reasons contained in the Order entered by the Honorable J. Michael Williamson on October 17, 2008.

Finally, in contending his sentence is excessive and in arguing for reconsideration of such, Defendant claims he "has been incarcerated for a substantial period of time, much of which is due to the Commonwealth causing a mistrial in the first case", and "Defendant was not the person who sold the controlled substances in the first incident and even accepting the Commonwealth's version was lesser involved." With respect to the first reason, Defendant was given credit for the time he was incarcerated and the Court fails to see why the length of pre-trial incarceration should affect the sentence. As far as Defendant's degree of involvement, the Court does not find such to be a basis for reconsideration of the sentence in this matter as such was considered in entering the sentence in the first instance.

ORDER

AND NOW, this 30th day of July 2009, for the foregoing reasons, Defendant's post-sentence motions are hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
James Protasio, Esq.
Gary Weber, Esq.

Hon. Dudley Anderson