

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No.: 1373-2008
	:	OTN: L 421078-0
v.	:	
	:	CRIMINAL DIVISION
RAYMOND Q. HOWARD,	:	
Defendant	:	

OPINION AND ORDER

The Commonwealth filed a Motion to Modify Sentence on July 30, 2010 and the Defendant filed an Amended Post-Sentence Motion on October 5, 2010. Argument on both Motions was held October 12, 2010. The sole issue raised by the Commonwealth is that the Court's sentence fell below the sentencing guidelines. In the Defendant's Amended Post-Sentence Motion, he requests a Judgment for Acquittal because he claims that the evidence was legally insufficient to sustain the jury's guilty verdict on the charge of Possession with Intent to Deliver as charged in count 16 of the information. The Defendant also requests a Motion for a New Trial for two reasons: 1) the Court erred in overruling trial counsel's objection to the testimony of Harry J. Rogers, Jr. (Rogers); and 2) trial counsel was ineffective for failing to file a motion to suppress the physical evidence seized from the residence by the police when the search warrant was executed.

Background

Based on information and evidence obtained from a series of controlled purchases of cocaine between the months of March and June of 2008, a search warrant was executed at the Hepburn Street residence on June 10, 2008. Upon entry into the residence, members of the

Williamsport Bureau of Police SRT Unit encountered Raymond Howard (Defendant) on the couch in the front room of the residence. Also located in the residence was Aaron Thompson (Thompson). A search of the residence revealed seven bags of cocaine inside the seat cushion of the couch, digital scales, and empty glassine bags. The Defendant was arrested and taken back to the Pennsylvania State Police Montoursville barracks where a search of his person found him to be in possession of U.S. currency used in a controlled purchase on June 10, 2008, and a cellular phone used by both the Defendant and Thompson. Following a jury trial, the Defendant was found guilty of five (5) counts Possession with Intent to Deliver, five (5) counts Possession of a Controlled Substance, four (4) counts Delivery of a Controlled Substance, three (3) counts Criminal Use of a Communication Facility, and one (1) count Possession of Drug Paraphernalia.

Discussion

The Court's sentence fell below the sentencing guidelines

On July 20, 2010, the Court sentenced the Defendant for four (4) counts of Delivery of a Controlled Substance, three (3) counts of Criminal Use of a Communication Facility, and one (1) count of Possession With Intent to Deliver. The Court sentenced the Defendant on the four (4) Deliveries to one (1) year probation on each, on three (3) counts of Criminal Use of a Communication Facility to one (1) year probation on each, and on Possession With Intent to Deliver to a mandatory three (3) to six (6) year sentence. The Defendant's aggregate sentence imposed was three (3) to six (6) years in state prison with a consecutive seven (7) years probation supervision. The Commonwealth states that the guidelines for each Delivery in the standard range was nine (9) to sixteen (16) months and the guidelines for each count of Criminal Use of a Communication Facility was three (3) to fourteen (14) months. The Commonwealth

believes that the Court's sentence fell below the sentencing guidelines because: 1) the Court did not consider that each of the four deliveries occurred on a separate and distinct date; 2) the Defendant, while out on bail on these charges, committed a new criminal offense for which he pleaded guilty prior to sentencing on this matter; and 3) the Defendant committed one of the deliveries (June 10, 2008) at a time while he was serving an unrelated sentence for Driving Under Supervision, for which he was required to wear a monitoring device.

The Sentencing Guidelines are in place for the Court to consider when determining the appropriate sentence for an offender. If the Court decides to impose a sentence outside of the sentencing guidelines, the Court merely has to state the reasons for its decision. 42 Pa.C.S.A. § 9721. In this case, the Court determined that the most appropriate sentence for the Defendant would be one where he had a longer period of probation. The Court took into account the nature of the Defendant's crime and his criminal history and concluded that the public would best be protected if the Defendant had an extended period of probation rather than a longer prison term. While the Defendant does have a substantial amount of prison time to serve as he was sentenced to three (3) to six (6) years, the seven (7) years of probation helps to ensure that if the Defendant commits another crime during the period of probation, he could get a subsequent period of incarceration. Also, it is clear that the Court did consider each Delivery as a separate incident which is apparent by the four (4) separate sentences imposed. Furthermore, a look at the Sentencing Order reveals that when the Court denied the Defendant's request to continue on bail pending appeal, it did in fact take into consideration the nature of the crime and the fact that the Defendant was convicted of an offense while out on bail pending sentencing. For these reasons, the Court finds no basis upon which to grant the Commonwealth's Motion to Modify Sentence.

The evidence was legally insufficient to sustain the jury's guilty verdict on the charge of Possession with Intent to Deliver as charged in count 16 of the information

The Defendant argues that he is entitled to a judgment of acquittal because the evidence is legally insufficient to sustain the jury's verdict on the charge of Possession With Intent to Deliver as charged in count 16 of the Information. Count 16 related to the cocaine found in the residence after execution of the search warrant. The Defendant avers that the cocaine in question was not found on his person and that, although the Defendant was present at the time the search warrant was executed, mere presence at the scene in this case is insufficient to sustain the jury's guilty verdict.

“A motion for judgment of acquittal challenges the sufficiency of the evidence to sustain a conviction on a particular charge, and is granted only in cases in which the Commonwealth has failed to carry its burden regarding that charge.” Commonwealth v. Abed, 989 A.2d 23 (Pa.Super.2010). The standard to apply in reviewing the sufficiency of the evidence is:

[w]hether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. *Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances.* The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence

Id. at 26. See Commonwealth v. Hutchinson, 947 A.2d 800 (Pa.Super.2008).

In order to prove the Defendant guilty of Possession With Intent to Deliver, the Commonwealth had to prove beyond a reasonable doubt that the Defendant possessed a controlled substance and that he intended to deliver the controlled substance to another person. See Hutchinson at 806. “The intent to deliver may be inferred from an examination of the facts and circumstances surrounding the case including the manner in which the drugs were packaged, the form of the drug and the behavior of the defendant.” Hutchinson at 806 (See Commonwealth v. Conaway, 791 A.2d 359 (Pa.Super.2002)). As in this case, when the controlled substance is not found on the defendant’s person, “[t]he Commonwealth must demonstrate he had constructive possession of the same, or that the individual had the ability and intent to exercise control or dominion over the substance.” Hutchinson at 806 (See Commonwealth v. Dargan, 897 A.2d 496 (Pa.Super.2006)). Here, even though the cocaine was not found on the Defendant’s person, the evidence, when viewed most favorably to the Commonwealth, supported the jury’s verdict that the Defendant constructively possessed the cocaine. Testimony taken from the jury trial on April 19, 2010, before the Honorable Nancy L. Butts, reveals that at the time the search warrant was executed, the Defendant and Thompson were the only two people in the residence. N.T. 80. Additionally, the parties stipulated to the fact that the Defendant was residing at the Hepburn Street residence. A search of the residence revealed seven bags of cocaine located in the couch in the living room where the Defendant had been sitting when the police entered the residence. N.T. 90. Once the Defendant was arrested and taken back to the Montoursville barracks, he was searched by Trooper Brett Herbst (Herbst). N.T. 81-82. Herbst found \$751.31 cash on the Defendant. N.T. 82. The cash found on the Defendant was then separated and compared to the previously recorded money used by the confidential informants to purchase cocaine. N.T. 82. Herbst discovered that \$200.00 of the money found on the

Defendant matched the money used by the confidential informants to purchase cocaine during the controlled buys. N.T. 83. Furthermore, at trial, Herbst testified as an expert on ascertaining whether drugs are possessed for personal use or possession with intent to deliver. N.T. 90. Herbst testified that based on the evidence obtained from the residence, which included digital scales, bags of cocaine packaged separately, and \$751.31 in cash, he believed the evidence was indicative of Possession With Intent to Deliver. N.T. 90-93. Considering the evidence presented, the Court believes there was sufficient evidence for the jury to conclude that the Defendant was guilty of Possession With Intent to Deliver. Therefore, the Court finds no basis on which to grant the Defendant's Motion for Judgment of Acquittal.

The Court erred in overruling his counsel's objection to the testimony of Rogers

The Defendant alleges that he is entitled to a new trial because the Court erred in overruling trial counsel's objection to the testimony of Rogers.

The Defendant believes that the Court erred in overruling trial counsel's objection to the testimony of Rogers because Rogers' testimony consisted of his interpretation of the electronic surveillance of the Defendant. At the time of the trial on April 20, 2010, Defense Counsel objected to Rogers' testimony because they felt that an expert was needed to testify about the electronic GPS monitoring of the Defendant and that Rogers was not qualified to give the testimony.

Rogers is the intensive supervised bail coordinator for the Lycoming County Prison. Part of Rogers' duties includes the electronic monitoring of people charged with driving under suspension. In light of Rogers' job description and his specialized knowledge of the electronic monitoring system, the Court believes he was in fact qualified to testify as to the electronic GPS

monitoring of the Defendant. See Miller v. Brass Rail Tavern, Inc, 664 A.2d 525 (Pa. 1995), where a trial court abused its discretion by refusing to allow a mortician/county coroner to testify as an expert witness based solely on his lack of formal medical training when the mortician/coroner had extensive experience and specialized knowledge regarding time of death not otherwise known to a lay individual.

The Defendant also objects to Rogers' testimony because he was not notified of the electronic surveillance evidence until the day of trial. The Court notes that at the trial on April 20, 2010, Defense Counsel agreed that the Defendant was in fact wearing a GPS monitoring unit on June 10, 2008. N.T. 2. Furthermore, Defense Counsel was given the opportunity to have time to go over the evidence with his client, but Defense Counsel responded that he did not need additional time, as he had already gone over the evidence with his client. N.T. 4. At no point did the Defendant object to the evidence on the basis that he was prejudiced by receiving it on the day of trial. The Defendant's only objection to the evidence at trial was that Rogers' was not qualified to testify on the subject matter. "[I]f the ground upon which an objection is based is specifically stated, all other reasons for its exclusion are waived...." See Commonwealth v. Arroyo, 723 A.2d 162, 170 (Pa. 1999). (citing Commonwealth v. Stoltzfus, 337 A.2d 873, 881 (Pa. 1975)). Therefore, the Defendant has waived his right to object to the evidence based on the fact that he received the evidence on the day of trial.

The Defendant also claims that the disclosure to the jury that he was under electronic surveillance supervision for unrelated criminal activity was prejudicial to him. The Defendant believes that the prejudicial effect of the evidence far outweighed its probative value. At the time the evidence of the electronic surveillance was admitted at trial, Defense Counsel did not object to its admission for reasons of its prejudicial effect. Defense Counsel merely objected to

the admittance of Rogers' testimony of the electronic evidence based on Rogers' lack of qualifications to testify. Therefore, the Defendant has waived his right to object based upon the prejudicial effect of Roger's testimony. As the Court stated above "[I]f the ground upon which an objection is based is specifically stated, all other reasons for its exclusion are waived...." See Arroyo at 172. (citing Stoltzfus at 881).

Trial counsel was ineffective for failing to file a motion to suppress the physical evidence seized from the residence by the police when the search warrant was executed

The Defendant believes he is entitled to a new trial because his trial counsel was ineffective in failing to file a motion to suppress the physical evidence seized from the residence when the search warrant was executed. The Defendant believes that a motion to suppress should have been filed for two reasons: 1) the search warrant was issued upon the basis of an affidavit which did not establish probable cause to search the residence in question and; 2) the police violated the "knock and announce" rule when they executed the search warrant.

In order to establish a claim for ineffective assistance of counsel, a petitioner must establish:

(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Reed, 971 A.2d 1216, 1221 (2009). (See Commonwealth v. Pierce, 527 A.2d 973 (1987)). Case law is clear that Defendants should wait to raise claims of ineffective assistance of trial counsel until collateral review. See Commonwealth v. Grant, 813 A.2d 726 (Pa.2002). Ineffective assistance of counsel claims are best raised on collateral review when an adequate record is available for the Court to address these claims. See Grant.

As the record on the Defendant's ineffective assistance of counsel claims is not adequately developed in this case, the Court dismisses these claims without prejudice in order for the Defendant to raise these claims in a Post Conviction Relief Act petition after appellate review is complete.

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 (30) days 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 3rd day of November, 2010, based on the foregoing Opinion, it is ORDERED AND DIRECTED as follows:

1. The Commonwealth's Motion to Modify Sentence is hereby DENIED.
2. The Defendant's Motion for Judgment of Acquittal is hereby DENIED.
3. The Defendant's Motion for New Trial on the basis that the Court erred in overruling counsel's objection to the testimony of Harry J. Rogers, Jr., is hereby DENIED; the Defendant's Motion for a New Trial on the basis that trial counsel was ineffective in failing to file a motion to suppress is hereby DISMISSED without prejudice in order for the Defendant to raise these claims in a Post Conviction Relief Act petition after completion of appellate review.
4. As to the Defendant's Motion to Reconsider Order Denying Bail Pending Post-Sentence Motion, said Motion was DENIED by the Court at the time set for hearing on October 12, 2010.

By the Court,

Nancy L. Butts, President Judge

xc: DA
Pete Campana, Esq.
Amanda B. Browning, Esq. (Law Clerk)
Gary Weber, Esq. (LLA)