

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. CR – 472 – 2010
:
vs. : CRIMINAL DIVISION
:
DEREK PAUL YOST, :
Defendant : Non-Jury Trial

OPINION AND VERDICT

Defendant has been charged with two counts of delivery of a controlled substance, two counts of possession of a controlled substance with intent to deliver, four counts of criminal conspiracy and one count of criminal use of a communication facility in connection with two transactions which occurred in November 2008. A non-jury trial was held November 10, 2010.

At trial, the Commonwealth established that on the first occasion, a confidential informant, who was seeking to cooperate with police, approached Defendant and asked him to obtain for him some marijuana. Defendant then called one Mr. Oeler, the CI and Defendant went together to Mr. Oeler's residence where the CI handed the money to Defendant outside, and when they went inside, Defendant handed the money to Mr. Oeler. Mr. Oeler pointed out some marijuana which was lying on the table and the CI picked it up and they left. On the second occasion, the CI asked Defendant again to obtain for him some marijuana and gave Defendant money, Defendant alone went to Mr. Oeler's residence, gave Mr, Oeler the money and obtained the marijuana and then brought the marijuana to the CI and gave it to him. On both occasions, Defendant provided all the money given to him by the CI to Mr. Oeler, and provided all the marijuana given to him by Mr. Oeler to the CI. Defendant did not profit from the transactions. The Commonwealth also established that the amounts of marijuana involved were 1.4 grams on one occasion and 6.9 grams on the other occasion.

Defendant argues that he cannot be convicted of delivery or possession with intent to deliver because subsection 780-113(a)(31) of the Controlled Substance, Drug, Device and Cosmetic Act pre-empts such convictions. The Court agrees.

Subsection 780-113(a)(31) provides as follows:

§ 780-113. Prohibited acts; penalties

(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

...

(31) Notwithstanding other subsections of this section, (i) the possession of a small amount of marihuana only for personal use; (ii) the possession of a small amount of marihuana with the intent to distribute it but not to sell it; or (iii) the distribution of a small amount of marihuana but not for sale.

For purposes of this subsection, thirty (30) grams of marihuana or eight (8) grams of hashish shall be considered a small amount of marihuana.

35 Pa.C.S. Section 780-113(a)(31). Since the amounts involved were less than thirty grams, the subsection clearly applies if the Court finds Defendant possessed with the intent to distribute but not to sell. That such may be concluded is supported by Commonwealth v. Flowers, 387 A.2d 1268, 1272 (Pa. 1978), wherein the Court relied on its prior holding in Commonwealth v. Simone, 291 A.2d 764 (Pa. 1972), that “where there is no evidence that appellant received any of the proceeds of the sale or was employed by the seller to promote sales he cannot be guilty of a sale.” As noted above, the Commonwealth showed that Defendant merely acted as an agent of the buyer, and there was no evidence that he received any proceeds of the sale or was employed by the seller.

The Court also looks to Commonwealth v. Gordon, 897 A.2d 504 (Pa. Super 2006), wherein the Superior Court vacated a conviction under subsection 780-113(a)(16) because the facts of that case supported a conviction under subsection 780-113(a)(31) instead. The Court interpreted the statute as providing for the *exclusive* application of subsection 780-113(a)(31) where a small amount of marijuana is involved. In the instant case, since Defendant *could* be convicted of Subsection (31),¹ he *cannot* be convicted of Subsection (30).

Defendant also argues that he cannot be convicted of conspiracy to commit a delivery, conspiracy to possess with intent to deliver, or criminal use of a communication facility to commit either crime, where his conduct does not constitute the crimes specified. Again, the

¹ That Defendant was not charged with violation of Subsection (31) is of no moment.

Court agrees. Clearly, if Defendant's conduct is not a "delivery" and he did not possess "with intent to deliver", which, according to Flowers and Simione, it is not and he did not, then he cannot be convicted of conspiracy to commit those crimes or use of a communication facility to commit those crimes under these circumstances.

Accordingly, the Court will enter the following:

VERDICT

AND NOW, this 17th day of November 2010, for the foregoing reasons, Defendant is found **NOT GUILTY** on all counts. Defendant is hereby discharged. Costs shall be paid by the County.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
Peter Campana, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson