IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-1782-2010**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
CARLOS BOOTHE,	**:**	
Appellant	**:**	**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 June 30, 2011 and its Order denying Appellant's post sentence motion dated August 16, 2011. The relevant facts follow.

On August 30, 2010, a confidential informant (CI) went to the Lycoming County Drug Task Force so he could make a controlled buy of heroin from Appellant, who he knew by the street name "Bread." The police strip searched the CI to ensure that he did not possess any contraband or money. The police then gave the CI $100 in pre-recorded funds and dropped him off near Appellant's residence at 310 High Street. The CI knocked on Appellant's door and asked him if he had any heroin. Appellant indicated that they had to take a walk. The CI and Appellant walked to 612 Park Avenue, where Appellant made a call on his cell phone. After Appellant got a call back on his cell phone, the CI gave him the $100 and waited on the porch of 612 Park Avenue for Appellant to return with the drugs. When Appellant returned, he had been beaten and he told the CI he had been robbed. Police surveillance confirmed Appellant was assaulted and possibly robbed in the 600 block of

Locust Street.

On September 25, 2010, the CI went to the Task Force office for the purpose of making a controlled buy of cocaine from Appellant. Again, the CI was strip-searched, given $100 and dropped off near Appellant's residence. The CI knocked on the door and asked Appellant "if he was good," meaning did he have any cocaine. Appellant said "yeah." The CI and Appellant then walked to the east side of the residence where the CI handed Appellant the money and Appellant handed two little bags of crack cocaine to the CI. As the CI left Appellant's residence, he turned his hat around to signal the police that the transaction occurred, and then he walked down the street where he was picked up by the police. The CI turned over the suspected crack cocaine to the police. The police field tested the substance in the two bags and the result was positive for cocaine.

On October 1, 2010, the CI went to the Task Force office a third time. Again, the CI was strip searched and given $100, but this time he telephoned Appellant to meet him at his residence so he could buy cocaine. The CI told Appellant he wanted $100 worth. Appellant said he had it and he would be right down. The CI walked from the Task Force office to his apartment and waited on the front steps for Appellant's arrival.

A short time later, Appellant arrived and sat down next to the CI on the porch. The CI handed Appellant the money and Appellant handed the CI six baggies of suspected cocaine. The video surveillance conducted by the police depicts an exchange taking place between Appellant and the CI, but one cannot see exactly what was exchanged on the video. After Appellant left, the CI turned the suspected cocaine over to the police. The substance in the six baggies field-tested positive for cocaine.

The police sent the cocaine to the Wyoming State Police laboratory for

weighing and analysis. A forensic scientist tested the substances and determined that the two bags delivered on September 25, 2010 contained .26 grams of crack cocaine and the six bags delivered on October 1, 2010 contained .21 grams of cocaine.

The police charged Appellant with criminal attempt to deliver heroin, two counts of delivering cocaine, two counts of possession with intent to deliver cocaine, and criminal use of communication facility.

A jury trial was held on April 12, 2011. The jury found Appellant guilty of all the charges.

On June 30, 2011, the Court imposed an aggregate sentence of five to ten years incarceration in a state correctional institution.

Appellant filed a post sentence motion on July 8, 2011, in which he challenged the weight of the evidence and sought reconsideration of his sentence. Following an argument on August 16, 2011, the Court denied the motion.

Appellant filed a timely appeal.[1]

Appellant first contends the verdict for all the counts, except criminal use of a communication facility, are against the weight of the evidence because neither the drugs nor the money were found on Appellant's person and no fingerprinting was conducted on the baggies to prove the drugs possessed by the CI were previously in Appellant's possession.

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

[1] Although Appellant filed a timely appeal, the Court did not become aware of this appeal until about three months later due to some problem or breakdown in the court's operations. For some unknown reason, the original and the court's copy of the notice of appeal are missing. Rather than order a statement of errors complained of on appeal at this late date, the court orally confirmed with counsel that she intended to raise the same issues on appeal that were asserted in the post sentence motion. The court apologizes for any delay in

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 (citation omitted). The evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. Id.

The credibility of a witness is within the sole province of the jury who is free to believe all, part or none of any witness's testimony. Commonwealth v. Spotz, 552 Pa. 499, 510, 716 A.2d 580, 585 (Pa. 1998); Commonwealth v. Gibson, 553 Pa. 648, 664, 720 A.2d 473, 480 (Pa. 1998).

The jury's verdict in this case did not shock the Court's conscience. The jury was free to accept the credibility of the CI, which was corroborated by the video surveillance and the testimony of the police officers.

Defendant also claims the sentence was excessive in light of the fact that this was his first drug delivery conviction, and sentences are designed to rehabilitate and teach personal responsibility in addition to punish. The Court cannot agree.

Although Defendant did not have any prior drug delivery convictions, his prior record score was a five, based on a juvenile adjudication for possession of a firearm by a minor and adult convictions for robbery, conspiracy to commit robbery, possession of a controlled substance, possession of drug paraphernalia and false identification to law enforcement. The offense gravity score for criminal use of a communication facility (count 6) was five, and the offense gravity score for the deliveries or attempted deliveries of

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getting this record to the Superior Court.

controlled substances was six.[2] Therefore, the standard guideline ranges were 12-18 months and 21-27 months, respectively.

The Court sentenced Defendant to an aggregate sentence of 5-10 years incarceration, consisting of 2-4 years on count 4, delivery of a controlled substance; 2-4 years on count 2, delivery of a controlled substance; and 1-2 years on count 1, attempted delivery of a controlled substance.[3] The sentence on Count 4 was a mandatory minimum for a delivery within 250 feet of a playground, but still was in the middle of the standard range. The sentence on Count 2 also was in the middle of the standard range. The sentence on Count 1 was below the mitigated range.

Defendant asked the Court to keep the minimum sentence at two years by having all the sentences run concurrently and to make him eligible for Boot Camp. The Court found Defendant should not receive a volume discount. The deliveries of cocaine and attempted delivery of heroin were three separate incidents on different days; therefore, they deserved separate sentences.

The Court also felt the sentence imposed was necessary for the protection of the public. Although Defendant was only twenty-three years old at the time of sentencing, he already had a prior record score of five and failed to take advantage of previous opportunities where he received sentences of probation and county incarceration.

For the foregoing reasons, the Court believes Defendant's issues lack merit.

DATE: _____ By The Court,

[2] The other offenses merged for sentencing purposes.
[3] The Court imposed a concurrent 1-2 year sentence on count 6, criminal use of a communication facility, with the minimum sentence being the bottom of the standard range.

Marc F. Lovecchio, Judge

cc: Aaron Biichle, Esquire (ADA)
Trisha Hoover, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)