IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	NO: CR-394-2010
vs.	:	
ANTWINE JACKSON	:	

O P I N I O N
Issued Pursuant to Pa.R.A.P. 1925(a)

Background

The Defendant was charged with Possession with Intent to Deliver and other drug related charges for offenses which occurred on January 21, 2010 and January 28, 2010. Following a jury trial, the Defendant was found guilty of all charges. On December 15, 2010 the Defendant was sentenced to an aggregate state sentence of three (3) to six (6) years.

On December 27, 2010 despite representation by counsel, the Defendant individually filed a Post Sentence Motion. On December 30, 2010 a Post Sentence Motion was filed by Defendant's counsel. On January 5, 2011 this Court issued an Order indicating that no action would be taken on the motion filed by Defendant Jackson individually pursuant to Pa.R.Crim.P. 576. This Court issued an Opinion and Order on February 25, 2011, denying as untimely the Defendant's Post-Sentence Motion filed by counsel.

On March 7, 2011 the Defendant, through his counsel, filed a Notice of Appeal. In the Defendant's Concise Statement of Matters Complained of on Appeal the Defendant avers three things:

1. that this Court's Post-Sentence Order of February 25, 2011 was erroneously denied;

2. that the Defendant's verdict of guilt at trial was against the weight of the evidence, and not supported by sufficient evidence; and

3. that the sentencing court abused its discretion by imposing an excessive sentence.

Discussion

Post-Trial Motion

On December 15, 2010, this Court sentenced the Defendant to an aggregate state sentence of three (3) to (6) years. On December 30, 2010 the Defendant, through counsel, filed a Post-Sentence Motion. Pa.R.Crim.P. 720(A)(1) provides that post-sentence motions must be filed "no later than 10 days after imposition of the sentence." On February 25, 2011, this Court issued an Opinion and Order denying as untimely the Defendant's Post-Sentence Motion filed by counsel. As the Post-Trial Motion was clearly filed beyond the ten day period, this Court respectfully requests affirmance of its February 25, 2011 Order. Although the Defendant filed a *pro-se* Post-Sentence Motion on December 27, 2010, the issue of dual filing was clearly addressed through Court's Opinion and Order of February 25, 2011.

In analyzing the issue of the dual filing in its Order of February 25, 2011, this Court relied upon Commonwealth v. Ellis, 626 A.2d 1137 (Pa. 1993). In Commonwealth v. Ellis, *supra*, following a jury trial, the defendant was convicted of

robbery and driving under the influence of alcohol. A number of issues were raised on the defendant's appeal to the Superior Court, and although the defendant was represented by counsel who filed an appellate brief with the Superior Court, the defendant attempted to file his own brief as well. Following the Superior Court's refusal to review the defendant's brief, the defendant petitioned the Supreme Court for allowance of appeal which was granted on the limited issue of whether it was error for the Superior Court to refuse to review the defendant's *pro se* brief.

In upholding the Superior Court's ruling that a defendant has no right of self-representation together with counseled representation, the Pennsylvania Supreme Court concluded that a represented appellant can petition to terminate his representation, or conversely elect to allow counsel to handle his appeal, but an appellant cannot confuse and overburden the court by his own *pro se* filings. Id. at 1141.

In response to the argument that it would be more effective, ultimately to review *pro se* filings than to deny review and be faced later with withdrawal of counsel and ineffectiveness claims, the Supreme Court held:

> While we concur with the appellant's description of the problem, we disagree with the conclusion. Tails should not wag dogs….[I]f appellate counsel's arguments do not prevail and the appellant is convinced that his own unheeded arguments should have been presented, he need only file a petition pursuant to the Post Conviction Relief Act, claiming appellate counsel's ineffectiveness. Id. at 1140.

As the Comment to Pa.R.Crim.P. 576 clearly provides that the filing by a Defendant, individually, when represented by counsel of record does not trigger deadlines or any action on the party of any other party, this Court submits that the

Defendant's Post-Sentence Motion was properly denied, and this Court respectfully requests affirmance of its February 25, 2011 Order.

Trial Verdict

The Defendant next contends that the verdict of guilt at trial was based upon insufficient evidence, and against the weight of the evidence.

The Evidence Was Legally Sufficient to Sustain the Jury's Guilty Verdict

The Defendant was charged with Possession with Intent to Deliver, Delivery of a Controlled Substance, two counts of Criminal use of a Communication Facility and Criminal Conspiracy. Following a jury trial, the Defendant was found guilty of all charges.

The standard to apply in determining the sufficiency of the evidence is whether, "[v]iewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the trier of fact could have reasonably determined that all of the elements of a crime have been established beyond a reasonable doubt." Commonwealth v. Keblitis, 456 A.2d 149, 150 (Pa.1983).

Delivery under 35 P.S. 780-102(b) is defined as "[t]he actual, constructive, or attempted transfer from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship."

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. Commonwealth v. Griffin, 804 A.2d 1, 15 (Pa.Super. 2002); Commonwealth v. Radford, 33 Phila. 399, 404 (Phila.Cty. 1997)

During the trial, Officer Gary Heckman testified that on January 21, 2010, he provided a confidential informant with prerecorded buy money. (N.T. 10/13/10, p. 17). The confidential informant called the Defendant on a cell phone to arrange for the purchase of cocaine. Id. at 18. Police officers followed the confidential informant to the location designated for the drug/money exchange. Id. at 19. Officers Heckman and Sproat testified that they observed the Defendant get into the confidential informant's car. Id. at 21, 88-89. The confidential informant and the Defendant took the car around the block. Id. at 21. The Defendant exited the vehicle, and the crack cocaine obtained by the confidential informant from the Defendant was given to Officer Heckman. Id. at 22. The drugs taken were later tested and confirmed to be crack cocaine. Id. at 22-24.

On January 28, 2010 Officer Heckman had the confidential informant contact the Defendant again by cell phone. Id. at 25. Prerecorded buy money was given to the confidential informant and an exchange point was set. Id. at 26-27. Officers followed the Defendant to the exchange point and observed an individual later identified to be William Colon approach the informant's vehicle. Id. at 27-28. Following the exchange, officers took Mr. Colon into custody. Id. The pre-recorded buy money was found on Mr. Colon's person and the crack cocaine given to the confidential informant was taken and confirmed to be crack cocaine. Id. at 29-31.

The confidential informant similarly testified that he called the Defendant using a cell phone on January 21, 2010 to arrange to purchase cocaine. Id. at 55-56.

At the place designated for the exchange, the Defendant got into his vehicle and gave him the crack cocaine for cash. Id. at 58. The second time he called the Defendant to set up a controlled buy he contacted the Defendant by cell phone. Id. at 64. The Defendant answered, but said he was out of town. The Defendant informed him that he would arrange to have someone get in touch with him. Id. The confidential informant then went to the place designated for the exchange. Id. at 65-66. An individual later identified to be William Colon got into his car. Id. The confidential informant asked him if he knew the Defendant and he said yes. Id. at 66. Cash was exchanged for the crack cocaine which was given to Officer Heckman. Id.

Viewing this evidence in a light most favorable to the Commonwealth as verdict winner, the Court believes the Commonwealth presented sufficient evidence to find the Defendant guilty of Possession with Intent to Deliver a Controlled Substance (cocaine) and Delivery of a Controlled Substance (cocaine).

To sustain a conviction for Criminal Use of a Communication Facility, the Commonwealth has to prove that the Defendant "intentionally, knowingly, or recklessly used a communication facility**,** and that, in so doing, the defendant intentionally, knowingly, or recklessly facilitated the commission or attempted commission of the underlying felony." Commonwealth v. Moss, 852 A.2d 374, 380-381 (Pa.Super.2004). Testimony taken at the jury trial established that the confidential informant called the Defendant on at least two separate occasions in order to set up a controlled purchase. Viewing the evidence in a light most favorable to the Commonwealth, the Court believes that the Commonwealth presented

sufficient evidence to find the Defendant guilty of Criminal Use of a Communication Facility.

In order to sustain a conviction for Criminal Conspiracy, the Commonwealth had to prove that the Defendant

> (1) entered into an agreement to commit or aid in an unlawful act with another person….(2) with a shared criminal intent and (3) an overt act was done in furtherance of the conspiracy.
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> In Re C.C.J., 799 A.2d 116, 120 (Pa.Super. 2002).

The overt act does not need to be committed by the defendant, it can be committed by the co-conspirator. Id.

Specifically, the Commonwealth had to prove that the Defendant agreed with William Colon that one or both of them would engage in conduct for the delivery of a controlled substance (cocaine), that the Defendant and William Colon intended to promote or facilitate the commission of the crime of delivery of the cocaine, and that the Defendant or William Colon performed an overt act in furtherance of that conspiracy.

The testimony at trial revealed that the confidential informant contacted the Defendant to purchase cocaine on January 28, 2010. The Defendant indicated that he was out of town, but that he would arrange to have someone get in touch with him. At the place designated for the exchange, William Colon approached the confidential informant's vehicle. When Mr. Colon got into the vehicle, he confirmed that he knew the Defendant. He proceeded to provide the confidential informant with cocaine in exchange for cash. As the Defendant clearly conspired with Mr. Colon to provide

cocaine to the confidential informant, and the cocaine was subsequently provided, the overt act in furtherance of the conspiracy was performed.

Viewing the evidence in a light most favorable to the Commonwealth, the Court believes that the Commonwealth presented sufficient evidence to find the Defendant guilty of Criminal Conspiracy.

The Verdict of Guilty Was Not Against the Weight of the Evidence

The Defendant contends that the verdict was against the weight of the evidence as to the charges for which he was convicted. A challenge to the weight of the evidence assumes that the evidence was sufficient but argues that the verdict was so contrary to the evidence as to shock one's sense of justice and mandate the granting of a new trial. See Commonwealth v. Hunter, 554 A.2d 550, 555 (Pa.Super.1989).

Based on the evidence presented at trial and the Court's reasoning explained above, finding that the Commonwealth did present sufficient evidence for the charges of Possession With Intent to Deliver, Delivery of a Controlled Substance, two counts of Criminal Use of a Communication Facility, and Criminal Conspiracy, the Court finds that the verdict of the jury does not shock the Court's sense of justice. Therefore, the Court finds the Defendant's contention that the verdict was against the weight of the evidence to be without merit.

Sentencing

The Defendant's final issue raised is that the sentencing court abused its discretion by the imposition of an excessive sentence.

A defendant has no absolute right to challenge the discretionary aspects of his sentence. Commonwealth v. Petaccio, 764 A.2d 582, 586 (Pa. Super. 2000). "A [bald] claim of excessiveness of sentence does not raise a substantial question so as to permit appellate review where the sentence is within the statutory limits." Id. at 587, *citing* Commonwealth v. Jones, 613 A.2d 587, 593 (Pa. Super. 1992) (*en banc*). Furthermore, it is well settled that sentencing is a matter vested in the sound discretion of the sentencing judge. Commonwealth v. Paul, 925 A.2d 825 (Pa. Super. 1997). The decision of the sentencing court will be reversed only if the sentencing court abused its discretion or committed an error of law. Id. at 829. This standard of review was further defined by the Superior Court as follows:

> An abuse of discretion is more than just an error in judgment, and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias or ill will.

Id. at 829, *citing* Commonwealth v. Kenner, 784 A.2d 808, 811 (Pa.Super. 2001).

In this case, the sentencing court did not abuse its discretion and the sentence was not excessive. The Court took into account the fact that the Defendant had a prior record score of three (3) at the time of sentencing. (N.T. 12/15/10, p. 2). Following a request from the Commonwealth that the Defendant be given essentially a five (5) to ten (10) year sentence by sentencing the Defendant in the middle of the standard range and running all counts consecutive, this Court merged Count 1, possession with intent to deliver merged with Count 2, delivery of a controlled substance, and sentenced the Defendant to incarceration in a State Correctional Institution for eighteen (18) months to thirty-six (36) months. The sentence of the

Court as to Count 3, criminal use of communication facility, was twelve (12) to twenty-four (24) months, to run concurrent to Count 2. As to Count 4, criminal use of communication facility, this Court similarly imposed a sentence of twelve (12) to twenty-four (24) months to run concurrent with Counts 2 and 3. The sentence of the Court as to Count 5, conspiracy to deliver a controlled substance was eighteen (18) to thirty-six (36) months to run consecutive to the sentence imposed in Count 2. Sentences were within standard range.

As the Defendant has failed to set forth a valid claim as to how the Court abused its discretion, his claim has no merit and this Court respectfully requests affirmance of its Sentencing Order of December 15, 2010.

BY THE COURT,

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Richard A. Gray, J.

cc: DA (KO)
PD (JL)
Gary Weber, Esquire