IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CP-41-CR-605-2010**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
HERRON MILLS,	:	
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 January 5, 2011 and its Orders dated December 20, 2010 and February 4, 2011. The relevant facts follow.

On March 31, 2010 at approximately 2:19 p.m. police officers, who were in full uniform but an unmarked vehicle, were traveling eastbound on Eldred Street when they observed a gold Ford Taurus occupied by three black males traveling westbound. The front passenger was leaning way back in his seat as if he was trying to conceal his identity. As the police turned their vehicle around to follow the Taurus, they noticed that the vehicle failed to come to a complete stop for the stop sign at Eldred and Market Street and increased its speed. The police activated the lights and siren on their vehicle. The driver of the Taurus, however, did not stop the vehicle and, instead, led the police officers on a high speed chase from Williamsport through portions of Loyalsock Township and Hepburn Township and back into Williamsport. The driver of the vehicle ran several stop signs and traffic signals, crossed the double yellow lines to pass other vehicles and generally drove the vehicle in an extremely

careless disregard for the safety of others.

During the pursuit, the front passenger of the Taurus threw objects out of the window in the area of 4721 Bloomingrove Road. Other officers subsequently went to the area to find and retrieve the items thrown from the vehicle. They found two plastic bags; one contained 30 baggies of cocaine and the other contained 25 baggies of marijuana. The baggies contained a total of 8.8 grams of cocaine and 20.5 grams of marijuana.

Through the use of spike strips and a pursuit termination maneuver, the police forced the Taurus off the road and it struck a garage. The occupants of the vehicle fled on foot. All the occupants were captured, and the front seat passenger was identified as Appellant Herron Mills. Appellant had $141 in currency and two cell phones on his person. The driver of the vehicle was in possession of $630, and a cell phone. The back seat passenger was in possession of $4,657 and a cell phone. None of these individuals possessed drug paraphernalia for personal use of the drugs that had been discarded during the pursuit.

At City Hall, the police utilized drug swipes to test the suspects' hands for drug residue. The swipe of Appellant's hands tested positive for cannabis, while the rear passenger's hands tested positive for cocaine and the driver's hands test positive for both cannabis and cocaine.

Appellant was charged with two counts each of criminal conspiracy, possession of a controlled substance with intent to deliver, possession of a controlled substance, and possession of drug paraphernalia (relating to the baggies in which the drugs were packaged), as well as one count of tampering with physical evidence.

A jury trial was held on October 5, 2010. When the Court was having a sidebar conference with counsel, the Court told the jurors they could talk among themselves.

Officer Jeremy Brown was seated at the prosecution table and juror #7, Harold Sausser, was seated slightly behind him and to his left in the end seat of the front row of the jury box. Officer Brown asked Mr. Sausser if he was in his way. Mr. Sausser said no, and then asked Officer Brown if he could talk to him or ask him something. Officer Brown said no and turned away from Mr. Sausser. Mr. Sausser then tapped his hand on the wooden rail of the jury box and said "good job."

Attorneys who were watching the trial informed defense counsel that there was some communication between juror #7 and Officer Brown. Defense counsel then came to sidebar and brought this issue to the Court's attention. The Court and counsel spoke to Officer Brown, who indicated: he had asked the juror if he was in his way; the juror said "no," but then asked to speak to Officer Brown; Officer Brown replied either "no" or "absolutely not" and then turned away; and the juror mumbled something about not being able to talk to anybody. The Court offered to recess the jury and call juror #7 to talk to him separately, but defense counsel replied, "I'm okay." Appellant's counsel did not seek a mistrial at that time or request the Court to talk to or take testimony from any other individuals.

The trial proceeded and the jury found Appellant guilty of all the charges.

On October 11, 2010, Appellant filed a post verdict motion for a mistrial, which also asserted that the evidence was insufficient and the verdict was against the weight of the evidence. In his motion, Appellant conceded his counsel relied on the statement of Officer Brown and did not request the Court to voir dire the juror; however, the motion alleged that counsel was later advised by witnesses that the juror told Officer Brown he did a good job. Defense counsel asserted that if she had known that information during trial, she

would have requested voir dire of the juror and asked for the juror to be discharged or for a mistrial to be granted.

A hearing on the motion was held on November 3, 2010. At the hearing, the following individuals testified: Kyle Rude, an attorney who was observing portions of the trial because he was counsel for one of the other occupants of the vehicle; Henry Mitchell, who was an assistant district attorney at the time of the trial but is now retired; Harold Sausser, who was juror #7; and Officer Jeremy Brown, the prosecuting officer in this case.

Mr. Sausser testified he asked Officer Brown if he could ask him a question and Officer Brown said, “No.” Mr. Sausser thought this occurred during a break. He did not recall saying anything else to Officer Brown at that time. After the jury announced its verdict and was leaving the courtroom, he and several other jurors said “good job” to Officer Brown. Mr. Sausser recalled being told by the Court at jury selection that jurors could not talk to the attorneys or the parties.

Kyle Rude testified that during a sidebar conference he saw juror #7 lean forward and ask if he could talk to Officer Brown, who said no. Juror #7 then said “good job” while he tapped his right hand on the wooden rail of the jury box. Mr. Rude turned to Mr. Mitchell, who was seated beside him, and asked him if he saw that. Mr. Mitchell said yes. Mr. Rude told defense counsel, and he believed Mr. Mitchell told the attorney for the Commonwealth, what they saw. Mr. Rude testified he was approximately 22 feet away from Officer Brown and juror #7. He stated he was not present in the courtroom when the jury returned their verdict. He also indicated in response to questioning from the attorney for the Commonwealth that he did not know what juror #7 meant when he said good job.

Henry Mitchell testified he was seated next to Mr. Rude. The trial attorneys

were at the bench with the judge when he saw juror #7 ask Officer Brown if he could talk to him. Officer Brown said no. Juror #7 then said good job. Mr. Mitchell also indicated in response to questioning by the attorney for the Commonwealth that he did not know what juror #7 meant when he said good job.

Officer Brown testified consistent with his statement during trial. He asked juror #7 if he was in his way and the juror said no but asked if he could talk to him. Officer Brown said absolutely not and turned away from the juror. The juror then mumbled something under his breath about not being able to talk to anybody. After the trial, several jurors said "good job" to Officer Brown.

Appellant's counsel argued the testimony of Mr. Rude and Mr. Mitchell, that Mr. Sausser said good job to Officer Brown. showed that Mr. Sausser was biased in favor of the prosecution, which entitled Defendant to a mistrial. The Commonwealth countered that defense counsel was given the opportunity to make a record during the trial but she neither availed herself of that opportunity nor requested a mistrial; therefore, this issue was waived. In the alternative, the Commonwealth contended that a mistrial was not warranted under these circumstances.

The Court denied Appellant's motion in an Opinion and Order dated December 20, 2010.

On January 5, 2011, the Court sentenced Appellant to undergo incarceration in a state correctional institution for an aggregate term of two to five years, followed by a consecutive term of five year probation. The Court further found that Appellant was not eligible for the Recidivism Risk Reduction Incentive (RRRI) due to a history of present or past violent behavior based on incidents of fighting and assault that occurred while he was

incarcerated at the Lycoming County Prison.

On January 10, 2011, Appellant filed a post sentence motion in which he raised a claim that the consecutive period of probation was excessive and re-asserted the issues he raised in his post verdict motion. A hearing was held on the motion on February 2, 2011, during which Appellant's counsel orally amended the post sentence motion to add an additional issue that the Court erred in declining to make Appellant RRRI eligible. The Court denied Appellant's post sentence motion in an Opinion and Order dated February 4, 2011.

Appellant filed a notice of appeal on February 8, 2011. The Court ordered Appellant to file a concise statement of errors complained of on appeal. Appellant filed a timely statement in which he asserted the following issues: (1) the trial court erred by denying a mistrial after Appellant was deprived of a fair trial as a result of juror misconduct; (2) the verdict of guilt was not supported by sufficient evidence; (3) the verdict of guilt was against the weight of the evidence; (4) the trial court erred by deeming Appellant ineligible for the recidivism risk reduction incentive; and (5) the sentencing court abused its discretion when it imposed an excessive sentence.

Mistrial

Appellant first claims that the trial court erred in denying his motion for a mistrial.

The Pennsylvania Rule of Criminal Procedure governing mistrials states in relevant part: "When an event prejudicial to the defendant occurs during trial only the defendant may move for a mistrial; the motion shall be made when the event is disclosed." Pa.R.Cr.P. 605. Although Appellant's counsel brought this issue to the Court's attention during trial, she did not request a mistrial. She also did not avail herself of the opportunity to question the juror about the incident or request that the Court take testimony from the individuals who brought the issue to her attention. Under these circumstances, the Court found that this issue was waived. See Commonwealth v. Jones, 501 Pa. 162, 460 A.2d 739, 741 (Pa. 1983)(issue waived where defense counsel immediately objected to prosecutor's conduct but did not request a mistrial or curative instructions).

Appellant's counsel contended in her motion that she was not fully aware of the nature and extent of the contact between Officer Brown and the juror until after trial. She asserted that she raised the issue at the first opportunity after she realized the juror made the comment "good job." Unfortunately, allegations in motions are not evidence. At the hearing on the motion for mistrial, Appellant's counsel did not present any evidence to support these allegations. During the sidebar conference, Appellant's counsel told the court that she was informed there was a conversation between the officer and the juror. At the hearing, Mr. Rude testified that he heard the juror ask Officer Brown if he could talk to him and Officer Brown said no. Then the juror tapped on the rail of the jury box and said "good job." Mr. Rude also testified that he asked Mr. Mitchell if he saw that, and he told Appellant's counsel

what he saw. From this record, one could infer that Mr. Rude was the one who informed Appellant's counsel during trial that there was a conversation between the juror and Officer Brown. If that is the case, counsel could have requested that the Court take testimony from Mr. Rude at the time of trial when it heard testimony from Officer Brown and this issue could have been handled at the time of trial. If that is not what occurred, then counsel should have made that clear during her questioning of Mr. Rude. The Court can only rule on the record made by counsel for both parties. Based on the record created in this case, the Court was constrained to find that this issue was waived.

In the alternative, the Court did not believe a mistrial was warranted. A mistrial is an extreme remedy that is appropriate only when an incident is of such a nature that its unavoidable effect is to deprive the defendant of a fair and impartial trial. Commonwealth v. Powell, 598 Pa. 224, 956 A.2d 406, 421 (Pa. 2008).

> The right to be judged by a fair and impartial jury of one's peers is, of course, firm and well-established. However, the inalterable fact of human frailty requires us to recognize that not every act of juror misconduct warrants the declaration of a mistrial. Only when there has been prejudice to the accused does an act of juror misconduct require the grant of a new trial.

Commonwealth v. Flor, 998 A.2d 606, 639 (Pa. Super. 2010), citing Commonwealth v. Jones, 530 Pa. 591, 610 A.2d 931, 937 (Pa. 1992). The Court did not believe that the simple comment "good job" meant that the juror was biased in favor of the prosecution. Neither Mr. Rude nor Mr. Mitchell knew what the juror meant when he made that comment. Numerous times the Court has told the attorneys and the litigants that it thought they did a good job presenting their cases, even when they were not the prevailing party. In this case, the Court told the jurors they could talk among themselves while the Court conducted a side bar

conference with the attorneys. At the time the juror made the comment, Officer Brown had turned away from him, and it appeared that the juror, who also had mumbled something about not being able to talk to anyone, was simply trying to find someone to whom he could talk and ended up talking only to himself.

Sufficiency of the Evidence

Appellant also asserts that the evidence was insufficient to support the jury's verdict. The Court cannot agree.

In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. Commonwealth v. Davido, 582 Pa. 52, 868 A.2d 431, 435 (Pa. 2005); Commonwealth v. Murphy, 577 Pa. 275, 844 A.2d 1228, 1233 (Pa. 2004). Circumstantial evidence can be as reliable and persuasive as eyewitness testimony and may be of sufficient quantity and quality to establish guilt beyond a reasonable doubt. Commonwealth v. Tedford, 523 Pa. 305, 567 A.2d 610, 618 (Pa. 1989)(citations omitted).

In order to prove Appellant possessed the cocaine and the marijuana with the intent to deliver it, the evidence presented by the Commonwealth must establish that: (1) the baggies contained the controlled substance in question; (2) Defendant was aware there was a controlled substance in the baggies; (3) Defendant possessed the baggies; and (4) Defendant intended to deliver the baggies. See Pa.SSJI 16.01.

The Commonwealth presented evidence that Defendant was the front passenger in the vehicle, who threw two bags out of the vehicle during the high speed chase.

Officers retrieved the bags. One bag contained 30 baggies of cocaine and the other contained 25 baggies of marijuana. The baggies contained a total of 8.8 grams of cocaine and 20.5 grams of marijuana. Appellant's act of throwing the bags out of the window showed consciousness of guilt that he knew the bags contained illegal controlled substances. This evidence also showed that Appellant possessed the controlled substances, because it shows he had the intent and power to control the controlled substances. Appellant's flight also showed consciousness of guilt. The number of baggies, the manner in which they were packaged, the lack of personal use paraphernalia, and amounts of money found on the occupants of the vehicle show that the drugs were possessed with the intent to deliver them. Based on the totality of the evidence presented, the Court found the evidence was sufficient to establish that Appellant possessed both the cocaine and the marijuana with the intent to deliver these substances. Since simple possession is a lesser included offense of possession with intent to deliver, the evidence also was sufficient to prove Appellant possessed the cocaine and the marijuana.

This evidence also showed that Appellant possessed drug paraphernalia. Drug paraphernalia includes items used to package or store controlled substances. Appellant possessed the bags and baggies that contained the cocaine and marijuana when he threw them out the window. Therefore, the evidence was sufficient to support Appellant's convictions for possession of drug paraphernalia.

The evidence also was sufficient for the jury to infer that all the occupants in the vehicle were engaged in a conspiracy to deliver the controlled substances. In addition to the evidence already mentioned for the possessory offenses, swipes to test for controlled substances were performed on the hands of all the occupants. Everyone's hands tested

positive for at least one of the controlled substances. The other occupants of the vehicles also were in possession of large amounts of cash. Based on the totality of the evidence, the Court found the evidence was sufficient for the jury to find Appellant guilty of the conspiracy charges.

The jury's guilty verdict for tampering with physical evidence also was supported by the evidence. The Crimes Code defines this offense, in relevant part, as follows: "A person commits a misdemeanor of the second degree if, believing that an official proceeding is pending or about to be instituted, he: (1) alters, destroys, conceals or removes any record, document or thing with intent to impair its verity or availability in such proceeding or investigation…." 18 Pa.C.S.A. §4910(1).

With lights flashing and sirens blaring, the police were attempting to stop the vehicle in which Appellant was a front seat passenger. The driver of the vehicle took the police on a high speed chase. During the chase, Appellant threw bags of drugs out of the window of the vehicle. From this evidence, the jury could reasonably conclude that Appellant was aware that the police were attempting to stop the vehicle to investigate it or its occupants and that Appellant discarded the drugs so that the police would not find them. Thus, the Court found the evidence was sufficient to support Appellant's conviction for tampering with physical evidence.

Weight of the Evidence

Appellant's third issue is that the verdicts were against the weight of the evidence. In his post verdict motion, this issue was raised with respect to possession with intent to deliver cocaine, possession of cocaine and conspiracy to possess cocaine with the intent to deliver it. Therefore, these are the only verdicts for which the Court will address the weight of the evidence.

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 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 jury's verdict did not shock the court's conscience. Credibility of witnesses is within the sole province of the jury. Commonwealth v. Gibson, 553 Pa. 648, 720 A.2d 473, 480 (Pa. 1998). As the finder of fact, the jury was free to believe all, some or none of the testimony presented, including the testimony of the defense witnesses. It is not shocking to the Court that the jury did not credit the testimony of the defense witnesses. Both Appellant and the driver testified that Appellant had no involvement with any of the drugs, but the swipe showed the presence of marijuana on Appellant's hands and other evidence presented showed that Appellant threw both bags of drugs out of the vehicle. Although the swipe did not show the presence of cocaine on Appellant's hands, Trooper Tyson Havens testified that Appellant went to the rest room and scrubbed his hands almost

like a surgeon prior to the swipe being conducted. N.T., October 5, 2010, p. 64. Considering the totality of the evidence presented, the Court found that the jury's verdict was not against the weight of the evidence.

RRRI eligibility

Appellant next asserts the Court erred in finding he was not eligible for RRRI. The RRRI program was established a few years ago by the legislature in order to encourage inmate participation in evidence-based programs that reduce the risks of future crime. 61 Pa. C.S.A. § 4502.

An eligible offender under the program is, among other things, a defendant convicted of a criminal offense who will be committed to the custody of the Department of Corrections and who does not demonstrate a history of present or past violent behavior. 61 Pa. C.S.A. § 4503.

If the Court is sentencing a defendant to incarceration in a state correctional institution, the Court must determine if he or she is eligible for an RRRI minimum sentence. See 42 Pa. C.S.A. § 9756; 61 Pa.C.S.A. §4503. "The RRRI statute offers, as an incentive for completion of the program, the opportunity for prisoners to be considered for parole at the expiration of their RRRI minimum sentence." Commonwealth v. Robinson, 7 A.3d 868, 872 (Pa. Super. 2010).

The legislature clearly intended to disqualify from RRRI eligibility a defendant who has demonstrated a history of present or past violent behavior. 61 Pa. C.S.A. § 4503. The Court was convinced that the Appellant's assaultive behavior while incarcerated at the Lycoming County Prison, which included fighting with other inmates, precluded him from being RRRI eligible under the clear language of the statute.

Appellant contended that in order for the Court to find that he has a history of present or past violent behavior he must have a conviction for a violence related crime. The Court did not agree.

Various provisions of the Statutory Construction Act would be violated by Appellant's interpretation. For example, the Act provides: "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa.C.S.A. §1921(a). "In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: … (2) that the General Assembly intends the entire statute to be effective and certain." 1 Pa.C.S.A. §1922(2).

The definition of eligible offender already excludes any individual convicted of a personal injury crime. 61 Pa.C.S.A. 4503. Violence related crimes fall within the definition of a personal injury crime. 18 P.S. §11.103. Restricting the interpretation of "a history of present or past violent behavior" to convictions for a violence related crime would render that paragraph mere surplusage, since crimes of violence are already covered by the paragraph concerning personal injury crimes. Such a result would violate the quoted provisions of the Statutory Construction Act. See Commonwealth v. Ostrosky, 589 Pa. 437, 909 A.2d 1224, 1231-1232 (2006)(finding Commonwealth's interpretation of the retaliation of witness statute would render a portion of the statute surplusage in violation of sections 1921(a) and 1922(2)). Furthermore, it is readily apparent from the other paragraphs of the definition of eligible offender and provisions of the sentencing code that if the General Assembly intended that the definition be limited to a "conviction" or a "crime of violence" it would have used those terms. See 61 Pa.C.S. §4503; 42 Pa.C.S.A. §9714.

Excessive Sentence

Appellant's final issue is that the court abused its discretion and imposed an excessive sentence when it ordered him to serve a sentence of five years probation consecutive to term of state incarceration. The Superior Court recently addressed the issue of excessiveness in connection with consecutive sentences in the case of Commonwealth v. Prisk, 2011 PA Super 22 (January 28, 2011).

Pennsylvania law "affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed." Commonwealth v. Pass, 914 A.2d 442, 446-447 (Pa. Super. 2006), quoting Commonwealth v. Marts, 889 A.2d 608, 612 (Pa. Super. 2005).

According to § 9721 (b) of the Sentencing Code, "the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa. C.S. § 9721 (b).

At the hearing on his post sentence motion, defense counsel conceded that the consecutive probationary sentence was at the bottom of the standard guideline range and not inconsistent with any specific provision of the Sentencing Code. Further, neither Appellant nor his counsel pointed to how, if at all, the consecutive probationary term is contrary to the fundamental norms which underlie the sentencing process.

By imposing a consecutive five-year period of probation, the Court ensured that Appellant would be under the supervision and oversight of the Pennsylvania Board of Probation and Parole for a significant time after he was released from prison. Although the

Court did not make Appellant eligible for RRRI, it did recommend him for the State Motivational Boot Camp Program. Given the fact that his crimes and his assaultive behavior at the county prison seemed to stem, at least in part, from his immaturity and lack of a support system, the Court found that a period of consecutive probation supervision would not only benefit and protect the public, but would give this young offender some structure after he is released from prison. Accordingly, the Court concluded that the sentence was appropriate and not excessive. See Prisk, supra.

DATE: _____________

By The Court,

____
Marc F. Lovecchio, Judge

cc: Jeana Longo, Esquire (APD)
Paul Petcavage, Esquire (ADA)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)