

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No.: 1776-2009
	:	
v.	:	
	:	CRIMINAL DIVISION
BRIAN NEWTON,	:	
Defendant	:	

OPINION AND ORDER

The Defendant filed a Post Sentence Motion on August 13, 2010. A hearing was held on the Motion on October 25, 2010. The Defendant raises three issues in his Motion: 1) the evidence presented was insufficient to establish the elements of Possession of a Controlled Substance, Delivery of a Controlled Substance, Possession With Intent to Deliver, Criminal Use of a Communication Facility, and Criminal Attempt Delivery of a Controlled Substance; 2) the verdict of the jury was against the weight of the evidence; and 3) a motion for a reconsideration of sentence as the school zone mandatory is not applicable.

Background

A jury trial on the Defendant's case was held before the Honorable Nancy L. Butts on April 28, 2010. Trooper Brett Herbst's (Herbst) testimony at the jury trial established that between the months of September and October of 2009, a series of controlled purchases of drugs was conducted by the Pennsylvania State Police between a confidential informant and the Defendant. The confidential informant in this case, Joseph Wyland (Wyland), also testified at trial and corroborated Herbst's testimony. Testimony at trial established that on September 28, 2009 Wyland called the Defendant and arranged to meet him at the Uni Market on River

Avenue. Under police surveillance, Wyland met with the Defendant and purchased ten (10) bags of heroin. The Defendant handed Wyland a napkin containing the ten (10) bags of heroin. On October 1, 2009 Wyland again called the Defendant using the same cell phone number as on September 28, 2009. Again under police surveillance, Wyland met with the Defendant at the Wegmans in Williamsport and purchased \$200.00 worth of heroin. Wyland and the Defendant walked away from Wegmans and the controlled purchase took place near Third Street in Williamsport. Wyland gave the Defendant the money and the Defendant told Wyland that the heroin was on the ground close to where they were standing near Third Street. The heroin was in a Wendy's french fry container on the ground where the Defendant said it would be. On October 7, 2009 the police planned to do what is known as a buy/bust operation. Wyland received a call from the Defendant and told the Defendant told Wyland to meet him at the park near River Avenue. Wyland then met with the Defendant under police surveillance to purchase \$200.00 worth of heroin. Although Wyland paid the Defendant \$200.00, the Defendant failed to give Wyland the heroin on October 7, 2009. The Defendant told Wyland that the heroin was in a chip bag that was on the ground, but when Wyland picked up the chip bag there was no heroin inside. The Defendant was then taken into custody by the police and a search of his person revealed a cellular phone and the \$200.00 in prerecorded currency given to Wyland on that day. The cell phone recovered from the Defendant at the time of his arrest was connected to the same number that was used to contact the Defendant.

Discussion

The evidence was legally insufficient to sustain the jury's guilty verdict

The Defendant argues that he is entitled to a new trial because the evidence is legally insufficient to sustain the jury's verdict on the charges of Possession of a Controlled Substance, Delivery of a Controlled Substance, Possession With Intent to Deliver, Criminal Use of a Communication Facility, and Criminal Attempt of Delivery of a Controlled Substance.

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 (Pa.1983).

Possession of a controlled substance is established by showing either actual or constructive possession. Actual possession is established when the Commonwealth shows that the defendant had the controlled substance on his person. Constructive possession is defined as “the ability to exercise a conscious dominion over the illegal substance: the power to control the contraband and the intent to exercise that control.” Commonwealth v. Radford, 33 Phila 399 (Phila.Cty.1997) (See Commonwealth v. Macolino, 469 A.2d 132, 134 (Pa. 1983)). “The intent required to show a conscious dominion and control over the controlled substances may be inferentially proven from the totality of the circumstances.” Radford at 405 (See Commonwealth v. Ocasio, 619 A.2d 352 (Pa.1993)). 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.” Testimony from the jury trial held on April 27, 2010 established that the Defendant had actual possession of the

heroin during the September 28, 2009 controlled purchase as he handed Wyland a napkin with the heroin inside of it. N.T. 83. Furthermore, during the October 1, 2009 controlled purchase, the Defendant had constructive possession of the heroin. The Defendant took Wyland to a specific place off of Third Street in Williamsport and told him that the heroin was located on the ground in a Wendy's french fry container. N.T. 85-86. Based on the totality of the circumstances, it appears to the Court that the Defendant had constructive possession of the heroin. Furthermore, the Defendant's actions in handing Wyland the heroin, and in telling Wyland that the heroin was on the ground inside the Wendy's container, constitute delivery of the controlled substance under 35 P.S. 780-102(b).

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 of a Controlled Substance (heroin) and Delivery of a Controlled Substance (heroin).

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. Radford at 404. As both of the elements of PWID were established above for Possession of a Controlled Substance and Delivery of a Controlled Substance, the Court finds that Commonwealth presented sufficient evidence to find the Defendant guilty of PWID (heroin) as well.

To sustain conviction for Criminal Attempt of the Delivery of a Controlled Substance, the Commonwealth has to prove that, with the intent to commit a specific crime, the person does any act which constitutes a substantial step toward the commission of that crime. 18. Pa.C.S. §901(a)

In this case, the Defendant was charged with taking a substantial step toward the commission of the crime of Delivery of a Controlled Substance during the October 7, 2009 controlled purchase. As stated above, delivery is “[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.” On October 7, 2009, the Defendant called Wyland to set up a controlled purchase of drugs. N.T. 87. Wyland met the Defendant at the park near River Avenue and gave the Defendant money. As noted above, the Defendant indicated to Wyland, “[i]t was there in a chip bag and I just thought he was doing what he did before and so I was like all right.” N.T. 87. However, when Wyland picked up the chip bag and opened it up, there was nothing inside of the chip bag. N.T. 87. The Court finds that the Defendant’s steps in calling the Wyland to set up a meeting, meeting Wyland, taking Wyland’s money, and indicating to Wyland that “[i]t was there in a chip bag....” constitute a substantial step toward committing the crime of Delivery of a Controlled Substance. Based on the above stated facts, 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 Attempted Delivery of a Controlled Substance.

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 (Pa.Super.2004). Testimony taken at the jury trial established that Wyland called the Defendant on at least two separate occasions in order to set up a controlled purchase. N.T. 81-86. Testimony also revealed that the Defendant called Wyland on October 7, 2009 to set up a drug purchase transaction. N.T. 87. Furthermore, at the time of

his arrest, the Defendant was found with a cellular phone on his person that was connected to the same number that was used to contact the Defendant for two of the three controlled purchases. 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.

Verdict was 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 motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court.”

Commonwealth v. Keaton, 729 A.2d 529 (Pa.1999). 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 of a Controlled Substance, Delivery of a Controlled Substance, Possession With Intent to Deliver, Criminal Use of a Communication Facility, and Criminal Attempt Delivery of a Controlled Substance, 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.

Reconsideration of sentence as the school zone mandatory is not applicable

The Defendant contends that the school zone mandatory is not applicable as there is no way of knowing precisely where the alleged drug transactions took place as there was never an observation by any officer. 18 Pa.C.S. §6317 Drug Free-School Zones, provides for a minimum two (2) year term of imprisonment if “the delivery or possession with intent to deliver of the controlled substance occurred within 1,000 feet of the real property on which is located a public, private or parochial school or a college or university or within 250 feet of the real property on which is located a recreation center or playground or on a school bus... .” At the time of the Defendant’s sentencing on August 3, 2010, the parties discussed the application of the school zone mandatory on the record. The Public Defender’s Office acknowledged that the Defendant was convicted of Delivery of a Controlled Substance as a result of the September 28, 2009 drug transaction near Faxon Bowling lane and that the location of the drug transaction was within one thousand (1000) feet of Sheridan Elementary School. Therefore, it is clear that the school zone mandatory under 18 Pa.C.S. §6317 does apply in this case.

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 12th day of January, 2011, based on the foregoing Opinion, it is ORDERED AND DIRECTED that for the reasons stated above, the Defendant's Post-Sentence Motion is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: DA
Trisha D. Hoover, Esq.