IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 1654-2010

VS :

DAWUD ROGERS, : Post Sentence Motions
Defendant

OPINION AND ORDER

On October 3, 2011, Defendant Dawud Rogers, by and through his attorney Jeffrey A. Rowe, Esquire, filed a Post Sentence Motion. Argument on Defendant's Motion was held on November 3, 2011. Defendant argues four issues in his Motion: (1) that the conviction was against the weight of the evidence as the verdict convicting him of Delivery of a Controlled Substance while acquitting him of Criminal Use of a Communication Facility is logically inconsistent; (2) the conviction was against the weight of the evidence due to the absence of physical evidence produced to identify him; (3) that the Court reconsider his sentence as to the consecutive period of supervision imposed; and (4) that the Court reconsider his sentence as to the school zone mandatory minimum imposed.

Background

On January 7, 2010, Frederick Allen III (Allen), while working with the police as a confidential informant, met with Officer Edward Lucas (Lucas), of the Williamsport Bureau of Police Drug Task Force, to organize a controlled purchase of cocaine. Allen called "E" to arrange the drug purchase and thereafter Lucas drove Allen to the intersection of Fourth and Diamond Street in Williamsport. Surveillance teams were sent ahead of Lucas and the

Defendant to the pre-arranged meeting location in order for the police to monitor the transaction. Lucas testified at the jury trial held before this Court on April 11, 2011, that while Allen did not know exactly who "E" was, he had previously purchased drugs off of "E" four to five times. Lucas also testified that as he drove into the parking lot of the Omega Bank where the drug transaction was supposed to take place, he observed a male, who was later identified as the Defendant, standing on the sidewalk outside of the Newberry Exchange. The Defendant then came over to the front passenger side window of the vehicle, took the $100.00 in pre-recorded funds from Allen, handed Allen suspected crack cocaine, and then left the area. The suspected crack cocaine field tested positive for crack cocaine and also tested positive for crack cocaine following a laboratory analysis with the Wyoming Regional Laboratory. The Defendant was thereafter arrested on a bench warrant.

Following the jury trial in this matter, the Defendant was found guilty of Delivery of a Controlled Substance and Possession With Intent to Deliver, but the Defendant was found not guilty of Criminal Use of a Communication Facility. On September 22, 2011, this Court sentenced the Defendant to state incarceration for a minimum of two (2) years and a maximum of four (4) years, with a consecutive period of five (5) years probation supervision through the Pennsylvania Board of Probation and Parole. Additionally, the Court determined that the Defendant was eligible for RRRI, with his RRRI sentence at eighteen (18) months, and that the Defendant was eligible for the boot camp program.

Discussion

A verdict convicting of Delivery of a Controlled Substance while acquitting of Criminal Use of a Communication Facility is logically inconsistent

The Defendant requests a new trial and contends that the verdict of the jury was against the weight of the evidence as a verdict convicting of Delivery of a Controlled Substance while acquitting of Criminal Use of a Communication Facility is logically inconsistent.

A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. Commonwealth v. Widmer, 744 A.2d 745 (Pa. 2000) (See Commonwealth v. Whiteman, 485 A.2d 459 (Pa. Super. 1984)). An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. Widmer at 751-752 (See Commonwealth v. Brown, 648 A.2d 1177 (Pa. 1994).

> The trial court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

Tibbs v. Fla., 102 S.Ct. 2211, 2216 n. 11 (1982). In this case, the Defendant therefore concedes that the evidence was sufficient to convict him, but contends that a verdict convicting of Delivery of a Controlled Substance while acquitting of Criminal Use of a Communication Facility is logically inconsistent, resulting in a serious miscarriage of justice.

The elements of the crime of Criminal Use of a Communication Facility include: "(1) Appellants knowingly and intentionally used a communication facility; (2) Appellants knowing, intentionally or recklessly facilitated an underlying felony; and (3) the underlying felony

occurred." Commonwealth v. Moss, 852 A.2d 374, 382 (Pa. Super. 2004). While it would have been logically inconsistent for the Defendant to have been found guilty of Criminal Use of a Communication Facility and not of the underlying felony of Delivery of a Controlled Substance, the Court does not find that the opposite is true. See Commonwealth v. Newton, No. 107 MDA 2011 slip op. at 11 (Pa. Super. August 29. 2011). 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." The Court finds that the Defendant was therefore capable of committing the offense of Delivery of a Controlled Substance without also committing the offense of Criminal Use of a Communication Facility. Based on the facts presented at trial, the Court does not find that verdict convicting the Defendant of Delivery of a Controlled Substance, but acquitting of Criminal Use of a Communication Facility, was logically inconsistent; therefore, the Court finds that the verdict does not present a serious miscarriage of justice and finds the Defendant's weight of the evidence claim to be without merit.

The conviction was against the weight of the evidence due to the absence of physical evidence produced to identify the Defendant

The Defendant opines that the jury's verdict was against the weight of the evidence as he was identified solely by the affiant and the confidential informant despite the fact that surveillance officers were present at the scene.

As noted above, a claim as to the weight of the evidence concedes that the evidence was sufficient to convict the defendant, but argues that the verdict resulted in a serious miscarriage of justice. See Tibbs at 2216 n. 11. Furthermore, the Court notes that as the finder of fact, the jury

is free to believe all, part or none of the evidence and to determine the credibility of the witnesses. Commonwealth v. Keaton at 540 (See Commonwealth v. Hawkins, 701 A.2d 492, 501 (Pa. 1997). With this in mind, the Court also notes that a "new trial should not be granted because of a mere conflict in testimony or because the judge on the same facts would have arrived at a different conclusion." Widmer at 751. Instead, the "role of the trial judge is to determine that 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.'" Widmer at 752. (quoting Thompson v. Philadelphia, 493 A.2d 669 (Pa. 1985).

Firstly, the Court notes that the Defendant's argument is somewhat incongruous. If the Defendant concedes that the evidence was sufficient to convict him, the fact that he was identified solely by the affiant and the confidential informant, but not also identified by surveillance officers present at the scene, is irrelevant. Notwithstanding this reality, the Court finds that nothing in the evidence presented at trial relating to the identification of the Defendant, which is articulated above, causes the verdict rendered to be a serious miscarriage of justice; therefore, the Court finds that the Defendant's argument that the verdict was against the weight of the evidence to be without merit.

The consecutive period of supervision imposed is unnecessary

The Defendant contends that the consecutive period of supervision imposed against him is unnecessary to further any of the goals enumerated in the Sentencing Code. The purpose of sentence is detailed in §303.11 of the Sentencing Code:

> In writing the sentencing guidelines, the Pennsylvania Commission on Sentencing strives to provide a benchmark for the judges of Pennsylvania. The sentencing guidelines provide sanctions proportionate to the severity of the crime and the severity of the offender's prior conviction record. This establishes a sentencing

> system with a primary focus on retribution, but one in which the recommendations allow for the fulfillment of other sentencing purposes including rehabilitation, deterrence, and incapacitation. To facilitate consideration of sentencing options consistent with the intent of the sentencing guidelines, the Commission has established five sentencing levels. Each level targets certain types of offenders, and describes ranges of sentencing options available to the court.

As noted above, the Defendant was sentenced to state incarceration for two (2) to four (4) years, with a consecutive period of five (5) years probation with the Pennsylvania Board of Probation and Parole. Additionally, the Court determined that the Defendant was eligible for RRRI, with his RRRI sentence at eighteen (18) months, and that the Defendant was eligible for the boot camp program.

During the hearing on the Defendant's sentencing, in response to questioning by the Court as to what he wanted to do in the future, the Defendant responded:

> Well, I did take a liking to -- to the asbestos business that my father was showing me about, and I -- I wanted to raise my family, and I just want to be there for them, and I've been going down the path in life that has gotten me nowhere fast, and I'm --I'm just ready to stop doing what I've been doing and get my life on track

N.T., 9/22/11, p. 33. The Court also read into the record a letter written by the Defendant in which the Defendant also expressed his desire to make positive changes in his life. N.T., 9/22/11, p. 34-35. In making the determination as to what sentence to impose against the Defendant, the Court made the following observations:

> When you figure from my position how do I gauge a person, you basically gauge them we are what we repeatedly do. You seem to like being involved in the criminal justice system, so it would seem that that is something that's more familiar to you…But this letter is not written by someone who would much rather go around and commit crimes…But I agree with your attorney in that you are of an age, you have the potential, hopefully at this point, and you appear to have the willingness to make a change, so I would be willing to sentence you to two to four years make you eligible for R.R.R.I., which is good time credit, because there seems to be nothing that says you shouldn't be, but also I'll make you eligible for the boot-camp program, because not everybody who gets into the boot-camp

> program completes it, and it's also going to be a part -- it's going to be your determination, your desire if you successfully complete that, but if you do then you've earned your way out to be released at the time you're eligible to be released, okay?

N.T., 9/22/11, p. 37-38. Based on the Court's determination that the Defendant genuinely desired to make positive changes in his life, the Court finds that the imposition of a consecutive period of probation following the Defendant's confinement is consistent with the goals of both rehabilitation and deterrence, as expressed in the Sentencing Code.

The school zone mandatory minimum sentence imposed is inapplicable to this case

The Defendant avers that the school zone mandatory minimum sentence imposed is inapplicable to this case as 18 Pa.C.S. §6317 does not reference a pre-school facility, and as the Court relied on the hearsay testimony of a teacher from the pre-school regarding the school's accreditation.

18 Pa.C.S. §6317 provides that a person 18 years or above, who is convicted of a violation of section (13), (14) or (30) of The Controlled Substance, Drug, Device and Cosmetic Act shall,

> 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, be sentenced to a minimum sentence of at least two years of total confinement, notwithstanding any other provision of this title….

Prior to sentencing on September 22, 2011, the Commonwealth introduced evidence that the drug transaction which is the subject matter of this case took place within 1,000 feet of Lycoming Nursery School. The Defendant does not contest that the transaction took place within the requisite distance from Lycoming Nursery School, merely that Lycoming Nursery

School is not a "school" within the meaning of the statute, and that the Court relied on hearsay testimony of a teacher from the pre-school regarding the school's accreditation. To establish the applicability of 18 Pa.C.S. §6317 to the facts of this case, the Commonwealth called Sue Dinsmore (Dinsmore), a teacher at Lycoming Nursery School, who testified that the difference between a day care facility and a school is that "[a] daycare is basic child care, we are actually a school where we are accredited to teach children." N.T., 9/22/2011, p. 21. Dinsmore testified that due to her own personal knowledge, she knew that Lycoming Nursery School was an accredited nursery school on January 7, 2010. N.T., 9/22/2011, p. 20. The Court finds the testimony relied on was not hearsay, and sufficiently established that Lycoming Nursery School was a "school" for the purposes of protection under 18 Pa.C.S. §6317, as this issued was already addressed by the Superior Court in Commonwealth v. Lewis, 885 A.2d 51 (Pa. Super. 2005),

> [t]he plain and ordinary meaning, as well as the common and accepted usage, of the word "school" includes pre-schools. The dictionary definition of school is: "An institution for the instruction of children or people under college age." American Heritage Dictionary (4th ed) (2000). A pre-school, especially one designed specifically to prepare children for elementary school**,** falls squarely within this definition.

See Commonwealth v. Campbell, 758 A.2d 1231 (Pa. Super. 2000). Accordingly, the Court finds the Defendant's contention that the school zone mandatory minimum sentence imposed is inapplicable to this case to be without merit.

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 ____ day of November, 2011, based upon the foregoing Opinion, it is hereby ORDERED and DIRECTED that the Defendant's Post Sentence Motion is DENIED.

By the Court,

Nancy L. Butts, Judge

xc: Aaron Biichle, Esq.
Jeffrey Rowe, Esq.