IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1818-2010**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
ISAIAH 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 February 1, 2012 and its opinion and order entered on July 5, 2012, which denied Appellant's post sentence motions. The relevant facts follow.

During the morning on November 10, 2010, members of the United States Marshal's Fugitive Task Force went to 405 High Street in Williamsport to serve a felony drug arrest warrant on Sharif Rainier. The Task Force also was aware that Rainier may be armed and dangerous.

Once the members had the premises surrounded, they knocked on the door. Appellant answered the door, dressed only in boxer shorts and a t-shirt. Appellant was ordered to the floor. One member of the Task Force did a wingspan search of the couch nearest to Appellant. When he lifted the couch cushion nearest to the front door, he discovered a semi-automatic handgun. Another member took possession of the gun and cleared it, while Appellant was handcuffed and placed on the couch.

The Task Force members went through the rest of the house looking for

Rainer. A white male, a female and a toddler were found upstairs, but Rainer was not located. Once those individuals were brought downstairs, members of the Task Force went back upstairs to retrieve clothing for Appellant. They grabbed a pair of Appellant's jeans off of a pile of clothing in the master bedroom and noticed a baggie of marijuana and Appellant's I.D. card in one of the front pockets.

The Williamsport police were called to obtain a search warrant for the premises because members of the Task Force observed a gun, drugs and drug paraphernalia when they were looking for Mr. Rainier. When the search warrant was executed, the police found seven baggies of crack cocaine, and a razor and digital scales with white residue in the pockets of a pair of snow pants that were balled up in a roaster that was sitting on a chair in the kitchen. The police also found another set of electronic scales and various invoices and notices bearing Appellant's name in the kitchen cupboards.

Upstairs in the master bedroom, which was designated room #5 for purposes of executing the search warrant, the police retrieved a bong from the nightstand. They also discovered and seized $2,390 and a crumpled up receipt from Williamsport Mirror & Glass made out to Appellant from a shopping bag that was hanging on the closet door handle. Near the television, they found a small book containing pages of names, nicknames, telephone numbers and other numbers, including addition and subtraction, which the police believed were owe sheets.

In another bedroom, room #7, the police found two cell phones (one of which appeared to be broken) and paperwork with Rainier's name on it.

During the course of the search, Appellant requested additional clothing. He was taken upstairs to the master bedroom (room #5), where he pointed out a jacket that was

in a pile of clothes. Officer Mayes picked up the jacket, ran his hands over it and felt an eight-ball of crack cocaine in one of the pockets. When Officer Mayes pulled out the cocaine, Appellant acknowledged that it was his.

The baggie retrieved from Appellant's jeans contained 1.4 grams of marijuana. A total of 28 grams of cocaine was seized.

An ion scan was performed on the money, which revealed the presence of cocaine in amounts much higher than the casual level.

The handgun from the couch was swabbed for DNA and compared with a swab of Appellant's DNA utilizing the YSTR method. Appellant could not be excluded as a contributor of the DNA on the handgun.

Appellant was arrested and charged with two counts of possession with intent to deliver a controlled substance (PWID), possession of a firearm with an altered manufacturer's number, possession of a small amount of marijuana, and possession of drug paraphernalia.

The Commonwealth withdrew the firearm charge, and a bench trial was held on November 8, 2011. The court found Appellant guilty of all the charges.

After trial and before sentencing, the Commonwealth gave notice of its intent to seek mandatory minimum sentences pursuant to 18 Pa.C.S. §7508 and 42 Pa.C.S. §9712.1.

On February 1, 2012, the court sentenced Appellant to three to six years of incarceration in a state correctional institution on count 2, possession with intent to deliver a controlled substance (26 grams of cocaine). The three year minimum was a mandatory sentence pursuant to 18 Pa.C.S. §7508(a)(3)(ii). Appellant also received a $200 fine on count 4, possession of a small amount of marijuana. The other sentences imposed were concurrent

to count 2.[1] The court found Appellant was eligible for a Recidivism Risk Reduction Incentive (RRRI), and his RRRI minimum was 27 months. Appellant also received credit for time served from November 10, 2010 to January 31, 2012.

Appellant filed a timely post sentence motion in which he raised the weight of the evidence for his convictions of possession with intent to deliver and possession of paraphernalia and he challenged the denial of his omnibus pre-trial motion. The court denied this motion in an opinion and order entered July 5, 2012.

Appellant filed a notice of appeal on August 3, 2012. Appellant raises four issues[2] on appeal: (a) the convictions for possession with intent to distribute, possession of a small amount of marijuana, and possession of drug paraphernalia were not supported by the weight of the evidence; (b) the cumulative effect of the errors during trial and during pretrial motions denied him a fair adjudication of his guilt; (c) the court abused its discretion by imposing a manifestly excessive aggregate sentence of 3-6 years incarceration plus an additional year of probation; (d) the court erred in denying his post sentence motion.

Appellant first challenges the weight of the evidence to support his convictions. 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 "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

[1] The court imposed a concurrent 1 to 2 year sentence for count 1, possession with intent to deliver a controlled substance (2 grams of cocaine) and a concurrent one year term of probation for count 5, possession of drug paraphernalia.

[2] While Appellant raises five issues in his statement of matters complained of on appeal, issues a and c are duplicative in that both issues assert weight of the evidence claims. Therefore, the court has eliminated

evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. Id.

None of the verdicts shocked the court's conscience. With respect to the first count of possession with intent to deliver (PWID), Appellant asserts that the verdict was against the weight of the evidence, because he was a user of cocaine, the bong found in the residence could be used for ingesting cocaine, the quantity of cocaine found in his jacket was consistent with personal use, and money can be held legitimately. The court cannot agree.

There was no evidence in the record that Appellant was a user of cocaine or that the cocaine found in Appellant's jacket was for his personal use. Although one of the police officers testified that it was possible that someone could use the bong that was found on the nightstand to ingest cocaine, the bong smelled like marijuana and typically would be used for smoking marijuana, not cocaine. The cocaine from Appellant's jacket weighed 2 grams, enough for a trafficking mandatory. Over $2300 in cash was found in the Appellant's bedroom in a paper shopping bag, along with a receipt in Appellant's name from Williamsport Mirror & Glass. An ion scan of the cash showed levels of cocaine four to five times what one would expect to find. An additional 26 grams of cocaine were located in the kitchen, along with 2 sets of digital scales and a razor. A handgun was found in the living room. Based on the totality of the circumstances, Appellant clearly possessed the cocaine with the intent to deliver it. Therefore, the verdict was not against the weight of the evidence.

Appellant also claims that the verdict on the second count of PWID, related to the cocaine found in the kitchen, was against the weight of the evidence, because: (1) the

---

Appellant's duplicative third claim and renumbered the remaining issues.

kitchen was a common area to which many people had access; (2) there also was indicia of occupancy in the residence for Mr. Rainier, on whom the U.S. Marshals were attempting to serve a felony drug arrest warrant; and (3) there was no testimony or evidence that Appellant knew the drugs were there or that the drugs in fact belonged to him. Again, the court cannot agree.

The indicia of occupancy for Mr. Rainier were found in room #7, whereas indicia of occupancy for Appellant were found in the kitchen cupboards and in the master bedroom. One of the digital scales also was found in the kitchen cupboards. The color and texture of some of the baggies of cocaine found in the pocket of the snow pants was off-white or tan in color just like the cocaine that was in Appellant's jacket pocket. There were 28 grams of cocaine in the baggies in the snow pants. Digital scales and a razor were found in the other pocket of the snow pants. There also was a large amount of cash found in Appellant's bedroom. Although other people were in the residence at the time the Task Force members arrived, no controlled substances were found in their clothing or with their papers and effects. All these circumstances, taken together, establish that the cocaine found in the kitchen belonged to Appellant and he possessed that cocaine with the intent to deliver it.

Appellant avers his conviction for possession of drug paraphernalia was against the weight of the evidence, because there was no evidence to show Appellant ever used the bong; and, on the day of the search, other people were in the room where the bong was found. These arguments are to no avail, however, because the drug paraphernalia charge was based on the baggies that contained the marijuana and cocaine, not the bong found on the nightstand. Appellant admitted that the baggie of crack cocaine in the jacket pocket was his. Moreover, a baggie of marijuana was found in Appellant's jeans, and multiple baggies

of marijuana were found in the pocket of a pair of snow pants in a roaster on a chair in the kitchen.[3] Since the evidence established that Appellant possessed the marijuana and cocaine, Appellant also possessed the baggies in which those controlled substances were packaged. Therefore, the verdict did not shock the court's conscience, and the verdict is not against the weight of the evidence.

Even if this charge was based on the bong, however, Appellant would not prevail. The bong was on the nightstand in master bedroom. Appellant was a resident at 405 High Street and his clothing and effects were in that bedroom; ergo, the master bedroom was Appellant's bedroom. Officer Mayes testified that the bong smelled like marijuana and typically would be used for smoking marijuana. A baggie of marijuana was found in Appellant's jeans. No controlled substances were found on the other people who were in the residence. From all these facts and circumstances, a finder of fact could reasonably conclude that bong was Appellant's. Therefore, even if the drug paraphernalia charge was based on the bong, instead of the baggies, the verdict would not be against the weight of the evidence.

Appellant also challenges the weight of the evidence for his conviction on count 4, possession of a small amount of marijuana. Appellant did not challenge this conviction in his post sentence motion. Therefore, this issue is waived. See Pa.R.Cr.P. 607.

Even if this issue was not waived, Appellant would not be entitled to relief. At trial, defense counsel conceded Appellant was guilty of this charge. See the portion of defense counsel's closing attached hereto as Exhibit 1. Moreover, the evidence presented at trial clearly established that the marijuana was Appellant's. When the Task Force entered the

3 Empty baggies also were found in the living room, which is where the evidence and reasonable inferences from the evidence indicate that the Appellant was located when the Task Force members arrived.

residence, Appellant was dressed only in boxer shorts and a t-shirt. Once the scene was secured, Deputy Sheriff Kula went upstairs to get Appellant a pair of pants. He was directed to a pair of jeans on a pile of clothing in the master bedroom. Deputy Sheriff Kula checked the pockets of the jeans before giving them to Appellant. In one of the pockets he found a baggie of marijuana and Appellant's Pennsylvania ID card. N.T., November 8, 2011, at pp. 34-37. The jeans also came from the same pile of clothing as the jacket or hoodie containing a baggie of cocaine, which Appellant admitted was his. N.T., November 8, 2011, at pp. 125-126. Based on the foregoing, Appellant's conviction for possession of a small amount of marijuana was not against the weight of the evidence.

Appellant next contends the cumulative effect of errors during trial and during pretrial motions denied him a fair adjudication of his guilt. The court cannot address this issue because Appellant has not specified what errors occurred during trial or during pretrial motions. To the extent Appellant is asserting that the lower court erred in denying his omnibus pretrial motion, the court would rely on the opinion and order entered on July 8, 2011 by the Honorable Nancy L. Butts.

Appellant also avers that the lower court abused its discretion by imposing a manifestly excessive aggregate sentence of 3-6 year of incarceration plus an additional year of probation. The court cannot agree.

Initially, the court notes that Appellant received a concurrent one-year term of probation. Furthermore, he did not challenge any aspect of his sentencing in his post sentence motion.

The court also did not abuse its discretion when it imposed a term of three to six years of incarceration on Count 2, possession with intent to deliver a controlled

substance. The Commonwealth sought a mandatory minimum sentence under 18 Pa.C.S. §7508, which states in relevant part:

> A person who is convicted of violating section 13(a)(14), (30) or (37) of the Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance is coca leaves or is any salt, compound, derivative or preparation of coca leaves or is any salt, compound, derivative or preparation which is chemically equivalent or identical with any of these substances or is any mixture containing any of these substances, except decocainized coca leaves or extracts of coca leaves which (extracts) do not contain cocaine or ecgonine shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:
>
> (ii) when the aggregate weight of the compound or mixture containing the substance involved is at least ten grams and less than 100 grams; three years in prison and a fine of $15,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity….

18 Pa.C.S. §7508(a)(3)(ii).

Possession with intent to deliver a controlled substance is a violation of section 13(a)(30) of the Controlled Substance, Drug, Device and Cosmetic Act. 35 P.S. §750-113(a)(30). The substance possessed for count 2 was 28 grams of cocaine. Therefore, the court had no discretion and was required to impose a minimum sentence of at least three years. 18 Pa.C.S. §7508 (c)("There shall be no authority in any court to impose on an offender to which this section is applicable a lesser sentence than provided for herein or to place the offender on probation, parole, work release or prerelease or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than provided herein.").

The court also was required to impose a maximum sentence of at least six years. The statutory maximum sentence for possession with intent to

deliver cocaine is ten years. 35 P.S. §750-113(f)(1.1). The minimum sentence cannot exceed one-half of the maximum sentence. 42 Pa.C.S. §9756(b)(1). Since the court was required to impose a minimum sentence of at least three years, the court could not impose a maximum sentence of less than six years.

The sentence imposed by the court was not excessive. Once the Commonwealth requested the mandatory minimum under section 7508, the sentence imposed was the lowest sentence the court could give Appellant under the circumstances of this case.[4]

Finally, Appellant asserts that the court erred in denying his post sentence motion filed on February 7, 2012. The court cannot agree.

The only issues raised in Appellant's post sentence motion were the weight of the evidence to support his convictions and the denial of his omnibus pretrial motion. In this opinion, the court has addressed each of Appellant's weight of the evidence claims. To the extent Appellant is claiming the court erred in denying his omnibus pretrial motion, the court would rely on the opinion and order entered on July 8, 2011 by the Honorable Nancy L. Butts.

DATE: _____ By The Court,

_____
Marc F. Lovecchio, Judge

[4] Appellant could have received a much greater sentence than that imposed by the court. In light of Appellant's age and lack of criminal record, the court exercised what discretion it had in Appellant's favor by imposing the lowest minimum and maximum sentences it could and running the sentences concurrent to each other.

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