

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CR-486-2011
	:
	:
vs.	:
	:
	:
NAZEER BURKS,	:
Defendant	: Post-Sentence Motion

OPINION AND ORDER

By Information filed on April 13, 2011, Defendant was charged with one count of Firearms Not to be Carried Without a License, a Felony 3 offense, one count of Criminal Trespass, also a Felony 3 offense and one count of Tampering with or Fabricating Physical Evidence, a Misdemeanor 2 offense. The charges arose out of an incident that occurred on March 17, 2011 in which Defendant and other individuals were first approached by law enforcement, Defendant then ran from the police and threw his jacket over a fence adjacent to a local residence. The police suspected Defendant had possessed a firearm in the jacket. Defendant then ran through the house out into the back yard, picked up the jacket with the weapon inside it, ran back into the house, hid the weapon in the bottom drawer of a refrigerator in the house, and then exited the house where he was stopped by the police.

On March 18, 2011, a Juvenile Petition was filed against Defendant for the aforesaid charges. The Petition was transferred to the Court of Common Pleas and a jury trial was held on October 21, 2011.

Following the jury trial, Defendant was found guilty with respect to Count 1, Firearms Not to be Carried Without a License, a Felony 3 offense and Count 3, Tampering with or Fabricating Physical Evidence, a Misdemeanor 2 offense.

Following the verdict, the Court ordered the preparation of a pre-sentence investigation report and scheduled a sentencing hearing for January 4, 2012. Following the hearing, the Court sentenced the Defendant to undergo incarceration in a State Correctional Institution for an indeterminate aggregate term, the minimum of which was twenty-seven (27) months and the maximum of which was five (5) years. Specifically, the Court sentenced the Defendant to a twenty-four (24) month minimum and maximum of four (4) years¹ in connection with the Carrying a Firearm without a License charge and a consecutive three (3) month minimum to twelve (12) month maximum on the Tampering charge. Additionally, the Court indicated Defendant was eligible for the State Correctional Boot Camp Program. At the time of sentencing, Defendant had credit for time served of approximately five (5) to six (6) months.

Defendant filed a timely Post-Sentence Motion on January 13, 2012, arguing that: (1) the guilty verdict was against the weight of the evidence; (2) the Court erred in admitting non-relevant and prejudicial evidence; and (3) the sentence was excessive in light of the nature of the charges, Defendant's age, his prior record and his particular circumstances. Argument was held on Defendant's Post-Sentence Motion on February 2, 2012.

A weight of the evidence challenge concedes that the evidence is sufficient to sustain the verdict, but submits that the jury verdict should be reversed as being so contrary to

¹ The maximum was corrected from three (3) to four (4) years by Order dated February 2, 2012.

the evidence as to shock one's sense of justice. Commonwealth v. Brown, 23 A.3d 544, 557-58 (Pa. Super. 2011). The trial court has only narrow authority to grant relief on a weight claim. Commonwealth v. Sanchez, 2011 Pa. Lexis 3095, at 22 (December 21, 2011), citing Commonwealth v. Blakeney, 946 A.2d 645, 652-53 (Pa. 2008).

“Relief on a weight claim is limited to ‘extraordinary circumstances, when the jury’s verdict is so contrary to the evidence as to shock one’s sense of justice and the reward of a new trial is imperative, so that right may be given another opportunity to prevail.’” Sanchez, supra at 22-23, citing Blakeney, supra at 653.

In order to convict a Defendant of carrying a firearm without a license in violation of 18 Pa. C.S.A. § 6106, the Commonwealth would need to prove beyond a reasonable doubt the following three elements:

- (1) that the weapon was a firearm;
- (2) that the firearm was unlicensed; and
- (3) that the defendant had actual or constructive possession of the firearm which was concealed on or about his person and outside of his home or place of business.

Commonwealth v. Parker, 847 A.2d 745, 750 (Pa. Super. 2004).

Defendant argues that the verdict was against the weight of the evidence as the gun was not found on his person and no one saw him handle the gun that day. Defendant specifically attacks the possession element of the offense.

“To prove possession of a firearm, the Commonwealth must establish that an individual either had actual physical possession of the weapon or had the power of control over

the weapon with the intention to exercise that control.” In Re: R.N., 951 A.2d 363, 369-70 (Pa. Super. 2008).

In reviewing all of the direct and circumstantial evidence, this Court cannot conclude that the verdict was “irreconcilably contradictory to incontrovertible facts, human experience of the laws of nature or based on mere conjecture.” Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 752 (2000), citing Commonwealth v. Thompson, 538 Pa. 297, 648 A.2d 315 (1994).

On March 17, 2011, Officer Jeremy Brown of the Williamsport Bureau of Police was near 643 Locust Street for the purpose of serving an arrest warrant on Ralph Thomas, an adult individual. When approaching the residence, Officer Brown noticed numerous individuals in front of it who then took off running as law enforcement officers approached.

Defendant, who was wearing a black windbreaker type jacket, had his hands in his pockets and started jogging away from the police between the residences at 641 and 643 Locust Street and toward a fence that connected to the back portions of 641 and 643 Locust Street. When Officer Brown confronted Defendant, he saw that Defendant had discarded the jacket. Officer Brown patted Defendant down and escorted him to the front of 643 Locust Street. Officer Brown then walked to the wooden fence and, looking through the slats of the fence, saw the jacket lying on the ground with what he “believed to be a gun... inside of the jacket protruding up in the air.” He described the portion of the gun protruding in the air as looking like the grip of a gun with the “magazine showing.”

While Officer Brown was walking to the fence and looking at the jacket through the fence, Defendant fled into the residence at 643 Locust Street. Very shortly thereafter, Defendant ran out of the rear of 643 Locust Street, scooped up the jacket, held it close to his stomach/chest area and ran inside the residence. Defendant refused to obey orders by the police, who had witnessed this event, to stop.

Defendant then exited the front of 643 Locust Street wearing the jacket. He was searched and nothing was found on him.

Agent Steve Sorage, a detective in the Criminal Investigation Division for the Williamsport Bureau of Police assisted in the investigation. He was looking over the fence from a different vantage point than Officer Brown when he witnessed Defendant run out from the rear of 643 Locust Street, scoop up the “jacket or hoodie...curl it under” and run back into the residence. Agent Sorage indicated that he identified himself as a police officer and ordered Defendant to stop but Defendant refused to do so.

On cross-examination, Agent Sorage conceded that he did not see anything protruding from inside the jacket, but that he saw it “at a different angle than Officer Brown.”

Officers soon obtained consent to search the residence at 643 Locust Street. Tracing the path that Defendant would have traveled, they searched for a weapon. Upon searching the refrigerator, they found a handgun in a bottom drawer. The refrigerator was between the front and rear door of 643 Locust Street and in the flight path of Defendant.

Numerous photographs were introduced into evidence depicting the house, fence, back yard, area between the houses, the inside of 643 Locust Street, the refrigerator, the gun in the refrigerator, and the flight path of Defendant. The photographs circumstantially

confirmed the version of events testified to by the prosecution witnesses. For example, the refrigerator was in close proximity to the rear door of the residence where Defendant first exited, then picked up the jacket with the gun apparently in it, and then returned to the residence where, given the close proximity of the refrigerator, Defendant could easily have stopped, put the gun in the refrigerator “crisper” and then continued exiting the premises.

Ralph Thomas also testified on behalf of the Commonwealth. He was the resident of 643 Locust Street. He confirmed that the gun that was found in the refrigerator was not his, was not placed in the refrigerator by him and that no gun was in the refrigerator earlier that day.

A jury considering all of this evidence could certainly conclude beyond a reasonable doubt that Defendant actually possessed the handgun or at the very least had constructive possession of the handgun.

In order to find a defendant guilty of tampering with evidence, the Commonwealth must prove three elements:

- (1) the defendant knew that an official proceeding or investigation was pending or about to be instituted;
- (2) the defendant altered, destroyed, concealed or removed an item;
and
- (3) the defendant did so with the intent to impair the availability of the item to the proceeding or investigation.

Commonwealth v. Yasipour, 967 A.2d 734, 745 (Pa. Super. 2008), appeal denied, 602 Pa. 658, 980 A.2d 111 (2009).

Defendant obviously knew that police officers were involved in an official investigation when they initially stopped him, frisked him and directed him to the front of the residence. He further knew that the police were involved in an official investigation when he heard them yell to stop upon him exiting the rear of the premises. See Commonwealth v. Morales, 447 Pa. Super. 491, 669 A.2d 1003, 1006 (1996). As well, Defendant concealed the gun in the refrigerator. The gun was initially in his jacket. Knowing that the police were conducting an investigation, he initially ran from them and threw the jacket over the fence. Further, and in defiance of police directives, he exited the back of the residence, grabbed the jacket and ran back into the house. He hid the gun in the refrigerator and then soon exited the residence wearing the jacket.

Finally, Defendant clearly concealed the weapon with the intent to impair its availability to the police. He knew the police had focused the investigation on him, he knew that he had thrown the jacket over the fence and that the police were either aware of it at that point or would soon be aware of it, knew that the police suspected something when they saw him running out from the residence and ordered him to stop, and certainly knew the police would be further searching him after he either exited the residence or they entered the residence after him. By hiding the gun in the refrigerator, Defendant obviously intended that the police would not find it on him.

Accordingly, Defendant's motion in arrest of judgment arguing that the verdict was against of the evidence will be denied.

Defendant next argues that the Court erred in admitting non-relevant and prejudicial evidence. More specifically, Defendant argues that the trial court allowed the

admission of testimony regarding drugs found in the vicinity of Defendant on the date of the incident leading to the charges.

Defendant argues that he was not charged with any drug-related offense and that the evidence relating to the controlled substances was unfairly prejudicial.

“Questions of the admission and exclusion of evidence are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion.”

Commonwealth v. Kendricks, 30 A.3d 499, 503 (Pa. Super. 2011), citing Commonwealth v. Freidl, 834 A.2d 638, 641 (Pa. Super. 2003).

“Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact or issue more or less probable, or supports the reasonable inference or presumption regarding a material fact.”

Commonwealth v. Reese, 31 A.3d 708, 716 (Pa. Super. 2011) quoting Commonwealth v. Stallworth, 566 Pa. 349, 363, 781 A.2d 110, 117-18 (2001).

The evidence was clearly relevant to the issue of possession. The evidence of drugs in the flight path of one of the individuals with Defendant tended to prove at least circumstantially that Defendant possessed the weapon. More specifically, the inference was that the individuals were engaged in drug transactions and there was expert testimony that it was not at all uncommon for groups under those circumstances to have one individual hold the drugs, a second individual hold money, and another individual possess a weapon to protect the merchandise. The evidence logically tended to make possession by Defendant more probable.

Defendant argues, however, that admission of the evidence, albeit relevant, was unfairly prejudicial. Defendant is correct that not all relevant evidence is admissible. Indeed,

the exclusion of relevant evidence is mandated where its probative value is outweighed by the danger of unfair prejudice. Pa. R.E. 403.

Evidence is unfairly prejudicial if it has “a tendency to suggest a decision on an improper basis or to divert the jury’s attention away from its duty of weighing the evidence impartially.” Pa. R.E. 403, comment; see also Sprague v. Walter, 441 Pa. Super. 1, 656 A.2d 890, 909 (1995), appeal denied, 543 Pa. 695, 670 A.2d 142 (1996). Certainly, evidence of drugs in the possession of one of Defendant’s cohorts, may have an undue tendency to suggest a decision on an improper basis. In other words, the jury might be inclined to conclude that Defendant was engaged in a conspiracy to distribute drugs and accordingly base their decision on that assumption instead of the facts of the case.

Under all of the circumstances, however, the Court finds that this danger of unfair prejudice did not outweigh the probative value of the relevant evidence. Relevant evidence is inadmissible only if its probative value is substantially outweighed by the danger of unfair prejudice or confusion. Commonwealth v. Lilliock, 740 A.2d 237, 244 (Pa. Super. 1999), appeal denied, 568 Pa. 657, 795 A.2d 972 (2000).

This was a largely if not entirely a circumstantial evidence case. No one actually saw Defendant with the gun and no admissions were made. Under such circumstances, even the smallest piece of circumstantial evidence was necessary. Indeed, the evidence of illegal substances completed the puzzle as to why under the circumstances Defendant would necessarily possess a gun.

Moreover, any prejudice was obviated by the Court’s instruction to the jury to limit its consideration of the evidence to the facts at issue. Indeed, the jury was cautioned not

to consider the evidence for any other purpose. It is presumed that juries follow the instructions of the Court. Commonwealth v. Coon, 26 A.3d 1159, 1166 (Pa. Super. 2011).

Accordingly, Defendant's Motion for a New Trial will be denied.

Defendant next argues that the sentence should be reconsidered and the Court should exercise its discretion and impose a more lenient sentence. It is clear that Defendant's argument implicates the discretionary aspects of the Court's sentence. Pennsylvania law provides the sentencing court with discretion in imposing a sentence, as long as the sentence is not inconsistent with the specific provisions of the Sentencing Code or contrary to the fundamental norms which underlie the sentencing process. Commonwealth v. Prisk, 13 A.3d 526 (Pa Super. 2011); Commonwealth v. Pass, 914 A.2d 442, 446 (Pa. Super. 2006).

Prior to sentencing Defendant, the Court ordered and received a pre-sentence investigation report. Given the Defendant's prior record score of a one (1) and offense gravity score of a nine (9) with respect to the firearm charge and an offense gravity score of two (2) with respect to the tampering charge, the respective standard ranges were eighteen (18) to thirty (30) months and RS to two (2) months. The Court sentenced Defendant within the standard range on the firearm charge and slightly above the standard range with respect to the tampering charge.

While sentencing courts clearly have discretion to sentence outside the guidelines based on relevant factors not specifically contemplated by the criminal statutes, a sentence must nonetheless be reasonable. See 42 Pa.C.S.A. §9781(c)(3); Commonwealth v. Perry, 32 A.3d 232, 237-242 (Pa. 2011).

In determining the reasonableness of the sentence, numerous factors must be considered including the nature and circumstances of the offense, the history and characteristics of the Defendant, the opportunity of the sentencing court to observe the Defendant, any pre-sentence investigation, the guidelines promulgated by the Commission and any other specific findings relevant to the purposes behind sentencing such as retribution, rehabilitation, deterrence and incapacitation. Perry, supra at 237.; 42 Pa. C.S.A. § 9781 (d); 204 Pa. Code § 303.11.

The Court considered all of those factors and imposed a sentence most appropriate under the circumstances.

The most serious offense for which Defendant was convicted was not only a felony offense but a felony offense involving the possession of a dangerous loaded weapon. Defendant's conduct in committing the offense not only put others in harm's way but also exhibited a complete disregard for the safety and authority of law enforcement.

Despite the evidence against him, Defendant has refused to accept any responsibility whatsoever. Defendant's version of the offense as set forth in the pre-sentence investigation demonstrates a defiant young man not willing to accept any accountability and completely ignorant of any harm that he may have caused by his conduct.

Defendant is no stranger to the court system. For a two and one-half (2 ½) year period preceding his arrest on these charges, he engaged in escalating delinquent and/or criminal behavior including a simple assault, theft, possession of a controlled substance (cocaine) and then the present firearm offense. Moreover, after being arrested on these charges and released on bail, he was charged with numerous felony charges of possession with intent to

deliver controlled substances and related misdemeanor offenses. A preliminary hearing was held shortly thereafter and all of the charges were held for court.

Defendant was previously placed at Glen Mills School for six (6) months as well as the Tioga County Detention Facility. Defendant failed to complete his high school education and never obtained a GED.

To his credit, he admitted a “drug problem of snorting heroin and using THC.” He also admitted abusing Percocet.

It was, and remains, the Court’s opinion that Defendant needs a sentence of state incarceration and that the community deserves the protection of such a sentence. The Defendant has exhausted the services available through the juvenile court and desperately needs a wake-up call. As well, he needs the treatment programs available to young offenders in a state correctional facility. The community needs to be protected from an individual like Defendant who has no respect for the laws of society or those entrusted with enforcing those laws, and who carelessly exposes others to death or serious bodily injury.

The Court clearly considered all of the required sentencing factors and imposed an appropriate and reasonable sentence. Accordingly, Defendant’s Motion to Reconsider Sentence will be denied.

ORDER

AND NOW, this ____ day of February 2012, following a hearing and argument,
the Court **DENIES** the Defendant's Post-Sentence Motion.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: DA
PD (TH)
Gary Weber, Esquire (Lycoming Reporter)
Work File