

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	NO. CR – 986 – 2010
	:	
vs.	:	CRIMINAL DIVISION
	:	
GARY COLEMAN,	:	
Defendant	:	Post Sentence Motion

OPINION AND ORDER

Before the Court is Defendant's Post Sentence Motion, filed April 2, 2012. Argument on the motion was heard April 23, 2012, at which time the court directed the transcription of certain portions of the trial testimony and gave counsel two weeks following production of the transcript in which to file memoranda addressing the court's denial of Defendant's motion for a mistrial. The transcript was filed on May 25, 2012 but as of this date, June 14, neither the Commonwealth nor the Defendant has filed a memorandum.

After a jury trial on December 14 and 16, 2011, Defendant was convicted of Possession with intent to deliver (Cocaine), possession of a small amount of marijuana, possession of cocaine and possession of drug paraphernalia. On March 22, 2012, Defendant was sentenced to incarceration of twenty-seven months to six years, fined \$300 and placed on concurrent supervision. In his post sentence motion, Defendant challenges the court's denial of his suppression motion, denial of his motion for mistrial and admission of evidence that Defendant was not employed.

Defendant first contends the court erred in denying his suppression motion as the stop of the vehicle in which he was riding was not supported by reasonable suspicion or probable cause. Inasmuch as the stop *was* supported by reasonable suspicion, however, this claim is without merit. See Opinion and Order of the Honorable Marc F. Lovecchio, filed March 18, 2011.

Defendant's second claim is also without merit. Defendant moved for a mistrial after Officer Mayes, called by the Commonwealth to provide expert testimony that Defendant possessed the cocaine with the intent to sell it rather than use it personally, stated that

Defendant was a “gangster” and a “drug dealer”. The remarks were made during cross-examination, specifically in response to defense counsel’s questions which insinuated that Defendant’s appearance was more consistent with a cocaine addict than a dealer. Officer Mayes had testified that a cocaine addict would be obvious from his “general appearance” and that Defendant appeared to be “healthy” and “in good shape”, “clean” and “decently dressed”. When defense counsel pointed out that Defendant had been wearing a pair of sweat pants with burn holes in them at the time of his arrest and suggested that Defendant may have gained weight since then, Officer Mayes responded that he thought Defendant looked “not tore up enough”, “not down and out”, “not messed up like a normal crack user is.” He told defense counsel that she could not “convince [him] of that.” Defense counsel then asked, “Because of how he looks sitting here today?” and Officer Mayes responded, “I’ve seen him my whole career here and there. I don’t see him on a daily basis, but he’s always – he’s always looked healthy and decent and in shape. I mean, he looks fine. He’s not what I’m used to seeing as a cocaine user, a crack user. He’s just not. He’s a gangster. He’s a drug dealer.” Defense counsel then objected and moved for a mistrial but the court denied that request and instead provided the following curative instruction:

Ladies and gentlemen, Miss Spring properly objected to the fact of the agent’s characterization of the Defendant. At the beginning I said that – I indicated in my initial instructions to you that you have to follow the instructions of the court, and I’m instructing you at this point that you are to give no weight to the fact that the agent referred to Mr. Coleman as a gangster, and in fact, the conclusion that he’s a drug dealer is for you. The agent may give or may opine on that which is reasonably connected to delivery of drugs, but the characterization was inappropriate and you are instructed to disregard it and give it no weight in your deliberations.

Granted that Officer Mayes’ comments were inappropriate, a mistrial should be declared only where the remarks were so prejudicial as to deprive Defendant of a fair and impartial trial. Commonwealth v. MacBride, 587 A.2d 792 (Pa. Super. 1991). Not every intemperate, uncalled for and improper remark demands a new trial. Id. Here, the remarks were made in the context of “the defendant looks not like a cocaine addict but *like* a gangster/drug dealer”, thus ameliorating their effect to a certain extent. Further, Officer Mayes did not include Defendant’s appearance in his list of factors supporting his opinion that the

cocaine was possessed with intent to deliver, thereby minimizing the importance of the comment. The court instructed the jury to disregard the remark and told them it was inappropriate, and Officer Mayes apologized “for that comment about Mr. Coleman” as he left the witness stand. The court believes that under these circumstances Defendant was not deprived of a fair trial. *See Commonwealth v. Taliaferro*, 417 A.2d 213 (Pa. Super. 1979)(the court's prompt curative instruction, the assistant district attorney's apology, and the full and complete charge of the court dissipated any prejudice the remark initially may have caused).¹

Finally, with respect to the contention the court erred in admitting evidence that Defendant was not employed, since such evidence was relevant to show the cash found on his person was more likely from selling drugs than from employment, the probative value of the evidence outweighed any prejudicial effect it might have had. Thus, this claim is also without merit.

ORDER

AND NOW, this 15th June 2012, for the foregoing reasons, Defendant’s Post Sentence Motion is hereby DENIED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: DA
PD
Gary Weber, Esq.
Hon. Dudley Anderson

¹ The court acknowledges Defendant’s argument that Officer Mayes’ qualification as an expert witness distinguishes the matter from the situation where a prosecutor makes an improper remark, but believes that since the remark was made in an offhand way, added simply to make a point during what could be called an argument with defense counsel, rather than stated as an expert opinion offered as substantive evidence, the fact that Officer Mayes was an expert witness does not really factor in to the equation.