

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1402-2011
vs. :
: CRIMINAL DIVISION
:
:
:
:
: 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 April 23, 2013. The relevant facts follow.

Shortly after midnight on October 1, 2011, Officer Damon Hagan of the Williamsport Bureau of Police saw Appellant Quion Bratten standing in front of the Finish Line bar. Officer Hagan recognized Appellant as a person who was wanted on an outstanding warrant.¹ Officer Hagan arrested Appellant and searched him incident to the arrest. During the search, Officer Hagan found a cell phone, \$720 in cash and 18 baggies of crack cocaine.

Appellant was charged with possession with intent to deliver a controlled substance, possession of a controlled substance, and possession of drug paraphernalia.

A jury trial was held December 20-21, 2012, at which the sole issue was whether Appellant possessed the cocaine with the intent to deliver it.² The jury found

¹ Appellant was wanted on a parole violation for leaving a half-way house.

² Appellant had already been found guilty of the other charges at a jury trial held on March 6, 2012, but that jury deadlocked and a mistrial was declared on the charge of possession with intent to deliver a controlled substance.

Appellant guilty, and on April 23, 2013, the court sentenced Appellant to 27 months to 5 years of incarceration in a state correctional institution.

Appellant filed a timely notice of appeal in which he asserted two issues: (1) the evidence was insufficient to prove that he intended to deliver the cocaine found on his person; and (2) the trial court erred by admitting intercepted jail telephone calls and visits, and by permitting the Commonwealth to present transcripts of those calls and visits to the jury.

When reviewing a challenge to the sufficiency of the evidence, the court must view the evidence and all reasonable inferences that can be drawn from the evidence in the light most favorable to the Commonwealth as the verdict winner. Commonwealth v. Nypaver, 69 A.3d 708, 714 (Pa. Super. 2013). Viewed in this light, there was ample evidence from which the jury could conclude that Appellant possessed the cocaine with the intent to deliver it.

Appellant possessed fifteen small orange baggies of cocaine in a large clear plastic “distribution” bag and three baggies of cocaine that were marked with a skull. The total weight of the cocaine was 2.38 grams. Appellant also possessed \$720 in cash, but he was not employed. Appellant claimed that he obtained this money playing pool inside the Finish Line bar, but the bouncer testified that Appellant was only inside the bar for fifteen or twenty minutes and he did not see Appellant playing pool. Appellant did not possess any paraphernalia for ingesting the cocaine, and he gave Officer Hagan a false name, which could have been considered as consciousness of guilt.

The Commonwealth also presented expert testimony from Officer Justin Snyder, who testified that, in his opinion, Appellant possessed the cocaine with the intent to

deliver it. Officer Snyder based his opinion on the amount and denominations of the cash in Appellant's possession; the packaging and amount of the cocaine, including the use of a "distribution" bag; the fact that the 2.38 grams of cocaine was worth about \$240, but to buy it as 15 \$20 baggies and three \$50 baggies would cost \$450; and the lack of any paraphernalia to ingest the cocaine.

The statements Appellant made to his girlfriend and friends during their telephone calls and visits also supported the jury's determination. Appellant admitted to a friend that he had "work" on him that night. He also said he should have run from the cops that night, instead of getting caught. When his girlfriend told him she wished he would just calm down, Appellant told her he was trying to calm down. She told him to quit lying. He wasn't trying to calm down; if he was, he would 'a done it. Appellant then said "as much as I was running around like, that shit tired me out. Sometimes I just wanted to turn my phone off." He also warned friends not to mess with an old white guy named Lyle, because he was a confidential informant. One friend asked, "Oh, he bad business?" Appellant replied, "Yeah, bad business."

When all the evidence and the reasonable inferences that can be drawn from that evidence are considered in the light most favorable to the Commonwealth, it is clear that the evidence was sufficient for the jury to find that Appellant possessed crack cocaine with the intent to deliver it.

Appellant also contends that the trial court erred by admitting the recordings of the calls and visits into evidence and by allowing the Commonwealth to present transcripts of those calls and visits to the jury. The court cannot agree.

The admission of evidence rests within the sound discretion of the trial court,

which must balance evidentiary value against the potential dangers of unfairly prejudicing the accused, inflaming the passions of the jury, or confusing the jury. Commonwealth v. Bryant, 67 A.3d 716, 726 (Pa. 2013). A trial court's decisions as to the admissibility of evidence will only be reversed if the appellant sustains his "heavy burden" to show that the trial court has abused its discretion. Id. "An abuse of discretion will not be found on a mere error of judgment, but rather exists where the court has reached a conclusion [that] overrides or misapplies the law or where the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." Id., quoting Commonwealth v. Eichinger, 591 Pa. 1, 915 A.2d 1122, 1140 (2007); see also Commonwealth v. Fischere, 70 A.3d 1270, ___ (Pa. Super. 2013).

The Commonwealth filed a motion in limine seeking a determination by the court that the recordings of the phone calls and visits were admissible evidence. An argument on that motion was held on December 19, 2012, the day before the trial started. At the argument, defense counsel objected to the admissibility of this evidence on two grounds: authentication and relevancy. The court rejected defense counsel's claims and permitted the Commonwealth to introduce the recordings.

Although Appellant never stated his given name on the recordings, the Commonwealth presented circumstantial evidence to establish that Appellant made the statements on the recordings. Appellant was incarcerated at the Lycoming County Prison when the statements were made. The parties entered a stipulation that Warden Kevin DeParlos would testify, among other things, that: all phone calls and visits are recorded; each inmate is given a pin number that is used to make calls, Appellant made 24 phone calls between October 1, 2011 and May 8, 2012; Warden DeParlos' staff transferred a copy of the

audio recordings onto three discs; the recordings were kept as a regular practice in the course of the regularly conduct activity; and Warden DeParlos was the custodian of the audio recordings.

The content of the recordings also circumstantially established their authenticity. Appellant's charges arose when he was arrested by police in front of the Finish Line bar on a warrant for a parole violation. During the phone call on January 13, 2012, the speaker says his only new case was "the drug john I caught at, up at the bar" and "I had work on me that night." He also talked about how he ran from the halfway house and how much back time he had left.

Finally, Appellant ultimately testified in his own defense, and he did not deny that it was his voice on the recordings. Instead, he tried to explain some of the statements that he made. N.T., December 20, 2012, pp. 144-153.

The recordings were relevant to show whether Appellant intended to deliver the drugs and to show that Appellant was the person making the statements. Appellant told the police he was not employed. In his trial testimony, he indicated that he was surviving during that time by friends and family giving him money. N.T., December 20, 2012, p. 141. Yet on the recordings of the phone calls and visits, Appellant talked about having money and expecting to get \$3,000 in January. A reasonable inference to be drawn from these statements, the number of baggies of cocaine on his person and the lack of employment was that Appellant was getting money by selling drugs. Appellant's statements warning others to stay away from Lyle because he was confidential informant (CI) also supported this inference. As Officer Snyder explained, an addict or user would not need to be worried about a CI because a CI is used to buy from drug dealers. N.T., December 20, 2012, p. 98-

100. Appellant also indicated Lyle was “bad business” and he used the term “work” when referring to his drugs, which when considered in conjunction with the other evidence in this case was relevant to show that Appellant was not an addict or user, but rather a dealer who was in the business of selling drugs for money to support himself.

While the court recognizes that evidence that a defendant is on parole normally would not be admissible due to its potential for undue prejudice, it was relevant and admissible in this case, because it was part of the history of the case. See Commonwealth v. Simpson, 66 A.3d 253, 273 (Pa. 2013). The police would not have arrested Appellant and searched his person incident to arrest if he was not wanted for a parole violation. It was also relevant circumstantial evidence to authenticate that Appellant was, in fact, the person making the statements in the recordings of the prison calls and visits. The court, however, did not permit the Commonwealth to introduce any evidence that the parole violation was related to a prior drug conviction.

With respect to the transcript of the recordings, the court did not send the transcript out with the jury during their deliberations. The jurors only had the transcripts in their possession when the Commonwealth was playing the recordings in open court. The transcripts were used as a guide and nothing more. In fact, the court specifically instructed the jury that they could use the transcripts as a guide while they were listening to the tapes, but the tapes were the evidence, not the transcripts. If there was a discrepancy between what was on the transcript and was the jurors heard, what the jurors heard controlled, not what was on the transcripts. N.T., December 20, 2012, p. 66-67. In crafting its instruction to the jury, the court was guided by the case of Commonwealth v. Bango, 560 Pa. 84, 742 A.2d 1070 (1999).

In conclusion, the evidence was sufficient to establish that Appellant possessed the cocaine with the intent to deliver it; the content of the recordings of the prison phone calls and visits were relevant and admissible to show Appellant's intent to deliver cocaine, as well as to authenticate that Appellant was the speaker; and the court properly permitted the jury to use the transcript solely as a guide while they were listening to the recordings.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Spring, Esquire (APD)
Martin Wade, Esquire (ADA)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)