

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CR-737-2014**
 v. :
 :
 :
 AMY LEEANN GATZ, : **CRIMINAL DIVISION**
 Defendant :

OPINION AND ORDER

On July 17, 2015, the Defendant filed a timely post-sentence motion. A court conference on the motion was held on July 30, 2015.

I. Background

On September 13, 2013, the Defendant entered a vehicle and gave 1.33 grams of heroin to a police informant. The informant then handed the heroin to Pennsylvania State Police Trooper Nicholas Madigan, who was undercover at the time. Madigan then gave the Defendant \$400 in pre-recorded currency.

On April 24, 2015, a jury found the Defendant guilty of Possession with Intent to Deliver a Controlled Substance,¹ Delivery of a Controlled Substance,² and Possession of a Controlled Substance.³ On July 7, 2015, the Court sentenced the Defendant on the Possession with Intent offense to five years in the County Intermediate Punishment Program with the first nine months to be served at the Lycoming County Pre-Release Center. The Court found that, for sentencing purposes, the other offenses merged with the Possession with Intent.

In her motion, the Defendant argues that she is entitled to a new trial because the Court erred in denying her request for a continuance and denying her request for jury instruction on the defense of duress. The Defendant also asks that her sentence “be shortened to allow her to

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780-113(a)(30).

³ 35 P.S. § 780-113(a)(16).

continue her higher education, seek treatment and counseling, and be involved in her children's lives."

A. Testimony of Police Informant

The Defendant did not appear to be distressed or upset when she gave the heroin to the police informant. The Defendant did not have any visible marks on her body to corroborate her claim.

B. Testimony of Trooper Madigan

Trooper Madigan had not met the Defendant before September 13, 2013. The Defendant did not appear to be nervous in the vehicle. She was not crying, and her hand was not shaking when she handed the heroin to the informant. It is possible for a drug dealer to have someone in "a lesser position" perform a drug transaction. N.T., 4/24/15, at 27.

C. Defendant's Testimony on Direct Examination

Two men named Ron and Ty moved into the Defendant's apartment in late summer, early fall of 2013. The men "came over to watch TV, they were playing video games, and then they just basically wouldn't leave." N.T., 4/24/15, at 42. Several times, the Defendant asked Ron and Ty to leave the apartment, but the men did not leave. The men were selling drugs and said that they "were going to put holes in [the Defendant and her children] if [the Defendant] gave them any indication that [she] was going to tell on them." N.T., 4/24/15, at 43. The men had pointed a gun at the Defendant on "a hand full" of occasions. *Id.* at 44. On September 13, 2013, the men "told [Defendant] to take something out to the car to the people so [the Defendant] could get a ride to Giant." *Id.* Between September 2013 and the spring of 2014, the Defendant

did not contact police about the men because she “was scared that [the men] would find [her] and hurt [her] and [her] children.” Id. at 46.

D. Defendant’s Testimony on Cross Examination

Ron and Ty moved into the Defendant’s apartment in June or July of 2013. The Defendant asked the men to leave on more than one occasion, but they would not leave. The Defendant realized the men were dealing drugs when she “saw all the traffic coming in and out of [her] house.” N.T., 4/24/15, at 49. The traffic started in late July of 2013. The Defendant did not call the police because she “was in fear and [she] also was trying to get [her] kids out of the house as much as possible to stay with their father in Harrisburg.” N.T., 4/24/15, at 50. The Defendant did bring her children back to the apartment while the men were there. The following exchange occurred during cross examination of the Defendant:

Prosecutor: Well, let me ask you this. On September 13th 2013, were they watching you at the Giant?

Defendant: I don’t know. I don’t know if somebody had followed me. I don’t know. A lot of times they had somebody following me, watching me.

Prosecutor: Really?

Defendant: Yes.

Prosecutor: Okay. I did not hear you say on direct examination that anyone threatened you on September 13th, 2013. Your testimony was that they asked you to give something to somebody, is that correct?

Defendant: Correct.

Prosecutor: So no threat was communicated to you before you went out the door to give those drugs to the two people in that car, is that correct?

Defendant: I really didn’t feel like I had a choice.

Prosecutor: You testified on direct that you felt that they were afraid that you would tell on them, is that correct?

Defendant: Yes.

Prosecutor: Did you tell anybody on September 13th?

Defendant: No. I was scared that the people that I – that they had wanted me to serve were going to go back to them and say something to them that I’m a rat or you better watch her or something of that nature and I would come home to violence.

Prosecutor: Okay. Tell me again about the efforts you took to get your kids out of the house.

Defendant: I made a lot of time for them to stay with their father in Harrisburg, as I said, to keep them away more.

N.T., 4/24/15, at 51-52.

II. Discussion

A. The Court did not Err in Denying the Request for the Duress Instruction Because There was not Sufficient Evidentiary Support for the Instruction.

“The Constitution guarantees to state criminal defendants a meaningful opportunity to present a complete defense. Hence, [w]here a defendant requests a jury instruction on a defense, the trial court may not refuse to instruct the jury regarding the defense if it is supported by evidence in the record” Commonwealth v. Markman, 916 A.2d 586, 607 (Pa. 2007) (citations and internal quotation marks omitted). “In determining whether there is sufficient evidentiary support for a duress instruction, the trial court considers all evidence presented, whether adduced by the defendant as part of her case in chief, through cross-examination, or, conceivably . . . in the Commonwealth’s own case in chief.” Id. (citation and internal quotation marks omitted).

“The elements which must be shown to establish a duress defense are: (1) an immediate or imminent threat of death or serious bodily injury; (2) a well grounded or reasonable fear that the threat will be carried out; and (3) no reasonable opportunity to escape the threatened harm

except by committing the criminal act.” Commonwealth v. Baskerville, 681 A.2d 195, 200 (Pa. Super. 1996) (citation omitted).

Here, there was no evidence that the Defendant was subject to an immediate or imminent threat. On direct examination, the Defendant testified that Ron and Ty “told [her] to take something out to the car to the people so [she] could get a ride to Giant.” N.T., 4/24/15, at 44. On cross examination, the Defendant testified that she did not know if somebody was following her. Id. at 51. She did not testify that somebody threatened her on the day that she sold the heroin to the informant and Trooper Madigan. Because there was no evidence that the Defendant was subject to an immediate or imminent threat, the Court did not err in denying the request for the duress instruction.

B. The Court did not Err in Denying the Defendant’s Request for a Continuance.

The Defendant requested a continuance because, on the morning of the trial, one of the Defendant’s witnesses “had some sort of emergency medical situation . . . where she was transported to the hospital.” N.T., 4/24/15, at 37. The Defendant asserted that the witness “would be able to provide and proffer testimony regarding the type of threats [the Defendant] received, the behavior of both [the Defendant] and her children during this time, which would go to whether or not [the Defendant] was under duress at the time of this offense.” Id. The Court has already noted that the witness “just sounds like she’s a corroborative witness for [the Defendant]” Id. at 37-38.

The following factors are considered when deciding whether to grant or deny a defendant’s request for a continuance:

- (1) the necessity of the witness to strengthen the defendant’s case;
- (2) the essentiality of the witness to the defendant’s defense;
- (3) the diligence exercised to procure his or her presence at trial;

- (4) the facts to which he or she could testify; and
- (5) the likelihood that he or she could be produced at court if a continuance were granted.

Commonwealth v. Bozic, 997 A.2d 1211, 1225 (Pa. Super. 2010).

Here, the factors support the Court's decision to deny the request for a continuance. The Defendant testified about her interactions with Ron and Ty, so the witness was not essential to the Defendant's defense. In addition, the witness would not have strengthened the Defendant's case because the Defendant would know the most about her interactions with the men. Furthermore, the witness presumably would have testified to the same facts to which the Defendant testified. Although the witness could have possibly been produced at a later date, and the Defendant appears to have exercised diligence in procuring her presence, these factors were outweighed by the factors supporting a denial of the continuance request.

C. The Court will not Reconsider the Defendant's Sentence.

The Court reviewed a pre-sentence investigation report on the Defendant, and the nine months of confinement is within the standard range of the sentencing guidelines. In addition, on August 20, 2015, the Defendant was granted medical work release. Therefore, the Court will not reconsider the sentence.

III. Conclusion

The Court did not err in denying the request for the duress instruction because there was not sufficient evidentiary support for the instruction. The Court did not err in denying the request for a continuance. The Court will not reconsider the Defendant's sentence.

ORDER

AND NOW, this _____ day of October, 2015, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Post-Sentence Motion is hereby DENIED. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), the Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of entry of this Order; (b) the right to assistance of counsel in the preparation of the appeal; (c) if indigent, the right to appeal in forma pauperis and to proceed with assigned counsel as provided in Pennsylvania Rule of Criminal Procedure 122; and (d) the qualified right to bail under Pennsylvania Rule of Criminal Procedure 521(B).

By the Court,

Nancy L. Butts, President Judge