

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA	:	CR-318-2014
	:	
v.	:	
	:	
DWAYNE ORLANDO MAYS,	:	
Defendant	:	1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE**

Background

On February 4, 2014, narcotics agents of the PA Office of the Attorney General charged Dwayne Orland Mays (Defendant) with two counts of Possession with Intent to Deliver a Controlled Substance¹, graded as a felonies; one count of Conspiracy to Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver², graded as a felony; one count of Criminal Use of a Communication Facility, a felony of the third degree. These charges arose out of a grand jury investigation centering on the distribution of heroin from a 2012 wiretap investigation in Centre County. By agreement of the parties the case was transferred to Lycoming County on January 16, 2015. On September 3, 2015 the Defendant was found guilty by this Court after a non-jury trial. Defendant was sentenced to 54 months to twenty (20) years. The Court believed the Defendant was eligible for RRRI and calculated his RRRI minimum at 45 months. The sentence was also to run consecutive to any sentence that the Defendant was currently serving. Defendant filed a timely Post Sentence Motion which was denied March 7, 2016. On April5, 2016 this Court requested a concise statement of matters on appeal. On May 3, 2016 the Defendant filed his concise statement.

¹ 35 Pa. C.S. § 780-113(a)(30)

² 18 Pa. C.S. § 903

1. Whether the trial court erred in finding the Appellant guilty of Possession with Intent to Deliver as the evidence was insufficient to show the Defendant possessed heroin with the intent to deliver the same between 2012 and 2013.

First, this Court notes that the Defendant is able to make a challenge to the sufficiency of the evidence on appeal. Pa.R.Crim.P. 606 (A) (7). As sufficiency of the evidence is a question of law rather than a question of fact, the appellate court's standard of review is *de novo* and its scope of review is plenary. When the appellate court reviews whether there was sufficient evidence to find Defendant guilty beyond a reasonable doubt, it

“must determine whether the evidence admitted at trial, an all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to enable the fact finders to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt”. Commonwealth v. Woodward, 129 A.3d 480 (Pa. 2015) quoting Commonwealth v. Fears, 575 Pa. 281, 836 A.2d 52, 58-59 (2003).

Accordingly, to sustain Defendant's conviction of possession with intent to deliver a controlled substance, conspiracy to the same, delivery of a controlled substance, and criminal use of communication facility, the appellate court must conclude that the evidence established beyond a reasonable doubt the elements of each charged crime. The elements of possession with intent to deliver a controlled substance are

“except as authorized by The Controlled Substance, Drug, Device and Cosmetic Act, the following acts and the causing thereof within the Commonwealth are hereby prohibited: the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance. 35 P.S. § 780-113 (a) (30).

For an individual to possess a controlled substance, three things are necessary, (1) the item must be a “controlled substance”, (2) the individual must be aware of the presence and nature of the substance i.e. where and what the substance is; and (3) the individual must have the intent to control and the power to control the substance. An individual does not have to be actually holding an item to possess it; he or she can constructively possess it by having the intent to control the item and the power to control the item. Two more persons can jointly possess a controlled substance provided that each has the intent and the power to control it. Additionally, a defendant may be found guilty of possession for an item which he did not personally hold, if it is proved that the defendant was part of a conspiracy, another conspirator knowing possessed drugs, and that possession occurred while the conspiracy was in existence and was in furtherance of the goals of the conspiracy.

In order for the trier of fact to find the Defendant guilty of possession with intent to deliver a controlled substance, a controlled substance must be possessed and it must be possessed not for personal use but for the specifically intended purposes of selling it or delivering it to another person or persons. The four elements of possession of a controlled substance with intent to deliver are (1) that the item is in fact a controlled substance, (2) that the item was possessed by the Defendant (see paragraph above regarding what entails possession); (3) the Defendant was aware of the item’s presence and that item was in fact the controlled substance charged and (4) the Defendant possessed this item with the specific goal of delivering the item to another.

At the non-jury trial of Defendant, the Commonwealth called as witnesses Laura Kalizewski (Kalizewski), Summer Anise Love (Love), Brandy Bevan (Bevan), Officer

Nathan Dereamer (Dereamer) and Officer Bortz (Bortz). Kalizewski testified to a controlled drug buy she performed as a confidential informant for the Lycoming County Drug Task Force. Nonjury trial transcript, 9/3/2015, p. 4; Testimony of Laura Kalizewski, 9/3/2015, p. 3. Kalizewski testified that on February 26, 2013, she called Defendant on his cellular phone number and arranged to meet him at 230 West Third St. Williamsport, PA to make a heroin purchase. As she would be purchasing one bundle i.e. ten bags, the price would be the customary rate of \$100. Lycoming County Drug Task Force provided Kalizewski, with the \$100 to purchase the heroin. Id. p.4. Direct and cross examination established that Kalizewski had a three bundle (i.e. 30 bags a day) heroin habit. Id. p. 10, 13. At the time of the controlled buy, she was five months clean of heroin, after having served six months in the Lycoming County Pre Release Center. Id. Kalizewski was on supervised bail on February 26, 2016, and she testified that she had not testified positive while on bail.

In addition to the controlled drug buy that Kalizewski was a part of on February 26, 2013, she also testified that she had been a regular customer of the Defendant. Id. p. 8. She testified that she would drive the Defendant and one of his colleagues to Philadelphia for them to acquire heroin. Id. p. 9. At that time she would test the heroin for her drug dealers to ensure that it was producing the desired effect. Id. p. 11. She testified that she purchased heroin from Defendant 50 times. Id. p. 8. She testified that she had been purchasing heroin for a year from Defendant prior to the controlled buy. Id. p. 7.

Love also testified to a similar relationship with Defendant. He was one of her drug dealers. She had contact with him every day. Id. p. 20, lines 4-7. She would also drive him and a few of his colleagues to Philadelphia and perform the same drug testing

services. Id. p. 23. She testified that the quality of Defendant's heroin was "the best quality around". Id. p. 22, line 8. Love also identified Defendant as someone she would purchase heroin from during the time period of May 2012, through April 2013. Id. p. 18-20.

This Court found the Commonwealth's witnesses credible. Because this Court believed the testimony of the two witnesses, that in itself is enough to find Defendant guilty of Possession with Intent to Distribute. The Commonwealth does not need to allege a specific amount and a specific date in order for the trier of fact, in this case, the Court, to find beyond a reasonable doubt that he indeed performed the acts the Witnesses testified to him performing. Those actions amount to the elements of Possession with Intent to Distribute a Controlled Substance: (1) Heroin is in fact a controlled substance, (2) Defendant had to possess heroin in order to sell it to Kalizewski and Love or have co-conspirators who possessed it, (3) the circumstances of asking the witnesses to drive to Philadelphia and test heroin for him and his co-conspirators tends to show that Defendant knew the type of product he was dealing in was a controlled substance, (4) the Defendant possessed this item with the specific goal of delivering the item to another i.e. he could not use the heroin himself, which is why he required testers. He paid the testers in heroin.

The amount of drugs attributed to Defendant's possession is relevant for purposes of sentencing and does not constitute an element of the offenses of which he was convicted, therefore, the Commonwealth was required to prove the quantity of drugs for which Appellant was liable by a preponderance of the evidence, not beyond a reasonable doubt. Commonwealth v. Harley, 2007 PA Super 148, P7 (Pa. Super. Ct. 2007). The

Commonwealth and the Defendant stipulated to an amount of drugs at the sentencing hearing:

THE COURT: Good morning. I'm sorry for the delay. We are in the case of the Commonwealth of Pennsylvania v. Dwayne Mays, 156-2015. We were last in court, I think it was, on the 13th of November and the Commonwealth wanted to present testimony of Agent Howe regarding number of weights and transactions and things and it caught me off guard so I had the transcript prepared and I reviewed it. I had my law clerk reach to both sides to say that, I believe, it's supported by the evidence or supported by the transcript so I am willing to hear and to take Agent Howe's testimony.

MR SLIVINSKI: Your honor, before we begin, I had the opportunity to speak to Attorney Leonard regarding the offense gravity score for these. We've both agreed that it's an eight based upon what's in the transcript and what Agent Howe would testify to is the average weight of 0.04 per pack and based upon that Attorney Leonard indicated that he wouldn't be able to prove more than 50 grams, we would not be able to show less than 10 grams, it would fall, somewhere between 10 and 50, which would be an offense gravity score of eight for Counts 1 and 2.

THE COURT: Okay. Are you stipulating to that?

MR. LEONARD: Yes. That's the only evidence we could prove, Judge. We intended to – we could not locate a witness who we believe based on what she told us at interviews would have inflated the amount. So based on exactly what's in the transcript, we could only prove through testimony that's more than 10, less than 50. So short answer is, yes, we agree also. Sentencing Transcript, 12/10/15, p. 2-3.

2. Whether the trial court erred in finding the Appellant guilty of the charge of Conspiracy of Possession with Intent to Deliver as the evidence was insufficient to show the Defendant conspired with any other individual to possess heroin with the intent to deliver the same between 2012 and 2013.

To find the Defendant guilty of Criminal Conspiracy, the trier of fact must find that there was an agreement to commit a crime and one of the parties to the agreement commits some act to help achieve the goal of the conspiracy. The first element of conspiracy is an agreement. It can be stated in words, or unspoken but acknowledged. But it must be an

agreement in the sense that two or more people have come to an understanding that they agree to act together to commit crime or crimes. The agreement does not have to cover the details of how the crime will be committed nor do all of the co-conspirators have to be engaged in the actual completion of the crime. They can agree that one of them will do the crime but what is necessary is that the parties agree that a crime will be committed. Even if the crime is never committed, the conspiracy to commit is a crime in Pennsylvania.

Next after finding that there was an agreement, this Court as finder of fact in a nonjury trial must find that an overt act was taken by any of the members of the conspiracy to further the commission of the conspired crime. The Commonwealth may prove a conspiracy by direct evidence or by circumstantial evidence. The Commonwealth may sustain its burden by means of wholly circumstantial evidence. Commonwealth v. Woodward, 129 A.3d 480 (Pa. 2015) citing Commonwealth v. Spell, 611 Pa. 584. 28 A.3d 1274, 1278 (2011). In this case, this Court cites to the testimony of Kalizewski and Love who both testified that they transported Defendant along with other dealers to Philadelphia to pick up heroin. Kalizewski testified that Defendant was in business with “Solat.” Testimony of Laura Kalizewski and Summer Anise Love, 9/3/2015, p. 8-9. Love testified that she traveled to Philadelphia with Solat, Weez [Defendant], and Dee, sometimes all of them. Id. p. 23. She testified that he was working with Solat, Dee and Sill and that she would normally make a telephone call to Defendant to arrange the purchase heroin from him by the federal building on Third Street. Id. p. 20.

3. *Whether the trial court erred in finding the Appellant guilty of the charge of Possession with Intent to Deliver as the evidence was insufficient to show the Defendant possessed heroin with the intent to deliver the same on February 26, 2013.*

For this assignment of error, the Court refers the reader to issue 1. Additionally, Commonwealth's Exhibit 1 was the statement Kalizewski prepared after the controlled drug buy was completed on February 26, 2013. Commonwealth's Exhibit 2 was a picture of Defendant that Kalizewski identified as the person from whom she had just purchased heroin on February 26, 2013. Dereamer, also testified to the details of the controlled buy. Commonwealth's Exhibit 3 was an evidence envelope that contained the video that Bortz took of Kalizewski approaching 230 W. Third St, Williamsport, PA, for the controlled buy. Bortz testified that he saw a man shorter than Kalizewski come to door to let her in. None of the testifying law enforcement officials were able to testify that they personally saw Defendant on that day; however, given the testimony of the Kalizewski and Love, and their identification of Defendant in the courtroom, the trier of fact was free to believe all, some or none of the Commonwealth's evidence. Bevan from the Pennsylvania State Police Wyoming Regional Crime Lab testified to her qualifications and the Defense stipulated to her qualifications. Nonjury trial Transcript, 9/3/15, p. 19. Bevan explained the process by which she receive the evidence envelope submitted as contained in Commonwealth's Exhibit 3 and determined that the packets Kalizewski purchased from Defendant on 2/26/2013 was heroin and "weighed 55 hundreds of a gram plus or minus 0.01 grams." Id. p. 23. 11-12; p. 25 lines 5-6.

4. *Whether the trial court erred in finding the Appellant guilty of the charge of the criminal Use of a Communication Facility as the evidence was insufficient to show the Defendant used a cell phone and the Commonwealth failed to provide evidence to show that any communication on the phone was Appellant and was for the purposes of committing a crime between 2012 and 2013.*

In order for the trier of fact to find the Defendant guilty of criminal use of a communication facility, the following elements must be proven beyond a reasonable doubt: (1) A person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section. 18 Pa.C.S. § 7512. As used in this section, the term "communication facility" means a public or private instrumentality used or useful in the transmission of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part, including, but not limited to, telephone, wire, radio, electromagnetic, photoelectronic or photo-optical systems or the mail. Dereamer testified that Kalizewski used a telephone to call Defendant. Id. p. 4, lines 18-21. Kalizewski testified to calling the Defendant again from the Wegmans parking lot before going up to make the buy. Testimony of Laura Kalizewski and Summer Love, 9/3/2015, p. 3. Love testified that she was also able to contact Defendant and his co-conspirators via telephone call. Id. p. 20. She testified that she has all four of the telephone numbers for the Defendants and his co-conspirators. Id. p. 24. The testimony regarding the cell phone use to make drug buy arrangements coupled with the testimony regarding the length of the drug buying relationship Kalizewski and Love had with Defendant and the time period of such relationship was sufficient evidence for this Court to find the Defendant guilty of one count of Criminal Use of a Communication Facility.

5. *Whether the trial court erred by failing to consider all relevant factors when determining its sentence.*

A challenge to imposed sentence that does not exceed statutory limit and does not concern application of a mandatory minimum penalty is a challenge to the discretionary aspects of the sentence, not its legality. Commonwealth v. Postell, 693 A.2d 612, 617 (Pa. Super. Ct. 1997). This Court stated clearly on the record the reasons for its sentence. This Court did recognize when sentencing that Defendant “had completed the violence program and remained misconduct free in the DOC. Their risk assessment tool indicates he is a medium risk for re-offending, and was recommended for parole but was not released pending these charges.” Sentencing Transcript, 12/10/15, p. 6, lines 14-17. This Court also recognized that Defendant’s behavior was predatory, in that Defendant is not domiciled in Williamsport, PA, but rather was using the geographical region to enhance the market for heroin. The Sentence of this Court was to specifically deter Defendant from returning to the area and engaging in drug dealing activity and it acted as a general deterrent, to send the message that if you are caught dealing drugs in Lycoming County, this is the type of sentence which you will serve. *Id.* p. 12.

6. *Whether the trial court erred by failing to explore other sentencing options such as State Intermediate Punishment.*

A challenge to the Defendant not being referred to the State Intermediate Punishment program is also a challenge to the discretionary aspect of a sentence. The State Intermediate Punishment Program is designed to treat individuals with drug-related offenses that have addiction to drug and alcohol, 61 Pa.C.S. § 4101 – 4108, not to give Defendant’s that prey upon those with addiction a shorter punishment period for such

predatory behavior. As this Court noted at the time of sentencing, Defendant did not use heroin; rather he had young women test the heroin. Id. p. 9, lines 13-15. Additionally, the Department of Corrections administers the State Intermediate Punishment program. As Defendant was housed with Department of Corrections at the time of the sentencing, and as the Pennsylvania Board of Probation and Parole prepared Defendant's presentence investigation report, if the Department of Corrections felt Defendant would be a candidate for the State Intermediate Punishment (SIP) program it would have indicated so to this Court. The Court may also order the Defendant to be evaluated for the SIP upon motion of the Commonwealth³ No such recommendation or motion was received. If the Court believed the Defendant had a drug addiction problem, it could have made the request of the Commonwealth. However, there appeared to be no indication that the Defendant would benefit from such a treatment program.

For all the reasons stated above, the Court respectfully suggests that the Order of Sentence be affirmed.

BY THE COURT,

DATE: _____

Nancy L. Butts, President Judge

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³ 204 Pa. Code §303.12 (c)