IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CP-41-CR-0001217-2013**
v.	:	
	:	
SHAREAF WILLIAMS,	:	**1925(a) Opinion**
Defendant	:	

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

Shareaf Williams (Defendant) was charged with Possession with Intent to Deliver[1], Criminal Use of a Communication Facility[2], Possession of a Controlled Substance[3], and Possession of Drug Paraphernalia[4]. Defendant was tried by jury on December 7, 2015. The jury found Defendant guilty on all counts.

The Court sentenced the Defendant to an aggregate sentence of forty-eight (48) months to eighteen (18) years. For Count 1, Possession with the Intent to Deliver a Controlled Substance (heroin, second or subsequent conviction), an ungraded felony, the Court imposed a minimum sentence of thirty (30) months to a maximum sentence of fifteen (15) years. For Count 2, Criminal Use of a Communication Facility, the Court imposed a minimum sentence of eighteen (18) months to maximum sentence of thirty-six (36) months. The sentence in Count 2 is consecutive to the sentence in Count 1. The Court found that for the purposes of sentencing, the charges in Count 3 and Count 4 merged and the sentence of the Court was guilty without further penalty.[5] The Defendant received credit for time served from July 15, 2013, through September 15, 2014, and January 22, 2015, through February 29, 2016. The Defendant was not eligible for a

[1] 18 Pa.C.S. § 780-113(a)(30)
[2] 18 Pa.C.S. § 7512
[3] 18 Pa.C.S. § 780-113(a)(16)
[4] 18 Pa.C.S. § 780-113(a)(32
[5] 42 Pa.C.S. § 9765

Recidivism Risk Reduction Incentive (RRRI) due to a prior conviction or adjudication for a Chapter 27 offense. Order of Sentence, 3/1/2016, at 2.

The Commonwealth's case in chief was established by the testimony of the attempted purchaser of the heroin and the arresting officer on the date in question, and a drug expert from the narcotics enforcement unit of Lycoming County. That testimony is as follows:

Testimony of Brandon Warner

The Commonwealth's witness, Brandon Warner (Warner), testified that he was a heroin addict, currently serving a sentence of state intermediate punishment.[6] N.T. 12/7/15, at 18. He testified that he had a two bundle a day habit and that on July 14, 2013, arranged via cellular phone, to meet Defendant to purchase three bags of heroin. Id. at 18-22. Warner went to First and High, the address where Defendant was staying. Id. at 22.

Warner testified that Defendant would typically just come out of the house and "give it to me" but on this occasion Defendant got in the car and told him to drive around the block. Id. at 23. Warner testified that they made it to the stop sign and "then the cops were behind us…we probably drove seven or eight blocks until we got pulled over; but the cops were right behind us the whole time". Id. Warner testified that he had $30 in his ashtray to give to Defendant to pay for the heroin. Id. at 24. Warner testified that when the Williamson inquired of him whether he had anything in the car he told him that he had a needle in the car. Id. at 25. Warner testified verbatim what he stated Defendant's cell phone number was on the day of the drug transaction, two and half years prior to the trial

[6] A sentencing alternative designed to treat individuals with drug-related offenses that have addiction to drug and alcohol. 61 Pa.C.S. § 4101 – 4108.

date; however, he was unable to recall his own cell phone number. Id. at 21, 27. Warner testified he had spoken to Defendant approximately fifteen times before. Id. at 21.

On cross examination, Warner testified that he had spoken to the Defendant 15 times in the month before the arrest date. Id. at 26.

MR. BOWER: You never specifically asked for three bags, correct?

WARNER: When he [Defendant] got out to the car I did. I asked him where my three bags were he said drive around the block.

Id. at 29-30.

Testimony of Trooper Williamson

The arresting officer, Trooper Robert Williamson (Williamson), testified that he had been a police officer for approximately two years on the date of Defendant's arrest. He was employed on that date as a patrolman with the Williamsport Bureau of Police. In May 2015, Williamson left the WBP to join the Pennsylvania State Police and thus was a State Trooper on the day of his testimony at trial. Id. at 31-32.

On July 13, 2013, Williamson was on patrol when he observed a silver Chrysler pull out from a legally parked position. He followed the vehicle and observed it turn East on Louisa St. and that its windows were tinted such that no occupants were visible. He followed the vehicle for about seven or eight blacks when he observed that the vehicle was missing a center brake light. Id. at 33.

Prior to stopping the vehicle, Williamson checked its registration and learned the vehicle was registered to a Watsontown address. As a patrolman with experience at that time working in 20-30 drug related cases, he knew the city of Williamsport gets an influx of out of town people to make drug purchases. Id. at 32-33. He also noted that the vehicle was driving in a suspicious manner, having made three right turns, essentially making a

big circle within the city. Id. Upon approaching the vehicle, Williamson learned that the front seat passenger was Warner, the driver was Kendra Burrell, who was later determined to be Warner's wife. Williamson inquired as to whether there were any other occupants in vehicle and the front passenger confirmed that there was, rolling down the back window, making Defendant visible. Id. at 34.

Williamson testified that he recovered $30 from the center console of the vehicle. Id. at 36. Williamson testified that he recovered no drug paraphernalia from Defendant's person at time of strip search; however, he did recover a cell phone. Id. at 39. Williamson testified that he did no cell phone search records of the phone recovered from Defendant nor did he apply for a search warrant of the phone. Id. at 41.

Testimony of Office Snyder

Officer Justin Snyder (Snyder), of the Williamsport Bureau of Police assigned to the Lycoming County Narcotics Enforcement Unit, testified as a drug expert in this case, regarding the habits of drug users and dealers. Id. at 47. Defense Counsel made no objection to Snyder's qualifications. Id. at 50.

Snyder explained that it was more likely that it was the heroin user that would have $30 on his person (that recovered from Warner's vehicle) rather than the $312 recovered from Defendant's person. Heroin users, Snyder testified, buy bags of heroin at a time to support their habit. Rather than purchasing a large amount, they make small purchases throughout the day to sustain their addiction. "Very rare do you see them buy in bulk." Id. at 53. Snyder also testified that in the past he has been asked to consider whether something was a possession with intent to deliver charge and he advised the investigating officers that he did not believe the case involved possession with intent to deliver. Id. 51.

Snyder testified "yes" in response to the question "and in your expert opinion do you believe the narcotics that were found during the course of this particular investigation were possessed by [Defendant] with the intent to deliver them?" Id. at 52.

Defense Counsel, though presenting no witnesses, impeached the credibility of the Commonwealth's witnesses. Warner could not recall the dates he had interacted with Defendant nor his own cell phone number and yet he could recite verbatim what he stated was Defendant's cell phone number on the date in question. Id. at 27. Both police officers testified that they made no attempt to establish that the cell phone recovered from Defendant's person was indeed the cell phone that was used to set up an illegal drug purchase. Id. at 41, 57. Snyder testified on cross examination that sometimes drug dealers have tinted windows, sit in the front seat of vehicles, and conduct drug transactions in their own vehicles. Id. at 58.

Discussion

The Defendant raises four (4) issues that the Court will address *seriatim:*

1. ***The trial court erred when it denied Appellants motion for new sentencing hearing in front of a different court of common pleas judge, as his sentence was the result of the judge's personal bias and ill-will towards appellant, as the court stated "[o]ne could argue that there is a special place in Hell for those who take advantage of the weak."***

A review of the record finds that the Court made the above statement at Defendant's sentencing hearing:

> People who deal drugs, drug dealers, you're preying upon the weakness of others. I think there is one could argue there is a special place in hell for people who take advantage of the weakness of others, especially when it comes to an addiction, which is a disease, taking advantage of the disease, nature of people.

N.T. 3/1/2016, at 13.

Defendant's Counsel cites Commonwealth v. Spencer, 344 Pa. Super 380, 496 A.2d 1156 (Pa.Super. 1985), where the trial court judge called defendant an "animal" at sentencing, and made various other admonitions. The Superior Court remanded for sentencing in front of a new judge, having found that the sentencing judge did bear ill-will toward the Defendant inappropriate to their respective positions in the criminal justice system and that the trial court judge "violated the most fundamental premise of our law -- that all persons are to be treated equally." Id. at 396. The judge in Spencer stated that he had been waiting for this sentencing day and referred to Spencer as "Chief", all comments that addressed neither the facts nor the law to Defendant's case.

Defendant in Spencer was sixteen-years-old on his offense dates. Defendant in the case at bar was 19-years-old on his offense dates. Like in Spencer, Defense Counsel here argued that it was a poor home life that led Defendant to make poor decisions and that maybe a parole agent could act as a father figure. Like in Spencer, the Commonwealth here pointed out that Defendant had been charged with the offenses in the case at bar while on supervision for identical offenses in another county.

Defense Counsel here argued for a 21-27 month minimum sentence with a maximum of eight (8) years for the PWID offense and for any additional sentence to be run concurrently. N.T. 3/1/2016, at 8. Commonwealth asked for a 54 month minimum sentence and for a maximum of ten (10) years. Id. at 10. The Court gave a 48 month minimum sentence with a maximum of 18 years.

The Court did not sentence Defendant in an aggravated range due to personal ill-will and bias towards Defendant. Rather, the Court sentenced Defendant to aggravated range sentence because the Defendant was on supervision from a prior PWID conviction

in Philadelphia on May 31, 2013, for the offense date of July 14, 2013, in the present matter. The Commonwealth argued, and the Court agreed, that rather on being on a path to rehabilitation the Defendant came to a new place to sell drugs. The Court did have a benefit of a pre-sentence investigation and sentence report when making its sentencing determination. Defendant's prior and current record of delivering controlled substances established him as a "drug dealer" and the Court merely stated those facts, directly applicable to its role in sentencing at the time of sentencing.

2. The trial court abused its discretion when it sentenced the Appellant to an aggravated range sentence for Possession with Intent to Deliver Conviction.

The Court sentenced the Defendant within the aggravated range only on Count 1. The aggravating circumstance was that the Defendant was on parole/probation for the identical offense committed in Philadelphia less than two months before the date of the offense at issue. Id. at 12-13. Rather than abusing its discretion, the Court remained within the sentencing guidelines and statutory guidelines for a second felony of PWID.

3. The trial court erred when it denied the Appellant's motion for judgment of acquittal for Possession with Intent to Deliver, since the Commonwealth failed to introduce sufficient evidence that the Appellant possessed the heroin with the intent to deliver, as the Appellant only had three bags of heroin.

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 the above listed charges, 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).

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 of 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; (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. The elements nor the case law require a specific amount of heroin to be recovered in order to make the determination that the controlled substance was possessed with the intent to deliver it to another.

As to element (1) that heroin is in fact a controlled substance there can be no dispute. Indeed, Defense Counsel stipulated to the fact that

> If Jennifer J. Libus, Forensic Scientist II from the Wyoming Regional Laboratory were to testify, she would testify that she received three Ziploc bags each containing a blue glassine packet of powder, that each of these items weighed ten-hundredths of a gram, the powder from one packet having a net weight of three hundredths of a gram and was tested and confirmed to contain heroin, which is a Schedule I narcotic.

N.T. 12/7/15, at 16-17.

As to element (2) that the item was possessed by the Defendant there can be no dispute. Williamson, employed by the Williamsport Bureau of Police at the time of Defendant's arrest, testified that when he strip searched Defendant, he recovered "three small ziploc bags each containing a light blue waxen baggy and within each of those waxen baggies was field test positive for heroin." Id. at 27.

As to element (3) that the Defendant was aware of the item's presence and that the item was in fact the controlled substance was also not disputed by Defense Counsel: Defense Counsel argued that the Jury could find Defendant guilty of Possession of Heroin based on the recovery of the three bags from his person. Id. at 73.

The dispute arises in regards to Element (4), whether the Defendant possessed this item with the specific goal of delivering the item to another. Element (4) can be established circumstantially, and of course the trier of fact, the jury in this case is free to believe or disbelieve any direct or circumstantial evidence presented at trial. Commonwealth v. Jannett, 2012 PA Super 272, 58 A.3d 818, 820 (Pa. Super. Ct. 2012). Both Commonwealth and the Defense presented its version of who was actually delivering the heroin, Warner or Defendant, see testimony above. The jury, as the trier of fact, found that it was Defendant, as reflected in its verdict. The Court submits in review of the

testimony, taking it into consideration in the light most favorable to the Commonwealth, the verdict winner, that if believed, it was sufficient to find Defendant guilty of possession with intent to distribute heroin. Warner's testimony alone if believed was sufficient to evidence of element (4), the goal of delivering the controlled substance to another.

4. The trial court erred when it denied Appellant's motion for judgment of acquittal for the Criminal Use of a Communication Facility, since the Commonwealth failed to produce any cellular records or prove any cellular devices were used in any controlled substance transaction.

Criminal Use of a Communication Facility is defined as follows:

> A person commits a felony of the third degree if that person uses a communication facility to commit, cause, or facilitate the commission or the attempt thereof any crime which constitutes a felony under this title or under the act 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.

In Commonwealth v. Moss, 852 A.2d 374 (Pa. Super. 2004), the Superior Court addressed two issues regarded 18 Pa.C.S. Section 7512: (1) its constitutionality and (2) the sufficiency of the evidence presented at trial to find Appellants' guilty under that statutory section. Having found that the statute is not unconstitutionally vague or overbroad, the Superior Court then went on to examine whether the evidence was sufficient to find appellants guilty.

The Superior Court stated in Moss that the Commonwealth must prove beyond a reasonable doubt that: (1) Appellant knowingly and intentionally used a communication facility; (2) Appellant knowingly, intentionally or reckless facilitated an underlying felony; and (3) the underlying felony occurred. Id. at 382. Warner's testimony that Defendant used a cell phone in order to arrange a drug transaction satisfies (1).

The jury believed Warner's version of events; that he used a cell phone to set up a drug transaction. That he called what he knew to be Defendant's phone number, which Defendant answered, and that they arranged to meet. At the arranged meeting place, the Defendant entered Defendant's vehicle and they drove "around the block" until being stopped by police.

The Commonwealth is not required to prove the use of a cellular device via cellular records, though a wiretap was used in the Moss case. The trial court judge presiding in a nonjury trial had the contents of telephone conversations and found them to establish the elements of the crimes charged. The testimony of Warner, if believed by the jury, was sufficient to find the Defendant guilty of criminal use of a communication facility. Element (2) is satisfied if the Jury believed that the Defendant was the party to the telephone call that arranged the meeting between Warner and Defendant that day, a reasonable inference given that Warner testified he called Defendant in order to arrange a meeting and Defendant did enter Warner's vehicle, which would suggest that a meeting was arranged. Lastly, the underlying felony did occur. Element (3) is established by the fact that Defendant did indeed possess the heroin and the intent to deliver was established by other testimony in the Commonwealth's case in chief.

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

BY THE COURT,

DATE: _____

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Nancy L. Butts, President Judge

cc: Joshua Bower, Esq. PD
DA
Gary Weber, Lycoming Law Reporter
Susan Roinick, Law Clerk