IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-0001482-2014**
	:	**CP-41-CR-0000934-2016**
	:	
DAQUAN ALFORD,	**:**	
Appellant	**:**	
	:	**Rule 1925(a) Opinion**

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

Jackson Browne is a renowned musician, singer, songwriter and poet. "These Days" is a song written by Jackson Browne when he was only 16 years old in either 1964 or 1965. It has since been recorded and played by numerous artists. It recently regained renewed visibility. It has been played in different versions not only in recent movies but also on a very recent version of the Emmy-winning TV drama "This is Us." The reason the song still resonates so well today is that its lyrics deal with the passage of time, regret and loss.

Over the past eight years, this court has authored close to 800 opinions addressing the varied legal issues brought before it. While the court acknowledges zealous advocacy and while the court is certain that it has and will err, that innocent people get convicted and that the appellate courts are crucial to the administration of justice, it sometimes wonders what role the professional ethics tenant of candor to the tribunal plays in pursuing an appeal.

Admittedly, the court is quite frustrated with this appeal. It has spent hours reviewing the pleadings and reading the transcripts. As set forth below, it can find absolutely no legal or factual basis whatsoever to support the claims advanced by Appellant. As Jackson

Browne noted, however:

> "Well I'll keep on moving, moving on, things are bound to be improving these days."

Under Information 1482-2014, filed on October 3, 2014, Appellant was charged with two counts of delivery of a controlled substance, two counts of possession with intent to deliver a controlled substance, two counts of possession of a controlled substance and two counts of criminal use of a communication facility.

Under Information 934-2016, Appellant was charged with one count of delivery of a controlled substance, two counts of possession with intent to deliver a controlled substance, one count of possession of a controlled substance, one count of possession of drug paraphernalia and one count of criminal use of a communication facility.

Under 1482-2014, Appellant proceeded to a jury trial. The jury trial was conducted before the undersigned on March 2, 2017. Following the trial, the jury returned a verdict of guilty on all counts.

Under 934-2016, Appellant waived, with the Commonwealth's consent, his right to a jury trial. The non-jury trial was conducted before the Honorable Dudley Anderson on May 8, 2017. Following the non-jury trial, Judge Anderson adjudicated the Appellant guilty on all counts.

At the time of the May 8, 2017 verdict, the Appellant waived his right to be sentenced by Judge Anderson. Appellant's sentencing was held before the undersigned on May 10, 2017. The aggregate sentence under Information 1482-2014 was a period of state incarceration, the minimum of which was three (3) years and the maximum of which was ten

(10) years. The aggregate sentence under Information No. 934-2016 was a period of state incarceration, the minimum of which was three (3) years and the maximum of which was ten (10) years.

Appellant filed a timely motion to reconsider. A hearing was held and by order of court dated August 28, 2017, the court granted in part Appellant's reconsideration. The total aggregate under both Informations was reduced to a period of state incarceration, the minimum of which was four (4) years and the maximum of which was twelve (12) years.

On September 26, 2017, Appellant filed a notice of appeal. The appeal was filed to the May 10, 2017 Order and did not reference or attach the August 28, 2017 Order. By order of court dated September 28, 2017, the court directed that Appellant file a Rule 1925 (b) concise statement of matters complained of on appeal.

On October 11, 2017, Appellant filed his concise statement raising issues related to both cases. Under Information No. 1482-2014, Appellant raises a sufficiency of evidence claim with respect to all of the counts. Under Information 934-2016, Appellant raises a sufficiency of evidence claim with respect to apparently counts 1, 2 and 3.

In addressing a sufficiency of evidence claim, the court must determine "whether the evidence admitted at trial, and all reasonable inferences derived therefrom viewed in favor of the Commonwealth as the verdict winner, supports the jury's findings of all of the elements of the offense beyond a reasonable doubt." ***Commonwealth v. Cash***, 137 A.3d 1262, 1269 (Pa. 2016) (quoting ***Commonwealth v. Smith***, 985 A.2d 886, 894-95 (Pa. 2009)).

Only where the evidence offered to support the verdict is in contradiction to

the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. ***Commonwealth v. Ortiz***, 160 A.3d 230, 234 (Pa. Super. 2017), citing ***Commonwealth v. Widmer***, 774 A.2d 745, 751 (Pa. 2000).

It is within the province of the factfinder to determine the weight to be accorded to each witness's testimony and to believe all, part, or none of the evidence. ***Commonwealth v. Poplawski,*** 130 A.3d 697, 709 (Pa. 2015)(citing ***Commonwealth v. Cousar***, 928 A.2d 1025, 1032-1033 (Pa. 2007). Moreover, the court may not reweigh the evidence and substitute its judgment for that of the factfinder. ***Commonwealth v. Brown***, 23 A.3d 544 (Pa. Super. 2011); see also ***Commonwealth v. Hutchinson***, 947 A.2d 800, 808 (Pa. Super. 2008)("It is not for the trial court to deem incredible that which the jury found worthy of belief."). Any doubts regarding defendant's guilt may be resolved by the factfinder unless the evidence is so inconclusive that as a matter of law no probability of fact may be drawn from the circumstances. ***Commonwealth v. Moreno***, 14 A.3d 133, 136 (Pa. Super. 2011).

In connection with Information No. 1482-2014, Appellant argues that the evidence was insufficient to find him guilty of the delivery, possession with intent to deliver and possession offenses because there was no physical evidence "associated with the delivery" that was recovered from the Appellant's person such as buy money, controlled substances, or any cellular devices. It is difficult to ascertain whether Appellant is claiming that the evidence was insufficient to prove possession, delivery, possession with intent to deliver or all three.

To sustain a conviction for the delivery of a controlled substance, there must be evidence that Appellant knowingly made an actual, constructive or attempted transfer of a

controlled substance to another person. ***Commonwealth v. Murphy***, 577 Pa. 275, 844 A.2d 1228, 1234 (2004).

To sustain a conviction for possession with the intent to deliver a controlled substance, the Commonwealth must prove both the possession of the controlled substance and the intent to deliver the controlled substance. ***Commonwealth v. Roberts***, 133 A.3d 759 (Pa. Super. 2016), appeal denied, 145A.3d 725 (Pa. 2017).

To sustain a conviction for possession of a controlled substance, the Commonwealth must prove that the defendant had knowing or intentional possession of a controlled substance and, if the substance is not found on the defendant's person, the Commonwealth must satisfy that burden by proof of constructive possession. ***Commonwealth v. Valette***, 531 Pa. 384, 613 A.2d 548 (1992). "Constructive possession requires proof of the ability to exercise conscious dominion over the substance, the power to control the [substance], and the intent to exercise such control." ***Commonwealth v. Perez***, 931 A.2d 703, 708 (Pa. Super. 2007)(quoting ***Commonwealth v. Bricker***, 882 A.2d 1008, 1014 (Pa. Super. 2005)).

Of course, all the elements of any offense may be established by circumstantial evidence based on the totality of said circumstances. All crimes can be proven by wholly circumstantial evidence if the circumstantial evidence is sufficient to convince the trier of fact that the crime occurred beyond a reasonable doubt. ***Commonwealth v. Morales***, 525 Pa. 146, 91 A.3d 80, 87 (2014)("The Commonwealth may sustain its burden 'by means of wholly circumstantial evidence'"); ***Commonwealth v. Sanchez***, 623 Pa. 253, 82 A.3d 943, 972 (Pa. 2013)("circumstantial evidence alone can be sufficient to prove every element of an

offense.”).

Clearly, the evidence in this case when taken in a light most favorable to the Commonwealth is sufficient to support the guilty verdicts on the delivery, possession with intent to deliver and possession charges.

Matthew Switzer first testified on behalf of the Commonwealth. He was working with Trooper Fishel in June of 2013 as a confidential informant making buys from the Appellant. (Trial Transcript, March 2, 2017, pp. 25-28), (herein after “March Trial Transcript”). Prior to June 20, 2013, he had made heroin buys from the Appellant “probably eight, ten times.” (March Trial Transcript, p. 28).

He purchased heroin from Appellant on both June 20 and June 9 of 2013. On both occasions he called a specific telephone number and spoke with Appellant. On both occasions, he arranged to buy a certain amount of heroin for a certain price. (March Trial Transcript, pp. 29, 30, 35-36). On June 20, 2013, he met Appellant at High Street and Cherry Street in Williamsport. Appellant got into Mr. Switzer’s vehicle. Mr. Switzer gave him $300.00 and Appellant gave him three bundles of ten packages of heroin for a total of 30 bags. (March Trial Transcript, pp. 34-35).

On June 29, 2013, Appellant and Mr. Switzer again spoke over the telephone and an arrangement was made for Mr. Switzer to purchase heroin from Appellant. He was speaking with Appellant on the phone while he was driving. He actually noticed Appellant on the sidewalk speaking on the phone with him. He eventually got out of the car and met Appellant in an alleyway. He purchased two bundles of heroin for $200.00. (March Trial Transcript, pp. 36-39).

Trooper Kenneth Fishel of the Pennsylvania State Police (PSP) Vice & Narcotics Unit also testified on behalf of the Commonwealth. He became involved in an investigation of Appellant on June 20, 2013. (March Trial Transcript, p. 57). On both June 20, 2013 and June 29, 2013, he conducted a controlled purchase of heroin from Appellant with Mr. Switzer being the confidential informant. (March Trial Transcript, pp. 57-70).

During the June 20, 2013 buy, he observed Mr. Switzer make the telephone call to the specified number in order to arrange for the purchase. He eventually dropped Mr. Switzer off at the designated transaction area and saw Appellant get into Mr. Switzer's vehicle. (March Trial Transcript, pp. 61, 63). He also observed Mr. Switzer dropping Appellant off at another location. (March Trial Transcript, p. 64).

On June 29, 2013, another purchase was arranged and conducted. (March Trial Transcript, p. 67). Mr. Switzer dialed the same designated telephone number. While the location constantly changed consistent with how drug transactions occur, the purchase "ultimately occurred in an alley near Memorial and First Avenue." (March Trial Transcript, pp. 69-70).

Trooper Fishel positively identified Appellant as the individual who he observed on June 20 and 29 meet with Mr. Switzer. (March Trial Transcript, p. 88).

With respect to Appellant's next issue, he claims that the evidence was insufficient to convict him of the criminal use of a communication facility count because "the cellular device was never recovered." In order for Appellant to be found guilty of this offense, the Commonwealth must prove that Appellant used a communication facility such as a telephone to commit, cause or facilitate the commission of a felony under the Drug Act. 18

Pa. C.S.A. § 7512 (a).

Clearly, based upon the above referenced testimony read in a light most favorable to the Commonwealth, there was sufficient evidence to support Appellant's conviction. There was direct testimony that the confidential informant spoke with Appellant over a telephone to arrange for two separate drug transactions. Furthermore, there was direct testimony from the confidential informant that while he was talking to Appellant, he saw Appellant using the telephone as he drove by.

Under Information No. 934-2016, Appellant argues that the evidence was insufficient to prove that Appellant possessed with intent to deliver the heroin that was found on him as he "only had 70 bags of heroin for personal use."

The court is initially perplexed with Appellant's claim. There was absolutely no evidence whatsoever introduced at trial that Appellant's possession of the 70 bags of heroin was "for personal use." Moreover, the evidence was not just sufficient; it was overwhelming.

Alec Hess first testified on behalf of the Commonwealth. She was acting as a confidential informant for law enforcement and on April 22, 2016, purchased 10 bags of heroin from Appellant in an alleyway near the Kwik Fill in the Newberry section of Williamsport. (Trial Transcript, May 18, 2017, pp. 4, 6, 12-13, 16-17)(hereinafter "May Trial Transcript").

Kenneth Mains next testified for the Commonwealth. He was employed as a Detective with the Lycoming County District Attorney's office. (May Trial Transcript, p. 19). On April 22, 2016, he and other law enforcement officers were conducting surveillance

in the area of Dove Street near the Kwik Fill (May Trial Transcript, pp. 19-20). He observed Ms. Hess meeting with an individual who following the meeting got into the passenger side of a white vehicle. (May Trial Transcript, p. 21). A marked police unit stopped the white vehicle at which time the same passenger "took off running." (May Trial Transcript, p. 22).

Joshua Bell next testified for the Commonwealth. He was employed as a police officer for the Williamsport Bureau of Police but on the date in question he was assigned to the Lycoming County Narcotics Enforcement Unit. (May Trial Transcript, pp. 25-26). On April 22, 2016, Ms. Hess met with him for the purpose of arranging a controlled buy of heroin from Appellant. (May Trial Transcript, pp. 28-29). Ms. Hess had arranged the transaction by utilizing the telephone number and texting: 773-402-8246. (May Trial Transcript, p. 31). Ms. Hess knew the number as that of an individual named "Ni." (May Trial Transcript, pp. 31-32).

During the April 22, 2016 transaction, Officer Bell was conducting surveillance. (May Trial Transcript, pp. 34-35). He observed Ms. Hess meet in the alleyway with a male wearing all black clothing. (May Trial Transcript, p. 35). As he was approaching the white vehicle to assist with the stop, he observed Appellant, wearing all black clothes, exiting from the front passenger area, looking at law enforcement and "begin fleeing northbound on foot." (May Trial Transcript, pp. 36-37). A foot pursuit ensued around several residence until Officer Bell stopped Appellant by drawing his firearm and ordering him to the ground. (May Trial Transcript, pp. 37-38).

Appellant was taken into custody and searched. Police located 70 bags of heroin in Appellant's right-front sweatshirt pocket. (May Trial Transcript, p. 38). The bags

were individual, single sealed, folded over, blue and waxen. (May Trial Transcript, p. 38). As well, Appellant was in possession of two cellular phones and currency. (May Trial Transcript, p. 39).

The one cellular phone was the same as that used by Ms. Hess, the confidential informant, to arrange for the transaction, the number being: 773-402-8246. (May Trial Transcript, pp. 39-40). As well, Appellant had $485.00 on his person, some of which was in $20.00 denominations. (May Trial Transcript, pp. 40-41). Further, the $20.00 bill denominations that were found in the area of a patrol unit where Appellant was placed in custody, were the same $20.00 bills provided to Ms. Hess as verified by the serial numbers and how they were folded. (May Trial Transcript, pp. 42-43). Finally, the ten bags purchased by Ms. Hess were identical to the 70 bags found on Appellant. They were blue, folded, unstamped, single sealed and waxen. (May Trial Transcript, pp. 45, 48-49).

Officer Bell, based on his extensive training and experience was offered and admitted without objection as an expert "in the field of drug investigations and especially pertaining to ascertaining whether drugs are possessed for personal use or for delivery." (May Trial Transcript, pp. 51-52). He opined that the 70 bags found on Appellant's person were possessed with the intent to deliver or sell them. (May Trial Transcript, p. 53). His opinion was based on several factors in combination: the heroin was packaged individually; approximately .03 grams of heroin was contained in each baggie; it was bundled up separately into 10-bag bundles; Appellant was not found in possession of any "methods of ingestion;" Appellant had currency in $20.00 denominations typically used by dealers; Appellant had a significant amount of money on him; Appellant had already sold 10 bags to

the confidential informant; Appellant demonstrated no signs of being under the influence or withdrawing; and the phone number was the same used for the transaction with the confidential informant as well as on another occasion. (May Trial Transcript, pp. 53-58, 63-64).

David Pletz testified as well for the Commonwealth. He was employed on April 22, 2016 as a sergeant for the Penn College Police Department. (May Trial Transcript, pp. 70-71). He was made aware of the narcotics operation and made himself available if needed. (May Trial Transcript, p. 71). He was called to assist in the stop of the white vehicle and did so by blocking it as it traveled onto Ridge Avenue. (May Trial Transcript, p. 72).

As he blocked the vehicle, the front passenger door just flew open and Appellant, who Sergeant Pletz knew from a prior encounter, fled. (May Trial Transcript, pp. 72-73).

Clearly, the Commonwealth presented ample evidence to prove beyond a reasonable doubt that Appellant possessed the 70 bags of heroin with the intent to deliver them.

Date: _____ By The Court,

_____
Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
Joshua Bower, Esquire (APD)
Gary Weber, Esquire (Lycoming Reporter)
Work File
Superior Court (original and 1)