

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
COMMONWEALTH OF PA : No. CR-2045-2017
:
vs. :
:
:
: **Post-Sentence Motion**
TYREE MOY, :
Defendant :

OPINION AND ORDER

By Information filed on January 4, 2018, Defendant was charged with one count of delivery/sale of a non-controlled substance, an ungraded felony and one count of criminal use of communications facility, a felony of the third degree. On June 13, 2018, Defendant waived his right to a jury trial and proceeded to a non-jury trial before this court. Following the non-jury trial, the court found Defendant guilty of both offenses.

On August 23, 2018, following a sentencing hearing, the court sentenced Defendant on Count 1 to incarceration in a State Correctional Institution, the minimum of which was 18 months and the maximum of which was five (5) years. With respect to Count 2, the court imposed the same sentence to run consecutive for an aggregate period of state incarceration, the minimum of which was three (3) years and the maximum of which was ten (10) years.

Defendant filed a post-sentence motion on September 4, 2018. Argument was originally scheduled for October 10, 2018 but because the transcript was not yet prepared, the court granted Defendant’s continuance of the argument to November 27, 2018. The court also granted to Defendant an additional thirty (30) days for the court to make a determination as to Defendant’s post-sentence motion.

Defendant first argues that the Commonwealth was unable to satisfy its burden of proof regarding the crimes. This argument fails because Defendant has not alleged any specificity with respect to such.

Defendant next argued that the Commonwealth failed to provide requested discovery prior to the time of trial, including but not limited to, confirmation of the confidential informant's identity, prior record, and any plea agreement between the Commonwealth and the confidential informant relative to any and all pending charges filed against the confidential informant.

By way of background, by Order of court dated March 26, 2018, following a hearing and argument on Defendant's motion for formal discovery, said motion was granted.

Among other things, the court ordered that the Commonwealth provide the name, criminal history and any plea benefits for the confidential informant. The Commonwealth agreed to provide the discovery within 30 days of March 26, 2018.

Prior to trial, Defendant claimed that the Commonwealth failed to provide the full and complete criminal record of the confidential informant "until well beyond the 30 days." (Transcript, 6/13/18 at 29). Defendant claimed that he did not receive the confidential informant's criminal record until May 22, 2018 and that it "was an incomplete criminal history." (Id.). Defense counsel submitted that he investigated the confidential informant's criminal history and found a misdemeanor 3 false identification to law enforcement conviction that the defendant had been convicted of the prior September. Defense counsel indicated that it located such on the "UJS magisterial docket." (Id. at 30).

The Commonwealth countered that it provided defense counsel with what it

had, which was the confidential informant's rap sheet. (Id. at 30, 31).

Defense counsel requested that the court exclude the testimony of the confidential informant as a remedy for the discovery violation. (Id. at 31). In response, however, the Commonwealth indicated that it was not going to call the confidential informant (Id. at 32).

It is clear that contrary to what Defendant claims in his post-sentence motion, that the Commonwealth did provide the confidential informant's identity and prior record. Clearly, defense counsel could not have investigated the confidential informant's criminal record without having the confidential informant's identity. Moreover, the confidential informant's rap sheet identified the confidential informant. Finally, and determinatively, the Defendant was not at all prejudiced by the Commonwealth's late or incomplete discovery response. The Commonwealth provided the information that it had approximately three weeks prior to trial. This was apparently enough time for defense counsel to investigate the matter further.

With respect to any alleged plea agreement between the Commonwealth and the confidential informant, no information was provided because apparently no plea agreement was made. Again, however, Defendant was not prejudiced in that the confidential informant did not testify. Moreover, Defendant waived any objection by requesting that the court exclude the testimony of the confidential informant. The confidential informant did not testify.

Even if the Commonwealth wholly failed to provide the requested information and it had such requested information, Defendant would not be prejudiced. The remedy the

Defendant sought was de facto granted when the Commonwealth agreed not to call or present the testimony of the confidential informant. (Transcript, 6/13/18, at 32).

As well, over the Commonwealth's objection, the court allowed defense counsel to question a witness as to whether there were any other similar controlled buys on the same day. (Id. at 158, 159). The court noted that the purpose of the evidence would be to test the witnesses' recall ability and whether there may have been someone else involved other than Defendant. (Id. at 158-159). The witness, Trooper Morse indicated that a controlled purchase of heroin was made earlier in the day from a different individual prior to conducting the controlled purchase from Defendant. (Id. at 159).

During the oral argument in this matter, the court permitted the defendant to raise an additional argument. Specifically, Defendant argued that the court erred in not drawing an inference that the confidential informant's testimony would have been unfavorable to the Commonwealth in that the Commonwealth did not call the confidential informant. (Id. at 161).

As the court noted, however during the trial, three factors must be present prior to the court drawing such an inference and further if those factors are present, there must be no satisfactory explanation for the party's failure to call the potential witness. (Id.). After a brief argument, the court concluded that it was not going to draw the inference. (Id. at 164). The court for the sake of the argument agreed that the confidential informant was available only to the Commonwealth, that the confidential informant had special information and that the confidential informant's testimony would not merely be cumulative. (Id. at 163). The court noted that this conclusion was for the sake of argument only and that in reality, the

witness was available to both parties and the testimony would have been cumulative given the testimony of the eyewitness trooper. The court noted, however, that it would not be able to draw the negative inference unless there was no satisfactory explanation.

In this particular case, the Commonwealth did have a satisfactory explanation. The Commonwealth obtained a material witness warrant for the confidential informant's arrest, they had set up a hotel room for him, they were trying to obtain a bus ticket for him and it was only a few days prior that they lost contact with him. As a result, they obtained the material witness warrant which unfortunately was never served because the confidential informant apparently evaded service. (Id. at 162, 163, 164).

Defendant next argued that the verdict was against the weight of the evidence because Trooper Morse "failed to testify credibly and was motivated to fabricate his testimony as evidenced by the prior inconsistent statements that were made at the trial", that Trooper Morse "mistakenly identified the defendant as the perpetrator of the crimes for which he was charged" and that the Commonwealth failed to prove that "the defendant knowingly distributed or sold a non-controlled substance upon the express or implied representation that the substance was in fact a controlled substance."

"A trial court may only grant a new trial on a weight claim 'when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.'" *Commonwealth v. Hall*, 2018 PA Super 319, 2018 WL 618348, *5 (November 28, 2018); (quoting *Commonwealth v. Clay*, 64 A.3d 1049, 1055 (Pa. 2013)). A trial judge cannot grant a new trial because of a mere conflict in the testimony or another judge on the same facts

would arrive at a different conclusion. Rather, the role of the trial judge is to determine whether “notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.”

Commonwealth v. Weir, 2018 PA Super 342, 2018 WL 6600226, *2 (December 17, 2018)(quoting *Commonwealth v. Widmer*, 744 A.2d 745, 751-52 (Pa. 2000).

Defendant failed to specify how or why Trooper Morse’s testimony was not credible. The court found Trooper Morse credible. It did not find his testimony inconsistent in any material respect. Trooper Morse did not mistakenly identify Defendant. Trooper Morse was present for the transaction. Trooper Morse observed Defendant hand the CI the blue wax bags and the CI hand Defendant \$160.00. The CI relinquished the bags to Trooper Morse after the transaction was completed and Defendant exited the vehicle. There were 22 blue wax bags that were packaged the way heroin is typically packaged. There were two sets of 10 bags bundled together with a black rubber band and the remaining two bags were in a lottery ticket.

Trooper Morse’s testimony was corroborated by the recordings from the body wire that the CI was wearing during the transaction and photographs of the text messages that Trooper Morse observed being exchanged between the CI and Defendant. The recordings from the body wire were played for the court and the photographs of the text messages were shown to the court at trial, as well as admitted as exhibits. Defendant also exhibited consciousness of guilt when he told the CI to delete the text messages and he had Trooper Morse drive around in circles to make sure no one was following them before Defendant exited the vehicle. Clearly, the verdict was not against the weight of the evidence.

At oral argument, defense counsel also argued the sufficiency of the evidence.

In addressing a challenge to the sufficiency of the evidence, the court must determine whether the evidence and all reasonable inferences therefrom, when viewed in a light most favorable to the Commonwealth as verdict-winner in this case, are sufficient for the trier of fact to find that each element of the crimes charged is established beyond a reasonable doubt. *Commonwealth v. Cannavo, Jr.*; 2018 PA Super 327, 2018 WL 6274465, *5 (December 3, 2018)(citing *Commonwealth v. Dale*, 836 A.2d 150, 152 (Pa. Super. 2003)). “[T]he evidence at trial need not preclude every possibility of innocence, and the factfinder is free to resolve any doubts regarding the defendant’s guilt unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances.” *Commonwealth v. McCoy*, 2018 PA Super 305, 2018 WL 5961698, *2 (November 14, 2018)(quoting *Commonwealth v. Trinidad*, 96 A.3d 1031, 1038 (Pa. Super. 2014)). When evaluating the credibility and weight of the evidence, the factfinder is free to believe all, part or none of the evidence. *Id.*

In this case, the evidence was not only sufficient but overwhelming in favor of the Commonwealth. As the finder of fact, the court easily found each and every element of the crimes charged beyond a reasonable doubt.

Trooper Tyler Morse testified on behalf of the Commonwealth. He is currently employed by the Pennsylvania State Police assigned to the Vice Narcotics Unit. On August 1, 2017, he conducted a controlled buy for what he thought was heroin.

In connection with the controlled buy, he utilized a confidential informant (CI). He retrieved the CI from his residence. They traveled to the Williamsport area where

the CI was debriefed and interviewed.

The CI sent a text message to Defendant asking him how much “a bun was.” A bun is a street term for a bundle of heroin.

The text messaging continued and, at the trooper’s direction, the CI requested two bundles. The CI and Trooper Morse, identified as a friend, eventually arranged to buy two bundles of heroin from Defendant for \$160.00.

Through a series of text messages, the CI and Trooper Morse met with Defendant, who got into the trooper’s undercover vehicle. The trooper positively identified Defendant. (Transcript, 6/13/18, at 120).

The parties drove around to a different location at which time Defendant exited the vehicle. After a period of time, approximately 15 minutes, Defendant returned to the vehicle. Trooper Morse witnessed a transaction between the CI and Defendant. Defendant handed the CI the suspected heroin. The CI then handed Defendant the money. (Transcript, 6/13/18 at 127, 128).

After driving around, Defendant eventually exited the vehicle at another location. (Transcript, 6/13/18, at 130).

The corroborating evidence presented by the Commonwealth included evidence from Jennifer Libus, a Forensic Scientist in the Drug Identification Unit for the Pennsylvania State Police, who analyzed the substances and concluded that the one sample was a non-controlled substance. She absolutely ruled out psychiatric medications. Trooper Wool, Trooper Dammer and Corporal Giantisco, Jr. of the Pennsylvania State Police provided credible testimony regarding the non-controlled substance and the chain of custody.

Of significance as well was the fact that the CI was wearing a body cam and the transaction was, in large part, video and audio recorded.

Specifically, addressing Defendant's claims, the court considered the credibility of Trooper Morse and found his testimony credible despite any alleged motive to fabricate or any alleged prior inconsistent statements.

The court concluded that Trooper Morse did not mistakenly identify Defendant. Finally, the court concluded that the direct and circumstantial evidence clearly supported a conclusion that Defendant knowingly sold a non-controlled substance upon the express and implied representation that the substance was, in fact, a controlled substance.

Defendant's final argument addresses his sentence. Defendant argues that the sentence was unreasonable and excessive under the circumstances and that the court abused its discretion by failing to adequately consider Defendant's mental health issues, family history, education and waiver of jury trial.

The Sentencing Code provides that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. 42 Pa. C.S.A. § 9721 (b).

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather the defendant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Edwards, 194 A.3d 625, 637 (Pa. Super. 2018)(citing *Commonwealth v.*

Mann, 957 A.2d 746, 749 (Pa. Super. 2008)).

Where a court is informed by a presentence report, it is presumed that the court is aware of all appropriate sentencing factors and considerations, and that where the court has been so informed, its discretion should not be disturbed. *Commonwealth v. Ventura*, 975 A.2d 1128, 1135 (Pa. Super. 2009).

In this case, the court's sentence was not manifestly unreasonable. The record clearly shows that the court took several factors into consideration when formulating Defendant's sentence. Among other things, the court considered the particular circumstances of the offense and the character of Defendant. The court referenced Defendant's prior record, his age, personal characteristics and his potential for rehabilitation.

As the Supreme Court previously noted, generally speaking, "unreasonable" commonly connotes a decision that is irrational or not guided by sound judgment. *Commonwealth v. Walls*, 926 A.2d 957, 963 (Pa. 2007).

When the record is reviewed as a whole, it reflects this court's consideration of the facts of the crime, the character of the offender and the purposes of the sentence.

One need only to review the sentencing order to support this conclusion.

The court first noted that it considered the presentence report, the documents provided by Defendant, the sentencing report provided by the Lycoming County Prison, the sentencing guidelines, the testimony from the trial and the testimony and arguments presented at sentencing. The court preliminarily noted that the sentence was consistent with and reflected the court's purpose of protecting the community, addressing Defendant's rehabilitative needs and acknowledging the severity of the crime to the extent that it impacts

the community.

With respect to Defendant's rehabilitation, the court noted that Defendant claimed that he suffered from mental health issues which caused him to be impulsive, to lack judgement and to not make appropriate choices. The court noted, however, that it was not provided with any documents whatsoever that supported Defendant's claim that he suffered from any mental health issues or had ever been treated for any mental health issues or problems.

The court noted that even if it accepted Defendant's testimony that he suffered from bipolar disorder, anxiety and schizophrenia and that he was treated for such since 2017 when he was hospitalized, there was no evidence upon which the court could conclude that Defendant's mental health problems caused or contributed to him committing these crimes.

The court reasoned that Defendant seemed to argue that after he was hospitalized and medicated, he did not see his primary care physician for the period of weeks that these crimes were allegedly committed. The court even noted that contrary to what the Commonwealth contended, it believed that Defendant may have made an admission to the crimes, although indirectly. Nevertheless, Defendant also claimed that he was taking PCP and other listed drugs that would counter the effects of any medication.

The bottom line to the court was that it did not accept Defendant's argument nor were there any documents to prove that Defendant's mental health issues either mitigated the crime, should mitigate any sentence or explain the crime. The court noted that it was difficult for it to believe that during Defendant's entire life and given the fact that he had been committing criminal offenses for the last 15 years and had been incarcerated and on

supervision that he would not have had a diagnosis and/or treatment to address his issues.

The court noted that Defendant had committed criminal offenses for 15 years. Defendant continued to commit these criminal offenses despite the fact that he had been subjected to increasing penalties and sanctions. According to the documents that were provided to the court, Defendant had been on probation, had paid fines, had been incarcerated in county institutions and had been incarcerated in state institutions.

The court noted that over the past 15 years, Defendant engaged in a continuing course of criminal activity. Moreover, it appeared to the court that Defendant's behaviors constituted an escalating threat to the community. Defendant had engaged in theft-related and deceptive practices for years, and had engaged in substance abuse related offenses for years. There was no doubt in the court's mind that a substantial sentence needed to be imposed to simply protect the community from Defendant's criminal behaviors.

The court also noted that Defendant did not appear to accept any responsibility whatsoever in light of overwhelming evidence. The court did not make the conclusion because Defendant chose to proceed to trial. The court did not even consider Defendant's choice to proceed to trial noting that it was his constitutional right. But in a letter that Defendant wrote to the court afterwards, Defendant made clear to the court that he did not feel his conviction was appropriate because the CI could not be found or would not appear. The court inferred from such that Defendant was taking a risk and was playing a game where he believed that if the CI could not appear or would not show up, that there was insufficient evidence to convict him.

As the court noted above, it concluded that despite the overwhelming

evidence against him and despite knowing what Defendant did, Defendant took a gamble with the hope that he could not be convicted due to the CI's unavailability.

It also appeared to the court that Defendant blamed others as part of his personality and does not accept any culpability. This was exemplified in Defendant's letter to the court as well as the fact that Defendant's behavior at the Lycoming County prison was deplorable. Defendant did not accept any responsibility whatsoever claiming that he was a victim.

The court noted that while it is not naïve enough to believe that prison officials may act inappropriately simply because they are human and may in fact retaliate, that this is not an isolated event. The court noted that this is a series of transgressions, manipulations and prison policy violations. Moreover, the court noted that to believe Defendant, the court would need to accept that numerous prison officials were engaged in a conspiracy of some kind to retaliate against him. The court found no evidence to support such.

Finally, and as set forth in the court's sentencing order, Defendant had been convicted of serious offenses. While the substances did not have any controlled substances in them, the court was of the strong opinion that Defendant believed he was selling heroin. The evidence was clear that the parties intended to sell and buy heroin. The court noted that the sale of controlled substances, especially heroin, has resulted in the destruction of many communities, many families and many lives. Even though this offense was of a non-controlled substance, it still risked lives in different ways. First, often times during drug transactions that might go awry, there is violence. Secondly, who knew what could have

been in that substance. It could have been rat poison or something else that could have easily killed its user.

Consistent with Defendant's conduct throughout which included blaming others and not accepting one iota of responsibility, Defendant makes frivolous claims with respect to his sentence. The minimum sentence on each count was within the standard guideline ranges. The court considered all of the relevant factors.

ORDER

AND NOW, this 21st day of December 2018, following an argument, the court **DENIES** Defendant's Post-Sentence Motion. Defendant is notified that:

1. He has a right to appeal this decision. Any appeal must be filed within 30 days of the date of this Order.
2. He has a right to the assistance of counsel in preparation of an appeal.
3. If he is indigent, he has the right to appeal *in forma pauperis* (without paying the filing fees/costs associated with an appeal) and to proceed with assigned counsel.
4. He has a qualified right to bail under Rule 521(B). Since Defendant's sentence includes imprisonment of 2 years or more, Defendant does not have the same right to bail as before verdict, but bail may be allowed in the discretion of the judge.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole M. Ippolito, Esquire (ADA)
Ryan Gardner, Esquire
Tyree Moy, c/o Lycoming County Prison
Gary Weber, Esquire (Lycoming Reporter)
Work file