

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

COMMONWEALTH,	:	
Plaintiff	:	
	:	NO. CR-1661-2018
vs.	:	
	:	
TYSHAWN MALIK BOWERY,	:	
Defendants	:	POST SENTENCE MOTION

OPINION

I. Relevant Facts

Defendant was charged with conspiracy to deliver a controlled substance, delivery of a controlled substance, possession with intent to deliver a controlled substance, and possession of a controlled substance. The charges were based on a transaction that occurred on August 7, 2018 that involved an individual, alleged by the Commonwealth to be the Defendant, selling two baggies containing a substance to an informant. The Information filed indicates that the controlled substance is crack/cocaine. The matter proceeded to trial on September 26, 2019. During his opening statement, the attorney for the Commonwealth indicated that there was a stipulation between the parties regarding the identification of the controlled substance. *Trial Transcript at page 11, lines 22-25.* During its case-in-chief, however, the Commonwealth failed to introduce evidence of the alleged stipulation or present evidence from an expert who had tested the substance. The Defendant made no motion for judgment of acquittal at any time during the trial nor made an argument to the jury on this issue. The jury found Defendant guilty on all counts.

II. Procedural History

At the time set for sentencing, the Defendant made an oral motion for judgment of acquittal and/or arrest of judgment pursuant to Pa.R.Crim.P. § 704(B)(1) claiming the Commonwealth failed to prove beyond a reasonable doubt that the powder contained in the baggies was a controlled substance. This Court denied Defendant's motion and sentenced the Defendant. Defendant filed this Post-Sentence Motion for Judgment of Acquittal/Arrest of Judgment on the same legal grounds.

III. Discussion

Defendant argues that the Commonwealth failed to prove beyond a reasonable doubt every element of the alleged crimes, specifically that the substance was in fact a controlled substance. The Defendant's argument is based on the Commonwealth's failure to formally introduce or enter into evidence a stipulation to the identity of the substance in the baggies. The Defendant claims that without the stipulation, the Commonwealth did not establish that the substance was in fact a controlled substance, such as cocaine. Due to this alleged failure, the Defendant believes he is entitled to acquittal.

a. Waiver

We must first address whether or not the issue complained of by Defendant was waived. Although not stated, it appears that Defendant filed his motion pursuant to Pa.R.Crim.P. § 606(a)(6) which states that a Defendant may "challenge the sufficiency of the evidence to sustain a conviction" by filing a motion for judgment of acquittal made after the sentence has been imposed

pursuant to Rule 720(B). Pa.R.Crim.P. § 720(B) states that the Defendant may file a post-sentence motion in the form of a motion for judgment of acquittal/arrest of judgment and shall include all requests for relief be stated with particularity and specificity.

The question then becomes: Did Defendant waive his right to post-sentence relief due to a sufficiency of the evidence claim when no such motion was made during the time of trial? The answer is no, Defendant did not waive his entitlement to this relief. “A sufficiency of the evidence claim is made after the trial is concluded. An objection based on sufficiency of the evidence would only be waived if it were not raised in post-trial motions or in appellant’s statement of matters complained of on appeal.” *Com. v. Foster*, 651 A.2d 163, FN 5 (Pa. Super. 1994). *See also Com. v. Dougherty*, 679 A.2d 779, 784 (Pa. Super. 1996) (holding that preservation of a weight of the evidence claim take the form of a post-sentence motion). By raising the issue in a post-sentence motion, the Defendant has properly preserved his claim.

b. Sufficiency of the Evidence

When reviewing this motion challenging sufficiency of the evidence, we must view the evidence admitted at trial in the light most favorable to the Commonwealth as the verdict winner. *Com. v. Estep*, 17 A.3d 939, 943 (Pa. Super. 2011). It is the fact-finder’s duty to resolve any doubts about a Defendant’s guilt and the jury is free to make credibility determinations and accept or reject as true any testimony. *Id. See also Com. v. West*, 937 A.2d 516, 522 (Pa. Super. 2007). Therefore, we must not weigh the evidence and

substitute our own judgment for that of the fact-finder. *Id.* When considering a Defendant's post-trial motion, the Court cannot grant relief "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." *Estepp*, 17 A.3d at 943-44. In other words, if there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt, then the Court must uphold the jury's verdict. *Id.* at 943.

It is well settled in Pennsylvania that proof of a controlled substance is an element that the Commonwealth must prove beyond a reasonable doubt for all of the crimes for which Defendant in this case was charged. *Com. v. Stasiak*, 451 A.2d 520, 524 (Pa. Super. 1982). This proof, however, need not come in the form of a chemical analysis and expert testimony, but may be established by circumstantial evidence alone. *Com. v. Minott*, 577 A.2d 929, 932 (Pa. Super. 1990). Courts are instructed to "permit the use of common sense and reasonable inferences in the determination of the identity of such substances." *Id.* For example, testimony from witnesses and a state trooper who identified a drug based on the color and markings on the capsules, as well as evidence of a positive urine sample of a witness who had consumed the drug, was sufficient to sustain a conviction without a chemical analysis. *Com. v. Leskovic*, 307 A.2d 357, 358 (Pa. Super. 1973).

A case more similar to the present matter is that of *Commonwealth v. West* where the police gave an informant money for the purpose of purchasing cocaine and dropped him off at a restaurant to complete the transaction with the Defendant. *West*, 937 A.2d at 520. Following a brief meeting between the

Defendant and the informant, which the officers observed, the informant returned to the police with two ounces of cocaine he had just purchased. *Id.* The informant testified at trial that he bought the cocaine from the Defendant and Defendant was found guilty. *Id.* at 520-21. The Superior Court held that the trial court, in denying Defendant's post-sentence motion based on sufficiency of the evidence, did not abuse its discretion based on this evidence. *Id.* at 521.

The testimony in the instant matter contain several un-contradicted statements concerning the substance alleged to be crack cocaine. Detective Caschera and Detective Havens asked Mr. Bird, an "unwitting" informant, to buy them \$100 worth of heroin and \$100 worth of cocaine. *Trial Transcript at page 26, lines 1-4.* Detective Havens had been previously investigating numerous people as it related to heroin and Detective Caschera was brought into the operation for the sole purpose of purchasing crack cocaine. *Trial Transcript at page 25, lines 10-18.* Mr. Bird testified that, on August 7, 2018, he drove both detectives to the corner of Memorial and Maple Streets for the specific purpose of purchasing crack cocaine, that he in fact did purchase crack cocaine, and that he gave the cocaine to Detective Caschera. *Trial Transcript at page 18, lines 12-18 and page 21, lines 1-7.* Detective Caschera even showed the jury the cocaine that was handed to him by the informant on August 7, 2018. *Trial Transcript at page 31, lines 5-7.*

The record is entirely devoid of any evidence disputing that the substance sold by Defendant was in fact crack cocaine. All of the Commonwealth's witnesses, including Mr. Bird and both Detectives, believed that the substance was crack cocaine. The Defendant did not offer any evidence or testimony to

dispute the substance was crack cocaine. Nor did the Defendant argue to the jury that the Commonwealth had failed to prove the substance was in fact a controlled substance. Therefore, based upon the circumstantial evidence presented at trial, the jury could have reasonably concluded that the substance was in fact a controlled substance, in particular, crack cocaine.

ORDER

AND NOW, this 25th day of **March, 2020**, upon consideration of Defendant's Post-Sentence Motion and Plaintiff's Response thereto, it is hereby Ordered that Defendant's Motion is **DENIED**.

Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), the Defendant is hereby notified of the following:

1. Defendant has the right to appeal this Order within thirty (30) days of the entry of this Order;
2. Defendant has the right to assistance of counsel in preparation of the appeal;
3. Defendant, if indigent, has the right to appeal this decision *in forma pauperis* and to proceed with assigned counsel as provided in Pennsylvania Rule of Criminal Procedure 122; and
4. Defendant has the qualified right to bail pursuant to Pennsylvania Rule of Criminal Procedure 521(B).

BY THE COURT,

Hon. Ryan M. Tira, Judge

RMT/ads

CC: DA (JR)
Robert Hoffa, Esquire
Gary L. Weber, Esquire, Lycoming Reporter