

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	: No. CP-41-CR-0000425-2022
	:
vs.	:
	:
	:
JOSHUA MENDEZ,	:
Appellant	: 1925(a) Opinion

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

This opinion is written in support of this court's judgment of sentence dated March 16, 2023.

On October 15, 2021, Detective Curt Loudenslager from the Lycoming County Narcotics Enforcement Unit (NEU) utilized a confidential information (CI), who indicated he could purchase methamphetamines from an individual he knew as “Josh.” The CI contacted “Josh” via telephone to purchase \$200 of methamphetamines. Detective Loudenslager strip-searched the CI, provided the CI with \$200, and transported the CI to Second Avenue in Williamsport, Pennsylvania. The CI entered Josh’s residence at 629 Second Avenue, provided the \$200 to Josh, and Josh provided methamphetamines to the CI. The CI exited the residence, returned to Detective Loudenslager, and surrendered approximately 2.3 grams of suspected methamphetamines to the detectives.

On October 25, 2021, the CI texted Josh to purchase 2 grams of methamphetamines. Detective Loudenslager strip-searched the CI and provided the CI with \$200 in pre-recorded currency. Detective Loudenslager transported the CI to Second

Avenue, the CI entered the residence at 629 Second Avenue, and Josh provided the CI with approximately 1.39 grams methamphetamines in exchange for the \$200. Josh admitted that he was short about .5 grams. The CI exited the residence, returned to Detective Loudenslager, and surrendered the methamphetamines.

On October 29, 2021, Detective Loudenslager obtained a search warrant for 629 Second Avenue. Joshua Mendez was alone in the first-floor bedroom of the residence. During the search, detectives from the NEU discovered seven bags of methamphetamines in a bag in an ashtray near the bed and another bag of methamphetamine on the bed.

On January 21, 2022, Detective Loudenslager filed a criminal complaint against Mendez, charging him with two counts of delivery of a controlled substance, two counts of criminal use of a communication facility, and one count of possession with intent to deliver (PWID) a controlled substance.

A jury trial was held on January 20, 2023. The jury found Mendez guilty of all the charges.

On March 16, 2023, the court sentenced Mendez to an aggregate term of 2 ½ to 5 years' incarceration in a state correctional institution followed by five years' probation.¹

On April 13, 2023, Mendez filed a notice of appeal. The court directed Mendez to file a concise statement of errors complained of on appeal. On May 5, 2023, Mendez filed his concise statement in which he asserted the following three issues:

- a. [Mendez] avers the [j]ury's verdict of guilt following trial was not supported by the weight of the evidence presented by the Commonwealth to a degree and extent that it shocks

¹ The aggregate sentence consisted of 2 ½ to 5 years on Count 5, PWID (2.5-<10 grams of methamphetamines), consecutive terms of 2 ½ years' probation on Counts 2 and 4, Criminal Use of a Communication Facility, and concurrent terms of 2 to 4 years' incarceration on Counts 1 and 3, Delivery of a Controlled Substance.

- the conscience and one's sense of justice.
- b. [Mendez] avers that the trial [c]ourt erred as a matter of law in denying his pre-trial motion(s) to preclude the introduction of evidence which was [received] on the eve of trial by [d]efense counsel, pursuant to violations of discovery rules by the Commonwealth.
 - c. [Mendez] avers the trial court abused its discretion in imposing sentence; despite the sentence falling within the standard range of the guidelines it is manifestly excessive, unreasonable and unduly harsh in consideration of [Mendez's] particular circumstances and rehabilitative needs.

Mendez first asserts that the verdict was against the weight of the evidence.

This issue is waived because it has not been properly preserved. In order to properly preserve a weight of the evidence claim, it must be raised in a motion for new trial orally on the record before sentencing, by written motion before sentencing or in a post-sentence motion. Pa. R. Crim. P. 607(A). Mendez did not raise this claim orally on the record or in any written motion. Therefore, this claim is waived. *Commonwealth v. Sherwood*, 982 A.2d 483, 494 (Pa. 2009)(“Appellant waived his weight of the evidence claim because it was not raised before the trial court as required by Pa. R. Crim. P. 607.”). This issue is also waived because Mendez's claim is boilerplate. *Commonwealth v. LeClair*, 236 A.3d 71, 76 (Pa. Super. 2020)(weight of evidence claims were waived where Appellant did not indicate which verdict or verdicts were against the weight of the evidence and did not offer a specific reason to support his generalized claim).

Even if Mendez had not waived this claim, it lacks merit. A claim that the verdict was against the weight of the evidence concedes that there was sufficient evidence to support the conviction. *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000). The judge need not view the evidence in the light most favorable to the Commonwealth, but the judge

may not reassess the credibility of the witnesses or sit as the thirteenth juror. *Id.*

In order to grant a new trial on the grounds that the verdict is against the weight of the evidence, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court. A verdict shocks the judicial conscience when the figure of Justice totters on her pedestal or when the jury's verdict, at the time of its rendition, cause the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench.

Commonwealth v. Akhmedov, 216 A.3d 307, 326 (Pa. Super. 2019); see also *Commonwealth v. Boyd*, 73 A.3d 1269, 1274-1275 (Pa. Super. 2013).

The jury's verdict did not shock the court's conscience. Credibility is within the province of the jury as the fact-finder, which is free to believe all, part, or none of the evidence. *Commonwealth v. Ramtahal*, 33 A.3d 602, 607 (Pa. 2011); *Commonwealth v. Holt*, 270 A.3d 1230, 1233 (Pa. Super. 2022).

Detective Curt Loudenslager, of the NEU, testified that the CI was aware of an individual named Josh who was living with a couple of females at 629 2nd Avenue and who was distributing methamphetamines out of that house. Detective Loudenslager investigated further and suspected that "Josh" was Joshua Mendez. Detective Loudenslager obtained a court order to permit the CI to utilize a audio/video recording device inside the house to record the controlled buys.

On October 15, 2021, the CI contacted Detective Loudenslager and told him that he had been in telephone contact with Josh and Josh agreed to sell him \$200 worth of methamphetamines. Detective Loudenslager drove the CI to an area near 629 Second Avenue. Detective Loudenslager strip-searched the CI and gave him \$200 in pre-recorded twenty-dollar bills. Detective Loudenslager dropped off the CI near 629 Second Avenue.

The CI walked to the residence and went inside. Mendez put methamphetamines into the cellophane wrapper of a cigarette pack and handed it to the CI. The CI rolled up the cellophane package of methamphetamines and put it in his pocket. He gave the money to Mendez. Shortly thereafter, the CI exited the residence, walked to Detective Loudenslager's vehicle, and gave the methamphetamines to Loudenslager. Trial Transcript (T.T.), 01/20/2023, at 27-32 (testimony of Detective Loudenslager); T.T., at 69-83 (testimony of CI); T.T. at 182 (stipulation regarding the lab results)

This testimony regarding the first controlled buy was corroborated by the video from the CI's camera, which was admitted as Commonwealth Exhibit #10. Among other things, this video depicted Detective Loudenslager handing the CI the buy money, Mendez placing the methamphetamines in the cellophane wrapper and handing it to the CI, and, as the CI is about to leave the residence, Mendez counting money. It was also supported by the photograph of the CI's call log (Commonwealth's Exhibit 1), as well as Detective Havens' testimony regarding a detective calling the phone number for "Josh" and Mendez' telephone ringing during the search of the residence a few days after the controlled buy. See T.T., at 149; Commonwealth's Exhibit 20.

Other detectives were conducting surveillance in the area and watched the CI walk to the residence and, less than five minutes later, they watched him leaving the residence and walk back toward Detective Loudenslager's vehicle. On the way back to Detective Loudenslager's vehicle, the CI asked someone for a light for his cigarette. T.T., at 123-125 (testimony of Detective Jonathan Rachel). This testimony was supported by Commonwealth Exhibits 13 and 14, which were recordings of the CI walking to and from the

residence.

The second controlled buy was similar to the first controlled buy. On October 25, 2023, the CI and Mendez arranged the transaction through text messages. Detective Loudenslager strip-searched the CI, drove the CI to the area near the residence, and gave him \$200 in buy money and the recording device. The CI walked to the residence, purchased methamphetamines from Mendez, walked back to Detective Loudenslager's vehicle, and turned over the methamphetamines to Detective Loudenslager, who again strip-searched the CI. See T.T. 32, 34-37 (testimony of Detective Loudenslager); T.T. at 84-94 (testimony of CI); T.T., at 128-130 (testimony of Detective Rachel); T.T. at 182 (stipulation regarding the lab results).

Although the video from the CI's recording device was not as good for the second buy as the first, the testimony regarding the second buy was supported by the audio from the CI's recording device (Commonwealth's Exhibit 10), the photograph of the text messages (Commonwealth Exhibit 11), the videos of the CI walking to the residence and later leaving the residence (Commonwealth's Exhibits 15 and 16) and Detective Haven's testimony regarding call the number the CI utilized to contact "Josh" and Mendez' phone ringing (T.T., at 149; Commonwealth's Exhibit 20).²

The court acknowledges that the controlled buy money was not recovered in this case. However, that is not surprising when Mendez was not immediately arrested after the second controlled buy. The buys occurred on October 15 and October 25, 2021, but the residence was not searched until October 29, 2021, and Mendez was not arrested until on or

² The court also notes that Mendez acknowledged providing drugs to the CI at his sentencing hearing; he only denied selling them to him. Sentencing Transcript, 03/16/2023, at 21-22.

about February 28, 2022.

After reviewing the evidence presented in this case, the court finds that the jury's verdict did not shock its conscience; therefore, Mendez' convictions were not against the weight of the evidence.

Mendez next contends the court erred in denying his pre-trial motion(s) to preclude evidence that the Commonwealth did not disclose to defense counsel until the eve of trial, in violation of the discovery rules. The court cannot agree.

"Decisions involving discovery matters are within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion." *Commonwealth v. Santos*, 176 A.3d 877, 882 (Pa. Super. 2017) (citation and quotation marks omitted), appeal denied, 189 A.3d 986 (Pa. 2018). "An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record." *Id.* (citation and quotation marks omitted).

The day before trial, while defense counsel was at the courthouse, he was contacted by an individual in the District Attorney's Office that they had just been provided new pieces of evidence from the NEU, including surveillance videos that Detective Rachel took of the CI leaving the residence after a controlled buy and speaking to another individual on a porch. According to defense counsel, part of the defense involved the interaction between the CI and this other individual. Defense counsel asked the court to preclude the Commonwealth from showing the surveillance video because in March and October of

2022,³ the defense requested this information and twice it was not provided. T.T., at 4-5.

The Commonwealth opposed preclusion by arguing that the defense was aware of the video because it was referenced in a police report. Furthermore, the defense was aware of what transpired between the CI and the other individual because the defense had an audio/video recording from the CI's camera. Additionally, the Commonwealth argued that any defense based on the interaction between the CI and the individual after the CI left the residence was "foolhardy" given the video evidence from the CI's camera of Mendez placing methamphetamines in the cellophane wrapper of a cigarette pack and handing it to the CI. T.T. 5-7.

The court denied preclusion because the video was provided as soon as the assistant district attorney received it and the video was consistent with other evidence that the defense possessed. T.T., at 7-8. The court did not deny the preclusion request based on bias, ill-will, impartiality or prejudice.

For the benefit of the appellate courts, the recording from the CI's camera depicted Mendez placing methamphetamines in the cellophane wrapper of a cigarette pack and handing it to the CI and Mendez counting money as the CI was leaving the residence. After the CI left the residence, the recording captured a conversation of the CI asking an

³ Prior defense counsel filed an informal request for discovery on March 25, 2022 and current counsel filed an informal request for discovery on October 20, 2022. Both requests sought surveillance videos and specifically stated: PLEASE CHECK WITH THE POLICE OFFICERS INVOLVED IN THIS CASE TO DETERMINE IF THEY HAVE ANY OF THE REQUESTED INFORMATION."

individual for a light for his cigarette but the video showed the direction the CI was walking and did not depict the individual on the porch. The surveillance video depicted the CI asking for a light from an individual on a porch and the CI picking up the lighter off the banister of the porch to light his cigarette and the CI placing the lighter back on the banister. Nothing was exchanged between the CI and the other individual.

Finally, Mendez contends that the court imposed a sentence, which despite falling within the standard guidelines, was manifestly excessive, unreasonable and unduly harsh in consideration of his particular circumstances and rehabilitative needs. This issue is also waived because Mendez failed to properly preserve it in a post-sentence motion and he has raised it in a boilerplate manner in his concise statement. *See* Pa. R.A.P. 302 (“issues not raised in the lower court are waived”); *Commonwealth v. Padilla-Vargas*, 204 A.3d 971, 975-76 (Pa. Super. 2019)(objections to the discretionary aspects of a sentence are waived if not raised at sentencing or in a post-sentence motion); *Commonwealth v. Mann*, 820 A.2d 788, 794 (Pa. Super. 2003)(lack of specificity in post-sentence motion and vague manner in which Appellant asserted sentencing claim in his concise statement resulted in waiver).

Even if Mendez had not waived this claim, it lacks merit. Sentencing is a matter vested within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *Commonwealth v. Rush*, 162 A.3d 530, 544 (Pa. Super. 2017), citing *Commonwealth v. Crump*, 995 A.2d 1280, 1282 (Pa. Super. 2010); see also *Commonwealth v. Perry*, 32 A.3d 232, 236 (Pa. 2011). “An abuse of discretion is more than a mere error of judgment; thus, a sentencing court will not have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the result of

partiality, prejudice, bias or ill-will." *Perry, id* (internal quotations omitted), citing *Commonwealth v. Walls*, 926 A.2d 957, 961 (Pa. 2007).

In imposing the sentence, “the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and the community, and the rehabilitative needs of the defendant.” 42 Pa. C.S.A. § 9721 (b).

The court is also guided by § 9781 (d) of the Judicial Code, which requires appellate courts in reviewing a sentence to determine from the record whether the court considered: “(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the opportunity of the sentencing court to observe the defendant, including any pre-sentence investigation; (3) the findings upon which the sentence was based; and (4) the guidelines promulgated by the commission.” 42 Pa. C.S.A. § 9781 (d). In determining if a sentence is excessive or unduly harsh, great weight must be afforded to the sentencing court’s discretion. *Commonwealth v. Colon*, 102 A.3d 1033, 1043 (Pa. Super. 2014), quoting *Commonwealth v. Mouzon*, 828 A.2d 1126, 1128 (Pa. Super. 2003)).

Where the sentencing court is informed by a presentence investigation report (“PSI”), it is presumed that the sentencing court was aware of relevant information regarding the defendant’s character and weighed those considerations and the appropriate sentencing factors. *Commonwealth v. Harper*, 273 A.3d 1089, 1097-1098 (Pa. Super. 2022); *Commonwealth v. Hill*, 210 A.3d 1104, 1117 (Pa. Super. 2019). “[W]here the court has been so informed, its discretion should not be disturbed.” *Harper*, 273 A.3d at 1098. “Further, where a sentence is within the standard range of the guidelines, Pennsylvania law views the

sentence as appropriate under the Sentencing Code. *Hill, id* (citing *Commonwealth v. Moury*, 992 A.3d 162, 171 (Pa. Super. 2010)).

An allegation of excessiveness due to the imposition of consecutive sentences implicates the discretionary aspects of sentencing. *Commonwealth v. Mastromarino*, 2 A.3d 581, 585 (Pa. Super. 2010). The imposition of consecutive, rather than concurrent, sentences only raises a substantial question in the most extreme circumstances. *Moury*, 992 A.2d at 171. Furthermore, a defendant is not entitled to a volume discount for his crimes. *Commonwealth v. Prisk*, 13 A.3d 526, 533 (Pa. Super. 2011); *Commonwealth v. Hoag*, 665 A.2d 1212, 1214 (Pa. Super. 1995).

Here, Mendez was convicted of five felony offenses: two counts of delivery of a controlled substance, ungraded felonies; two counts of criminal use of a communication facility, felonies of the third degree; and one count of possession with intent to deliver (PWID), an ungraded felony. The maximum penalty for the ungraded felonies was up to 10 years in prison and up to \$100,000 in fines. The maximum penalty for the felony of the third- degree convictions was up to 7 years in prison and up to \$15,000 in fines.

Mendez has a prior record score (PRS) of 5. The offense gravity score (OGS) for PWID was 7, delivery was 6, and criminal use of a communication facility was 5.

With an OGS of 7 and a PRS of 5, the standard guideline range for Count 5, PWID, was 24-30 months' incarceration. The court sentenced Mendez to 2 ½ years (or 30 months) to 5 years (or 60 months) for this offense. The minimum sentence imposed was at the top of the standard guideline range. The court could have imposed a maximum sentence up to 10 years but it did not. Rather, the court imposed a sentence that was only double the

minimum sentence. *See* 42 Pa. C.S.A. §9756(b)(1)(“The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed.”).

The standard range for delivery was 21-27 months’ incarceration. The court imposed concurrent sentences of 2 years (or 24 months) to 4 years (or 48 months). The minimum sentence imposed was in the middle of the standard guideline range. The court ran these sentences concurrent because the court did not believe that Mendez needed additional imprisonment beyond the sentence imposed for PWID.

The standard range for criminal use of a communication facility was 12-18 months’ incarceration. The court imposed consecutive sentences of 2 ½ years’ probation for these convictions, which were below even the mitigated guideline range of 9-12 months’ incarceration. Although the court did not believe that Mendez needed additional incarceration, the court wanted to ensure that Mendez had a period of supervision after he was released from prison. The court also notes that if an individual is doing well, probation may be terminated early whereas parole cannot. *See* 42 Pa. C.S.A. §9771(a).

The court made Mendez eligible for RRRI and boot camp. If Mendez applies for boot camp, is accepted into the program, and successfully completes it, he could significantly reduce the amount of time that he is incarcerated.

The court would have made Mendez eligible for the State Drug Treatment Program (SDTP), but the Commonwealth was opposed to Mendez participating in this program. *See* 61 Pa. C.S.A. §4104(a)(“The judge shall exclude the person from eligibility if the prosecuting attorney opposes eligibility.”). Since the court’s hands were tied by the

Commonwealth, the court asked the Department of Corrections (DOC) to consider Mendez for placement in a therapeutic community to address his history of controlled substance use.

On the one hand, Mendez committed several felonies. On the other hand, Mendez was a bright individual with a difficult upbringing and a history of controlled substance use. The court reviewed all of the facts and circumstances and imposed an aggregate sentence that the court believed properly balanced them. The court made Mendez eligible for as many programs as possible so that if he is sincere in his desire to address his drug use and better his life, he will be able to do so. The court could not, however, give Mendez a “free pass” and impose no incarceration at all.

DATE: June 21, 2023

By The Court,

Nancy L. Butts, President Judge