NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. GILBERT NARVAEZ, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3069 EDA 2012

Appeal from the Judgment of Sentence September 20, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006627-2011

BEFORE: BOWES, LAZARUS, and WECHT, JJ.

MEMORANDUM BY BOWES, J.: **FILED DECEMBER 04, 2013**

Gilbert Narvaez appeals from his September 20, 2012 judgment of sentence of three to eight years imprisonment imposed after a jury found him guilty of possession of a controlled substance with intent to distribute ("PWID"), conspiracy, and knowing and intentional possession of a controlled substance. After review, we affirm.

Appellant's convictions arose from events that occurred at approximately 8:45 p.m. on April 20, 2011, at the intersection of Mascher and Cambria Streets in Philadelphia. Officer Chris Hulmes was in plain clothes and located in an unmarked vehicle with tinted windows parked on 2900 block of Mascher Street and conducting surveillance of the intersection.

> Police Officer Chris Hulmes observed [Appellant] standing on the southeast corner of the intersection. . . . Rafael Colon and Juan Cortez, co-defendants in this case, were located on each

corner of Cambria and Mascher Street and were intermittently walking into the intersection to look up and down the streets. N.T., 8/1/12, at 25-27, 30.

Officer Hulmes observed a man, later identified as Ben Powell, walk up to [Appellant]. After a brief conversation with Mr. Powell, [Appellant] retrieved objects from his waist and handed them to Mr. Powell in exchange for United States currency. Mr. Powell took the objects and walked away eastbound on Cambria Street. Officer Gregory Fagan arrested buyer Powell on the 2800 block of Lee Street at about 8:50 p.m. and recovered four packets of heroin stamped "Super Strong." ***Id***. at 28-29, 43, 87.

Next, an older white male, later identified as Gerald Vanhart, approached from the area of Gurney and Indiana Streets and walked up to [Appellant] on the northeast corner of the intersection of Cambria and Mascher Streets. Vanhart talked with [Appellant] and handed him United States currency. [Appellant] removed objects from his waist and handed them to Mr. Vanhart in a hand to hand transaction. ***Id***. at 30.

Buyer Vanhart and [Appellant] were speaking with each other when [Appellant] yelled in the direction of co-defendant Colon. [Appellant] directed Vanhart [to] go to a store on the southwest corner of Mascher and Cambria Streets. Vanhart sat on the step of the store and co-defendant Colon approached him. Co-defendant Colon took objects from his right pocket and handed them to Vanhart. Vanhart then walked away heading north on Mascher Street. Police Officer Derrick Jones arrested buyer Vanhart on the 100 block of West Gurney Street. He recovered from Vanhart six clear heat-sealed packets with red glassine bags of heroin stamped "Super Strong." ***Id***. at 31, 49, 89.

After Mr. Vanhart left, [Appellant and his two co-defendants] met at the northeast corner of the intersection. Co-defendant Cortez bent down and retrieved an M&M container from under a fence. Co-defendant Cortez took out objects from the container, counted them, and then returned them. All three [men] removed United States currency from their pockets and counted it. [Appellant] and co-defendant Colon handed their

> money to co-defendant Cortez. Cortez kept the money in his hand and walked eastbound on Cambria Street. ***Id***. at 32-33.
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> [Appellant] and co-defendant Colon walked to the southeast corner of the intersection of Mascher and Cambria Streets and spoke to a woman in a parked Toyota, later identified as Danielle Reamer. Co-defendant Cortez returned to the intersection with something in his hand. Police Officer Hulmes believed that "they were being re-upped." Officer Brian Irizarry later approached the Toyota and arrested Ms. Reamer after he observed her attempt to conceal two clear heat-sealed packages of heroin inside a red glassine packet, stamped "Super Strong." ***Id***. at 34-35, 60-61.
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> As back up officers were approaching, co-defendant Cortez threw a Ziploc packet with red inserts stamped "Super Strong" to the ground. Police Officer Bates recovered two Ziploc packets with red inserts stamped "Super Strong" from co-defendant Colon's right pocket. Both packets contained heroin. The officers also recovered the M&M container with blue heat-sealed packets which held crack cocaine. Nothing was recovered from [Appellant]. After co-defendant Cortez was placed in a police vehicle, Police Officer James R[e]i[l]ley recovered another M&M container with eleven packets of crack cocaine from the area around co-defendant Cortez's feet. ***Id***. at 36, 65-66, 73, 90-91.

Trial Court Opinion, 1/3/13, at 2-3.

The jury convicted Appellant of the aforementioned offenses, and he was sentenced on September 20, 2012. Appellant filed a timely post-sentence motion, which the trial court denied on September 28, 2012. Thereafter, Appellant appealed to this Court and complied with the trial court's direction to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. The trial court issued its Rule 1925(a) opinion. Appellant presents two issues for our review:

I. Is the Defendant entitled to an arrest of judgment on the charge of PWID, Criminal Conspiracy and related offenses where the evidence is insufficient to sustain the verdict?

II. Is the Defendant entitled to a new trial on all charges including PWID and related offenses where the verdict is not supported by the greater weight of the evidence?

Appellant's brief at 3.

In reviewing a challenge to the sufficiency of the evidence, our standard of review

> requires that we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Widmer,*** 560 Pa. 308, 744 A.2d 745, 751 (Pa.2000). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." ***Commonwealth v. Brewer,*** 876 A.2d 1029, 1032 (Pa.Super. 2005). Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty." ***Id.; see also Commonwealth v. Aguado,*** 760 A.2d 1181, 1185 (Pa.Super.2000) ("The facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence."). Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. ***See Commonwealth v. DiStefano,*** 782 A.2d 574, 582 (Pa.Super. 2001).
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> The Commonwealth may sustain its burden by means of wholly circumstantial evidence. ***See Brewer,*** 876 A.2d at 1032. Accordingly, "the fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence." ***Id.*** (quoting ***Commonwealth v. Murphy,*** 795 A.2d 1025, 1038–39 (Pa.Super. 2002)). Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in

> the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, the appellant's convictions will be upheld. ***See Brewer****,* 876 A.2d at 1032.

Commonwealth v. Lynch, 72 A.3d 706, 707-08 (Pa.Super. 2013) (citations omitted).

Appellant contends that the Commonwealth did not establish that he possessed drugs, possessed drugs with the requisite intent, or that he engaged in a conspiracy for that purpose. He points to the fact that when he was arrested, he was not in possession of any contraband or cash. Furthermore, Appellant maintains that there was no evidence to suggest that he was engaged with others in selling drugs, and thus, the conspiracy conviction was infirm.

The record belies Appellant's characterization of the evidence. The Commonwealth's proof was that Appellant personally engaged in two separate hand-to-hand drug transactions with Powell and Vanhart. Not only did the police officers observe the sales, they maintained surveillance on the buyers and apprehended them with the narcotics in close proximity to the purchase. The drugs recovered were stipulated to be heroin and all of the drugs were identically packaged in clear ziplocs containing heat-sealed red glassine bags stamped, "Super Strong." In addition, the drugs in the M&M container were stipulated to be cocaine. Such evidence connected Appellant to the drugs and was sufficient to sustain the PWID and possession charges.

Appellant claims next that the Commonwealth's evidence "fell woefully short of establishing any agreement" to commit the crimes, and thus, there

was no nexus for conspiratorial liability. Appellant's brief at 10. Appellant posits that he may have merely been out on the street when others were engaged in drug trafficking and that knowledge that others were selling drugs does not establish that he was a conspirator. He relies upon ***Commonwealth v. Goodman***, 350 A.2d 810 (Pa. 1976), where we held that a defendant's presence at the scene of the crime and flight, standing alone, were insufficient to establish conspiracy beyond a reasonable doubt. In sum, Appellant avers "the evidence simply was not of the necessary length and breadth to establish conspiratorial and criminal liability." Appellant's brief at 10.

Conspiracy, defined in 18 Pa.C.S. § 903(a), provides:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
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> > (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
> >
> > (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Under this provision, the Commonwealth must prove that "1) the defendant entered into an agreement with another to commit or aid in the commission of a crime; 2) he shared the criminal intent with that other person; and 3) an overt act was committed in furtherance of the conspiracy." ***Commonwealth v. Nypaver***, 69 A.3d 708, 715 (Pa.Super.

2013) (citation omitted). Since a formal or explicit agreement to commit a crime is seldom capable of proof, a conspiracy may be inferred where the evidence demonstrates some relationship among the parties, and the overt acts of the co-conspirators proves a criminal confederation. ***Commonwealth v. Perez***, 931 A.2d 703, 708-09 (Pa.Super. 2007). We utilize four factors "in deciding if a conspiracy existed. Those factors are: '(1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy.'" ***Nypaver***, ***supra*** at 715 (partially quoting ***Commonwealth v. Feliciano***, 67 A.3d 19, 25 (Pa.Super. 2013)).

The evidence established that Appellant, Cortez and Colon were not only present together at the scene but also associated with each other. They were observed removing and counting items from an M&M container that contained crack cocaine, counting money, and handing their money to Cortez. Appellant took an active role in the object of the conspiracy, personally selling heroin to Powell and Vanhart. Together with co-defendant Cortez, Appellant approached Danielle Reamer, and Cortez returned to her with something in his hand. Reamer was arrested after Officer Irizarry observed her attempting to conceal two clear heat-sealed packages inside a red glassine packet stamped "Super Strong," packets just like those containing heroin that Appellant provided to Powell and Vanhart. ***Id***. at 34-

35, 60-61. All four factors are present herein and demonstrate the existence of a conspiracy. Thus, this claim fails.

Next, Appellant claims that the verdict shocks one's sense of justice and is so contrary to the weight of the evidence as to require a new trial. He avers that in making such a determination, this Court need not review the evidence in the light most favorable to the verdict winner and may undertake its own credibility determinations.

Appellant misapprehends our standard of review of a weight claim.

> A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. ***Commonwealth v. Widmer***, 560 Pa. 308, 319, 744 A.2d 745, 751-52 (2000); ***Commonwealth v. Brown***, 538 Pa. 410, 435, 648 A.2d 1177, 1189 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. ***Widme*r**, 560 A.2d at 319-20, 744 A.2d at 752. Rather, "the role of the trial judge is to determine that '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.'" ***Id***. at 320, 744 A.2d at 752 (citation omitted). It has often been stated that "a new trial should be awarded 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." ***Brown***, 538 Pa. at 435, 648 A.2d at 1189.
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> An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court: Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. ***Brown***, 648 A.2d at 1189. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when

> reviewing a trial court's determination that the verdict is against the weight of the evidence. ***Commonwealth v. Farquharson***, 467 Pa. 50, 354 A.2d 545 (Pa. 1976). One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice. ***Widmer***, 560 Pa. at 321-22, 744 A.2d at 753.

Commonwealth v. Clay, 64 A.3d 1049, 1054-1055 (Pa. 2013).

Since we review the trial court's exercise of discretion rather than the underlying question of whether the verdict is against the weight of the evidence, an appellant is required to file a post-sentence motion in the trial court in order to preserve the issue. ***Commonwealth v. Bond***, 985 A.2d 810, 820 (Pa. 2009). The Commonwealth maintains that Appellant's post-sentence motion, consisting of one sentence, averring that the verdict was against the weight of the evidence and offering no legal authority, argument, or citation to the record, was legally insufficient to preserve the issue for review. It continues that the argument Appellant presents herein, based on ***Commonwealth v. Karkaria***, 625 A.2d 1167 (Pa. 1993) and ***Commonwealth v. Farquharson***, 354 A.2d 545 (Pa. 1976), was not advanced in the trial court, hence, not ruled upon, and that there is nothing for this Court to review.

The Commonwealth's characterization of the post-sentence motion is accurate. However, it was within the court's discretion to schedule briefing or argument on the issues raised therein if the court felt it necessary prior to disposition. Pa.R.Crim.P. 720(B)(2)(a) and (b). Instead, the trial court

denied relief by order entered September 28, 2012, without ordering the parties to brief the issues or present argument. The court's rationale for denying relief on the weight challenge is set forth in its Pa.R.A.P. 1925(a) opinion, and available for our review. Thus, we decline to find that Appellant waived this issue.

The trial court found that the Commonwealth's evidence "plainly establishes guilt and is in no way susceptible to an argument that it should not be credited." Trial Court Opinion, 1/3/13, at 8. It found credible the police officers' eyewitness testimony implicating Appellant in multiple drug sales in conjunction with his co-conspirators Colon and Cortez. In addition, the fact that Appellant's co-conspirators were in possession of heroin that was packaged in the same distinctive way as the heroin recovered from the three buyers, two of whom bought their drugs from Appellant, strengthened the Commonwealth's case. The court's conscience was not shocked by the jury's verdict in light of what it characterized as overwhelming evidence of guilt. ***Id***. We find no abuse of discretion.

Appellant also argues in support of his weight of the evidence claim that the "verdict was based upon nothing more than speculation, conjecture, and surmise" that "did not prove that he was engaged in criminal activity." Appellant's brief at 13. He cites ***Karkaria*** and ***Farquharson*** for the proposition that such a verdict cannot be permitted to stand. We note that the conviction in ***Karkaria*** was overturned by our Supreme Court on

sufficiency grounds because the Court found no reliable evidence presented as to each element of the offense charged. In ***Farquharson***, the Court acknowledged the principle articulated in ***Commonwealth v. Bennett***, 303 A.2d 220, (Pa.Super. 1973): "that where evidence offered to support a verdict of guilt is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, a jury may not be permitted to return such a finding," but found it inapplicable on the facts therein. ***Farquharson***, ***supra*** at 550.

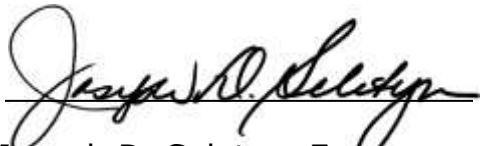
While Appellant presents this argument in support of his contention that the verdict is against the weight of the evidence, it is actually a challenge to the sufficiency of the evidence. ***See Commonwealth v. Brown***, 52 A.3d 1139, 1156 n.18 (Pa. 2012) ("Our Court therefore recognized that, in those extreme situations where witness testimony is so inherently unreliable and contradictory that it makes the jury's choice to believe that evidence an exercise of pure conjecture, any conviction based on that evidence may be reversed on the grounds of evidentiary insufficiency, since no reasonable jury could rely on such evidence to find all of the essential elements of the crime proven beyond a reasonable doubt."); ***but see id***. at 1190 n.1 (Castille, C.J. concurring and dissenting) (opining that the issue was a weight of the evidence claim).

This Court, in ***Commonwealth v. Lofton***, 57 A.3d 1270, 1274 (Pa.Super. 2012), cited ***Brown***, ***supra***, for the proposition that there may

be "extreme situations where witness testimony is so inherently unreliable and contradictory that it makes the jury's choice to believe that evidence an exercise of pure conjecture." The present matter, however, is not such a case and this theory does not entitle Appellant to relief. Initially, Appellant fails to direct our attention to the testimony that he deems contradictory or unreliable. Furthermore, our review of the certified record has not revealed the type of "extreme situation" described in ***Brown***, ***supra***. Herein, the trial court found the Commonwealth's witnesses credible and the evidence of guilt overwhelming.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013