NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. STEVEN ELLIOT JOHNSON Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1095 MDA 2012

Appeal from the Judgment of Sentence December 14, 2010
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0000539-2009

BEFORE: SHOGAN, J., OTT, J., and COLVILLE, J.*

MEMORANDUM BY OTT, J.: Filed: February 15, 2013

Steven Elliot Johnson appeals from the judgment of sentence entered following a bench trial in which he was convicted of possession with intent to deliver a controlled substance (PWID), carrying a firearm without a license, and tampering with evidence.[1] The trial court sentenced Johnson to an aggregate term of five to 10 years' incarceration. On appeal, Johnson claims: 1) the verdict was against the weight of the evidence; and 2) the evidence was insufficient to convict PWID when the evidence establishes that

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* Retired Senior Judge assigned to the Superior Court.

[1] 35 P.S. § 780-113(a)(30), 18 Pa.C.S. § 6106(a)(1), and § 4910(1), respectively. Johnson was also convicted of the summary offense of operating a motor vehicle without required financial responsibility, 75 Pa.C.S. § 1786(f).

the possession was consistent with personal use. After a thorough review of the official record, submissions of the parties, and relevant law, we affirm on the basis of the comprehensive Pa.R.A.P. 1925(a) opinion authored by the Honorable Jeannine Turgeon.

The charges in this matter arose on December 15, 2008, following a lawful traffic stop.[2] Discovering the vehicle was uninsured it was secured for towing. Patrolman Edward Grynkewicz informed Johnson an inventory search would be performed. Johnson then stated a .45 caliber Ruger, P-97 handgun, with a loaded magazine and one in the chamber was located under the front seat. After running a check on the weapon it was discovered Johnson did not have a permit to carry the gun and he was immediately placed under arrest for the gun violation. Prior to being placed in a police van for transporting, Johnson was patted down and police found two cellphones and a bundle of cash totaling $387. However, upon arrival at the station and opening the back of the van, police saw Johnson attempting to swallow a mouthful of previously concealed crack cocaine. Efforts to prevent ingestion of all but .89 grams[3] proved futile.

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[2] The police initially noticed Johnson's vehicle had a lit television monitor mounted to the dashboard in front of the driver. Thereafter upon submission of the vehicle's information it was determined it was not insured. The police conducted a lawful traffic stop after the car stopped at a gas station.

[3] This amount was recovered from the floor of the police van.

The trial court has thoroughly addressed the appellate claims raised by Johnson in its July 11, 2012 Rule 1925(a) opinion. We therefore rely upon the reasoning of that opinion in denying Johnson relief.

The parties are directed to attach a copy of the July 11, 2012 trial court memorandum opinion in the event of further proceedings.

Judgment of sentence affirmed.

Colville, J., concurs in the result.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
	:	DAUPHIN COUNTY, PENNSYLVANIA
	:	
v.	:	No. CP-22-CR-539-2009
	:	
STEVEN JOHNSON	:	Appeal

MEMORANDUM OPINION

Defendant has filed an appeal from a judgment of sentence entered following his conviction for possession with the intent to deliver a controlled substance, carrying a firearm without a license and tampering with evidence. Defendant argues that the evidence was insufficient to prove his guilt for possession with the intent to deliver a controlled substance. He argues that same conviction should be dismissed since it was against the weight of the evidence and that a new trial be granted. This opinion is written in support of the judgment of sentence entered following defendant's conviction, pursuant to Pa.R.A.P. 1925(b).

Background

A bench trial was held before me on August 18, 2010,[1] at which the following relevant testimony was produced: At approximately 10:00 p.m. on December 15, 2008, in the area of Sixth and Muench Streets in Harrisburg, Harrisburg Police Officer Edward Grynkewicz was on patrol in his police vehicle when he observed Defendant driving a vehicle in which a TV monitor was mounted illegally on the front dashboard. Officer Grynkewicz learned within moments from a police dispatch that the vehicle was uninsured. (N.T. 5-6) Officer Grynkewicz conducted a lawful vehicle stop after the vehicle pulled into a gas station. Shortly thereafter, a second officer, Clark Godusky, arrived at the scene. (N.T. 26) After verifying that the vehicle was suspended for insurance cancellation, Officer Grynkewicz obtained permission to tow the vehicle. He asked Defendant if he needed to retrieve anything of value from the vehicle before it was towed and Defendant told him his gun was under the seat. After police ran a check and discovered Defendant did not have a permit to carry a concealed weapon, he was arrested. (N.T. 17-18, 28)

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[1] A suppression hearing was initially held before the Hon. Lawrence Clark on May 25, 2010, following which Judge Clark denied the suppression motion.

Officer Grynkewicz stayed with the car while Officer Godusky helped escort Defendant back to the police station in a van. Before transporting him, Officer Godusky performed a search of Defendant's person incident to his arrest during which he recovered money and cell phones. (N.T. 30) After checking that his transport van was clean in the arrestee/prisoner compartment, he placed Defendant in to the van. (N.T. 30) While driving Defendant back to the police station alone, he noticed movement as if Defendant was trying to discard something. Upon his arrival at the station, Officer Godusky quickly opened the back doors and saw Defendant attempting to swallow suspected crack cocaine. Officer Godusky observed Defendant with a white pasty substance on his lips and face and pieces of suspected crack cocaine on the van floor including one larger chunk and several smaller crumbs. (N.T. 31) Officer Godusky notified Officer Grynkewicz and also directed Defendant to spit out the substance in his mouth. (N.T. 32)

Officer Grynkewicz testified that after Defendant was arrested, he received a call from Officer Godusky that Defendant was trying to eat what looked like a large amount of crack cocaine. (N.T. 9, 20) Upon his arrival at the police station, Officer Grynkewicz saw Defendant standing up against the van and Officer Godusky yelling at him to spit out the crack. (N.T. 9) Defendant did not comply and was taken to the ground while Officer Grynkewicz assisted by pinching Defendant's nostrils to hamper his swallowing. Officer Grynkewicz described Defendant as having "a lot in his mouth" and observed Defendant try to spit out little pieces of crack cocaine. (N.T. 9-10) Officer Grynkewicz also observed a large chunk of crack on the floor of the van. (N.T. 10)

Officer Godusky testified that he and Officer Grynkewicz had Defendant face down on the ground with his head to the side trying to get him to spit out the crack cocaine during which Defendant continued to chew. (N.T. 33-34) He testified that they struggled with Defendant for two to three minutes while on the ground. (N.T. 32, 38) They eventually gave up and let him swallow what was in his mouth. (N.T. 33) Officer Godusky believed that based upon the vigorous chewing motions Defendant made and the size of the substance in his mouth, that he had been able to swallow four to five times what police were able to collect. (N.T. 34) Defendant was later taken to the hospital and treated overnight. (N.T. 10)

Officer Godusky stated that he had not felt any crack cocaine on Defendant's person when he conducted his search incident to the arrest and he surmised that Defendant may have hidden the contraband in his genitalia or buttocks area where Officer Godusky had not searched. (N.T. 36) He stated that such places are commonly used by drug traffickers to hide contraband. (N.T. 36)

Police took the firearm into possession and also recovered from Defendant's person two cell phones and $387 cash found in a single bundle in Defendant's pocket (sixteen $20's, four $10's, two $5's and seventeen $1's). (N.T. 11, 19) The firearm was a .45 caliber Ruger loaded with a single bullet. (N.T. 14). Defendant had legally purchased the firearm but did not have the proper concealed weapon permit to transport it. (N.T. 17-18) Police collected crack cocaine weighing .89 grams. (N.T. 15) Officer Grynkewicz testified that he learned that Defendant was unemployed at the time of the arrest and that his home address was in Middletown PA. (N.T. 12, 23) Police did not discover any other evidence when conducting the inventory search of the vehicle, including any drug paraphernalia. (N.T. 18)

Harrisburg Detective John Goshert, offered as an expert in street level drug trafficking, testified that in his opinion Defendant was more likely in possession of the cocaine for the purpose of dealing rather than for his own personal use based upon his possession of a loaded gun, two cell phones and $387 in cash despite being unemployed, Defendant was arrested at Sixth and Muench Streets which is an area known for drug trafficking, and that no drug using paraphernalia was found on Defendant's person or in his car. (N.T. 42-43) Chief Goshert admitted that .89 grams of cocaine was "not a lot of cocaine." He testified that a 1.0 gram of crack normally sells for $80 to $100 and that that buyers typically buy crack cocaine in $20, $40 and $60 increments. (N.T. 43, 50) Chief Goshert testified that an amount of cocaine two or three times the amount recovered by police in this case (presumably the amount of crack Defendant ingested) would not be consistent with personal use. (N.T. 43)

Defendant offered the testimony of a Brad Duppstadt, who works in the PSECU loss prevention department where Defendant had an account. He testified that Defendant's December 2008 bank statement showed that on December 1st he had a balance of $20.23. On

December 2nd, a deposit was made by check and his balance increased to $620.23 followed by a $500 deduction. On December 10th, he had a direct deposit of some sort increasing his balance to $389.24, which was then reduced that day to $9.25 after $379.99 was deducted from his account, presumably withdrawn by Defendant as cash. (N.T. 54-56) Defendant offered this testimony to show he had the means to legally obtain the cash found on his person.

At the conclusion of trial, I found Defendant guilty of carrying a firearm without a license (Count 1), possession with intent to deliver a controlled substance (Count 2) and tampering with evidence (Count 3). I thereafter sentenced Defendant to an aggregate term of 120 months intermediate punishment. Upon the Commonwealth's motion to modify, I modified the sentence on December 14, 2010 to an aggregate term of 5 to 10 years incarceration. On March 15, 2011, in ruling on Defendant's Amended PCRA petition, I granted him the right to file a post sentence motion or direct appeal *nunc pro tunc.* On March 24, 2011, Defendant filed a post sentence motion in which he challenged his conviction for possession with intent to deliver a controlled substance on the basis that it had been against the weight of the evidence. I denied defendant's post sentence motion August 16, 2011. Defendant filed an appeal which the Superior Court later quashed as untimely. Commonwealth v. Johnson, 1785 MDA 2011 (Nov. 17, 2011). Defendant thereafter filed a PCRA petition claiming ineffective assistance of counsel and seeking reinstatement of his appeal rights *nunc pro tunc*, which the Commonwealth did not oppose. I thus reinstated his appeal rights and Defendant later filed his appeal June 12, 2012 and his statement of errors on appeal June 28, 2012.

Legal Discussion

Defendant claims on appeal that (1) the evidence produced at trial was insufficient to prove beyond a reasonable doubt that he was guilty of possession with intent to deliver a controlled substance where the Commonwealth failed to prove he possessed the drugs with the intent to deliver and where the evidence established that the possession was consistent with personal use; and (2) that he should be granted a new trial on his conviction for possession with the intent to deliver a controlled substance since it was against the weight of the evidence to the extent of shocking one's sense of justice where Defendant did not possess the drugs with the intent to deliver, and where the evidence established that the possession was consistent with personal use.

Sufficiency of the Evidence

A challenge to the sufficiency of the evidence implicates the following principles:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the [above test], we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder 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. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Schoff, 911 A.2d 147, 159 (Pa. Super. 2006) (citation omitted).

To sustain a conviction for possession with intent to deliver a controlled substance (35 P.S. § 780-113(a)(30)), "the Commonwealth must prove both the possession of the controlled substance and the intent to deliver the controlled substance." Commonwealth v. Lee, 956 A.2d 1024, 1028 (Pa. Super. 2008) (citations omitted). The intent to deliver may be inferred from the circumstances including the quantity of the drugs possessed, method of packaging, the form of the drug, lack of consuming paraphernalia and defendant's behavior. Commonwealth v. Conaway, 791 A.2d 359, 362-363 (Pa. Super. 2002) (citations omitted).

The evidence admitted at trial, in the light most favorable to the Commonwealth as the verdict winner, showed there existed sufficient evidence to enable the fact-finder to find beyond a reasonable doubt that Defendant possessed crack cocaine and an intent to deliver it. While police recovered only a small amount of cocaine (.89 grams) considered consistent with personal use, Defendant had swallowed four to five times that amount beyond that recovered. The Commonwealth's expert witness testified that Defendant possessed what is normally a seller's quantity of cocaine when the crack cocaine he ingested was considered. Additional circumstantial evidence revealed Defendant's possession was consistent with that of a seller

including his possession of a loaded gun, two cell phones and a large amount of cash; that he was arrested in an area known for drug trafficking some distance from his home; that he likely hid contraband from police in his private parts where drug dealers typically hide them; and that he was not found to possess any drug paraphernalia associated with personal use.

Weight Of The Evidence

A new trial should be granted only in truly extraordinary circumstances, i.e., "when the [fact finder'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." Armbruster v. Horowitz, 813 A.2d 698, 703 (Pa. 2002). In a bench trial, as in a jury trial, "the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence." Commonwealth v. Zingarelli, 839 A.2d 1064, 1069 (Pa. Super. 2003), appeal denied, 856 A.2d 834 (Pa. 2004). "[T]he evidence at trial need not preclude every possibility of innocence, and the fact-finder is free to resolve any doubts regarding a 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. Love, 896 A.2d 1276, 1283 (Pa.Super. 2006) (citations omitted). A new trial can not be granted because of a mere conflict in testimony. Commonwealth v. Brown, 648 A.2d 1177, 1189 (Pa. 1994).

The verdict in this case was consistent with the credible evidence which showed that while police recovered only a small amount of cocaine (.89 grams) considered consistent with personal use, Defendant had swallowed a significantly larger amount beyond that recovered. This court found credible Officer Godusky's testimony as to the amount he believed Defendant swallowed – which was four to five times the amount recovered - inasmuch as he observed Defendant up close for a few minutes while Defendant struggled to swallow the crack cocaine. Thus, the credible evidence revealed that Defendant originally possessed an amount of cocaine consistent with possession with the intent to deliver or sell. The Commonwealth presented additional relevant evidence including that Defendant possessed a loaded gun, two cell phones and a large amount of cash; that he was arrested in an area known for drug trafficking some distance from his home; that he likely hid contraband from police in his private parts where

drug dealers typically hide them; and that he was not found to possess any drug paraphernalia associated with personal use.

Defendant, in his post sentence motion, cited Commonwealth v. Smagala, 557 A.2d 347 (Pa. Super. 1989) and Commonwealth v. Jackson, 645 A.2d 1366 (Pa. Super. 1994) in support of his argument that the evidence was inconsistent with a conviction for possession with the intent to deliver. In Smagala, defendant possessed .80 grams of cocaine. He had been discovered by police trespassing in a garage. Police recovered from the garage a razor blade, a rolled up twenty dollar bill, a small amount of bicarbonate of soda, test tubes, a glass pipe, wire mesh screens, hundreds of burnt matches, hundreds of used tissue papers, four index cards with names and numerical amounts written on them, two bundles of used, reusable baggies and $834 cash. Police also recovered a loaded handgun under the seat of defendant's locked vehicle outside the garage. The trial court held there was sufficient evidence to support the jury's conviction for possession with intent to deliver cocaine. The superior court, in reversing the trial court, stated as follows:

> A common sense review of the facts reveals unequivocally that the appellant possessed the cocaine for personal use, not distribution. The appellant possessed only 0.8 of a gram of cocaine, a small amount consistent with personal use. Expert testimony at trial indicated that test tubes and bicarbonate of soda are used to convert cocaine in the powder form into cocaine in the rock form, "crack." The cocaine rock is then smoked in a glass pipe inside of which is a wire mesh screen. Instantly, the garage work bench was covered with hundreds of burnt matches and the appellant possessed all the necessary tools to create and smoke "crack." Those facts are consistent with personal use of cocaine. Also, a rolled up twenty dollar bill and a razor blade were found on the appellant's person. The Commonwealth's expert testified that the razor blade was used to divide the cocaine into "lines" and then the rolled currency was used to inhale those lines of cocaine through the user's nostrils. Also, numerous used "Kleenex" were found on top of the work bench where the glass pipe was located. Again, those facts are consistent with personal use. The totality of the evidence leads us to the unavoidable conclusion that the appellant intended either to smoke the cocaine or inhale it.
>
> Commonwealth points to the glassine baggies commonly used to package cocaine for distribution as evidence of intent to deliver. However, all of the glassine baggies had been previously used, and, although they are generally reusable, many of these particular baggies had been damaged by previous use to such an extent that future use in distribution would be impossible. The Commonwealth also points to the large amount of cash on the appellant's person. Yet, there is no evidence of

> record to show that the currency was the product of drug distribution. The Commonwealth argues that the appellant possessed a handgun to protect his cash and drugs found on his person. However, the handgun was found under the seat of the appellant's car after an inventory search of the car at the police station. If, as the Commonwealth argues and the trial court implicitly agrees, the handgun was possessed to protect the appellant's cash and drugs, is it not logical that the handgun would have been inside the garage with the appellant, accessible at a moment's notice? Finally, the Commonwealth offers the tally sheets as evidence of intent to deliver. While this evidence is consistent with drug distribution, this evidence is not sufficient alone to justify a conviction for possession with intent to deliver.

Id. at 477-78 (citation omitted, footnote omitted). The notable and dispositive difference between Smagala and this case is that the defendant there was found in possession of a wide array of paraphernalia showing he possessed the cocaine in order to ingest it; specifically, he possessed numerous items and tools to allow him to convert powder cocaine into rock cocaine and then for him to smoke rock cocaine. The *hundreds* of burnt matches found in the garage revealed the defendant was most likely a crack addict who had consumed significant quantities of cocaine in the garage. On the other hand, Defendant here was found to possess no paraphernalia showing past use or anticipated future use of crack cocaine.

In Commonwealth v. Jackson, the trial court found that there was insufficient evidence to establish defendant had the requisite intent to deliver a controlled substance, upheld on appeal by the superior court, reasoning as follows:

> ... Jackson possessed 17 balloons of fentanyl [a heroin-like substance] weighing a total of 1.17 grams. ... The Commonwealth's expert testified that he knew of an addict who used 30 balloons daily. Here, the 17 balloons possessed by Jackson falls well within the amount possible for personal daily consumption. Jackson testified that he consumed about six balloons daily. Seventeen balloons, therefore, might very well represent a few days worth of drugs for his personal consumption. Jackson had a ten dollar bill in his possession at the time of his arrest. This is not a large sum, relatively speaking; such evidence does not contribute to the finding of an intent to distribute. Further, Jackson had seven syringes in a brown bag. These syringes were unused and represent personal use paraphernalia. The evidence did not establish that Jackson was dealing drugs; rather, the testimony presented at trial indicated that Jackson was a drug **user**. ...

Id. at 1369-70 (emphasis in original). The totality of the evidence revealed the defendant in Jackson possessed drugs for his own personal use, most notably his possession of seven syringes. Again, Defendant here possessed no drug use paraphernalia.

Accordingly, I entered a judgment of sentence December 10, 2010.

July 9, 2012
Date

Jeannine Turgeon, Judge

Distribution:
Andrea Haynes, Esq. – Public Defender's Office
Jason McMurry, Esq. – District Attorney's Office

EXHIBIT B

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS : DAUPHIN COUNTY, PENNSYLVANIA
V.	: NO.: 539 CR 2009
STEVEN JOHNSON	: CHARGES: CARRYING A FIREARM : WITHOUT A LICENSE; POSSESSION : WITH INTENT TO DELIVER A CONTROLLED : SUBSTANCE; TAMPERING WITH EVIDENCE

TO THE HONORABLE JEANNINE TURGEON, JUDGE OF SAID COURT:

CONCISE STATEMENT OF ERRORS COMPLAINED OF ON APPEAL PURSUANT TO APPELLATE RULE OF PROCEDURE 1925(b)

AND NOW, this 28th day of June, 2012, comes the above-named appellant, Steven Johnson, by and through his attorney, Andrea L. Haynes, Assistant Public Defender, and respectfully files the following Concise Statement of Errors Complained of on Appeal pursuant to Pa. R.A.P. 1925(b), and in support thereof, respectfully avers the following:

1. The evidence at trial was insufficient to prove beyond a reasonable doubt that Appellant was guilty of possession with intent to deliver, where the Commonwealth failed to prove that Appellant possessed the drugs with the intent to deliver, and where the evidence establishes that the possession was consistent with possession for personal use.

2. The verdict was against the weight of the evidence so as to shock one's sense of justice where Appellant did not possess the drugs with the intent to deliver, and where the evidence establishes that the possession was consistent with possession for personal use.

WHEREFORE, pursuant to Pa. R.A.P. Rule 1925(b), the appellant submits the foregoing as his reasons relied upon for appeal.

Respectfully submitted,

Andrea L. Haynes
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COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS : DAUPHIN COUNTY, PENNSYLVANIA
V.	: NO.: 539 CR 2009
STEVEN JOHNSON	: CHARGES: CARRYING A FIREARM : WITHOUT A LICENSE; POSSESSION : WITH INTENT TO DELIVER A CONTROLLED : SUBSTANCE; TAMPERING WITH EVIDENCE

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing documents upon the person(s) and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121, and Pa. R.A.P. 122:

Service in person as follows:

The Honorable Deborah Essis Curcillo
Dauphin County Courthouse
Harrisburg, Pennsylvania 17108

Dauphin County District Attorney's Office
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Harrisburg, PA 17101

Dated: June 28th, 2012

Andrea L. Haynes

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COMMONWEALTH OF PENNSYLVANIA	: IN THE SUPERIOR COURT OF : PENNSYLVANIA FOR THE : HARRISBURG DISTRICT
V.	:
STEVEN E. JOHNSON	: NO. 1095 MDA 2012

VERIFICATION

I verify that the facts contained at the above captioned docket and CD herein are true and correct to the best of my knowledge, information and belief. I understand that the facts herein are verified subject to the penalties for unsworn falsification to authorities under Crimes Code, Section 4904 (18 Pa.C.S. §4904).

Dated: October 24, 2012

Andrea L. Haynes

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COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA FOR THE
	:	HARRISBURG DISTRICT
V.	:	
	:	
STEVEN E. JOHNSON	:	NO. 1095 MDA 2012

Certification of Service

I hereby certify that I am this day serving the foregoing document upon the person(s) and in the manner indicated below which service satisfies the requirements of Pa. R.A.P. 121:

Service in person:

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