NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
CHARLES JACOB BERGER,	:	
Appellant	:	No. 1134 WDA 2011

Appeal from the Judgment of Sentence entered on March 23, 2011 in the Court of Common Pleas of Fayette County, Criminal Division, No. CP-26-CR-0000898-2008

BEFORE: MUSMANNO, BOWES and WECHT, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: January 10, 2013

Charles Jacob Berger ("Berger") appeals from the judgment of sentence imposed after he was convicted of possession with intent to deliver cocaine, possession of cocaine, and driving under the influence of a controlled substance.[1] We affirm.

The pertinent procedural history of this case is as follows:

> On March 8, 2011, [Berger] was convicted in a jury trial of [the above-mentioned offenses]. The cocaine [125 grams] was found in the center console of a vehicle driven by, and registered to, [Berger] on April 13, 2008. The discovery of the drug was made by Pennsylvania State Troopers as they were investigating a one-vehicle accident wherein [Berger] was the uncooperative driver of the vehicle involved. At trial[, Berger] admitted to the jury that he knowingly possessed the cocaine and was driving under the influence of the drug known as PCP.

[1] 35 P.S. §§ 780-113(a)(30), (a)(16); 75 Pa.C.S.A. § 3802(d)(1)(ii).

> Pennsylvania State Police Corporal Dennis Ulery, testifying as an expert in the field of narcotics investigation, told the jurors that powder cocaine is generally sold to personal users in Fayette County in amounts of 0.10 to 2.5 grams, and a gram costs approximately one hundred dollars ($100.00). The 125 grams of powder found in [Berger's] possession is exactly one-eighth of a kilogram[,] or 4.5 ounces, a very common amount to be sold or purchased by dealers. Corporal Ulery opined, based upon the weight and the packaging of the cocaine, that [Berger] possessed the cocaine with the intent to deliver it. In the Trooper's expert opinion, the possessor of such an amount in such a package had just purchased it himself and had not yet broken it down into smaller amounts. He also stated that if the powder was broken down into smaller amounts for resale, the street value would be $12,500.00, but if purchased as it was found by the officers, the value would be about $5,625.00.

Trial Court Opinion, 6/16/11, at 1-2 (citations omitted).

The trial court sentenced Berger, on the conviction of possession with intent to deliver cocaine, to a prison term of seven to fourteen years, and to a consecutive prison term of three to six months on the conviction of driving under the influence of a controlled substance.[2] Berger filed a post-sentence Motion, which the trial court denied. Berger then filed the instant timely appeal. The trial court ordered Berger to file a Rule 1925(b) concise statement of matters complained of on appeal, and Berger timely complied with that Order. Berger raises the following issues on appeal:

> 1. Whether the Pre-Trial Court erred in denying [Berger's] Omnibus Pre-Trial Motions for Writ of Habeas Corpus and Motions to Dismiss for Lack of Probable Cause…?

[2] The trial court imposed no further penalty on the conviction of possession of a controlled substance.

2. Whether the Pre-Trial Court erred in denying [Berger's] Omnibus Pre-Trial Motions for Suppression of the Evidence, by Order dated December 15, 2008, where [Berger's] vehicle was searched without probable cause, exigent circumstances, or a search warrant …?

3. Whether the Trial Court erred in sustaining the Commonwealth's objection to allow [Berger] to present evidence of his continued drug use shortly after the incident, and in doing so, prevented [Berger] from presenting evidence of his continued drug use based on subsequent drug testing and positive results for use of cocaine and PCP…?

4. Whether the Trial Court erred in failing to grant [Berger's] Post Sentence Motions for Judgment of Acquittal, and in Arrest of Judgment, as to the charge of possession with intent to deliver …?

5. Whether the Trial Court erred in allowing the evidence to be submitted to the jury against [Berger], and in failing to grant [Berger's] Post Sentence Motions, when the jury's verdict was so contrary as to shock one's sense of justice, and where the verdict was directly contradictory to the weight of the evidence, as to possession with intent to deliver…?

6. Whether the Trial Court erred in failing to grant [Berger's] Post Sentence Motions challenging the sufficiency of the evidence as to the charge of possession with intent to deliver a controlled substance…?

7. Whether the Trial Court erred in denying [Berger's] Post Sentence Motions for modification of sentence, when the Trial Court imposed a consecutive sentence upon [Berger], when a lesser or even concurrent sentence was warranted and justified under the circumstances?

8. Whether the Trial Court erred in imposing the mandatory minimum sentence for possession with intent to deliver a controlled substance, according to the sentencing provisions of 18 Pa.C.S.A. § 7508…?

9. Whether the Trial Court erred in imposing the statutory maximum sentence for Driving under the Influence, when

> [Berger] admitted to driving under the influence to the jury and expressed remorse?

Brief for Appellant at 4-5.

Berger first contends that the trial court erred in denying his omnibus pre-trial Motions for writ of *habeas corpus* and to dismiss for lack of probable cause. Specifically, Berger argues that the Commonwealth failed to meet its burden of showing sufficient probable cause to suspect that Berger had any intent to deliver a controlled substance and failed to establish a *prima facie* case of possession with intent to deliver against Berger.

"When reviewing a trial court's decision to grant a *habeas corpus* petition, we will not reverse the trial court's decision absent a manifest abuse of discretion." ***Commonwealth v. Ruby***, 838 A.2d 786, 788 (Pa. Super. 2003).

> Furthermore, our scope of review is limited to determining whether the Commonwealth has established a *prima facie* case. In criminal matters, a *prima facie* case is that measure of evidence which, if accepted as true, would justify the conclusion that the defendant committed the offense charged.

Id. (citations omitted).

However, once a defendant has gone to trial and been found guilty of a crime, "any defect in the preliminary hearing is rendered immaterial." ***Commonwealth v. Jacobs***, 640 A.2d 1326, 1330 (Pa. Super. 1994). Where it is determined at trial that the Commonwealth's evidence is sufficient to be submitted to the jury, any deficiency in the presentation to the district justice would be deemed harmless. ***Id.***

In the present case, the Commonwealth's evidence of possession with intent to deliver was sufficient to submit to the jury, and the jury convicted Berger of that crime. Therefore, Berger's claim concerning his pre-trial Motions for writ of *habeas corpus* and to dismiss lacks merit.

Next, Berger contends that the pretrial court erred in denying his omnibus pretrial Motion to suppress. Berger asserts that the warrantless search of the vehicle was illegal because the police lacked probable cause to search, and no exigent circumstances were present.

Our standard of review of the denial of a motion to suppress is as follows:

> An appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Since the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.

Commonwealth v. Stevenson, 894 A.2d 759, 769 (Pa. Super. 2006) (citation omitted).

"Inventory searches are a well-defined exception to the search warrant requirement." ***Commonwealth v. Hennigan***, 753 A.2d 245, 254-55 (Pa. Super. 2000) (citations omitted).

> "The purpose of an inventory search is not to uncover criminal evidence. Rather, it is designed to safeguard seized items in order to benefit both the police and the defendant." Inventory searches serve one or more of the following purposes: (1) to protect the owner's property while it remains in police custody; (2) to protect the police against claims or disputes over lost or stolen property; (3) to protect the police from potential danger; and (4) to assist the police in determining whether the vehicle was stolen and then abandoned.
>
> A warrantless inventory search of an automobile is different from a warrantless investigatory search of the same. An inventory search of an automobile is permitted where: (1) the police have lawfully impounded the automobile; and (2) the police have acted in accordance with a reasonable, standard policy of routinely securing and inventorying the contents of the impounded vehicle.

Id. (citations omitted).

The police may lawfully impound a vehicle "in the interests of public safety and efficient movement of traffic." ***Hennigan***, 753 A.2d at 256. Further, a police officer

> may remove or cause to be removed to the place of business of the operator of a wrecker or to a nearby garage or other place of safety any vehicle found upon a highway under any of the following circumstances:
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> …
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> (2) The person or persons in charge of the vehicle are physically unable to provide for the custody or removal of the vehicle.
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> (3) The person driving or in control of the vehicle is arrested for an alleged offense for which the officer is required by law to take the person before an issuing authority without unnecessary delay….

75 Pa.C.S.A. 3352(c).

In the instant case, the Commonwealth presented evidence at the omnibus pretrial hearing that two state troopers found Berger in the driver's seat of a vehicle, which was stuck in a culvert on a roadway, with the engine still running. N.T., 11/19/08, at 4-5. Berger was unresponsive to the troopers' questions and commands. ***Id.*** at 7-10. The troopers had to pull Berger out of the vehicle. ***Id.*** at 9. Trooper Aaron Gilbert suspected that Berger was under the influence of a narcotic because of his lack of responsiveness, lack of odor of alcohol, and fixed, bloodshot eyes. ***Id.*** at 11. After calling for a tow of the vehicle, Trooper Gilbert conducted an inventory search, during which he recovered a white powdery substance, later identified as 125 grams of cocaine, in a clear plastic bag in the unlocked center console of the vehicle. ***Id.*** at 11-13. Another witness at the omnibus pretrial hearing, Corporal Dennis Ulery, gave expert testimony that, based on the large amount of cocaine seized and the lack of any drug paraphernalia indicating personal use, Berger possessed the cocaine with the intent to deliver it. ***Id.*** at 32-34.

The record shows that Berger was "physically unable to provide for the custody or removal of" his vehicle. Further, as Berger was arrested on charges of felonies and a misdemeanor as well as summary offenses, he was required to be taken before an issuing authority without delay. ***See*** Pa.R.Crim.P. 519(A)(1) (providing that, when a defendant has been arrested without a warrant in a court case, the defendant "shall be afforded a

preliminary arraignment by the proper issuing authority without unnecessary delay"); Pa.R.Crim.P. 103 (providing that a court case is one in which one or more of the offenses charged is, *inter alia*, a misdemeanor or felony). Thus, we conclude that the police lawfully impounded Berger's vehicle.

Further, the record demonstrates that the police acted "in accordance with a reasonable, standard policy of routinely securing and inventorying the contents of the impounded vehicle." ***See Hannigan***, 753 A.2d at 255; N.T., 11/19/08, at 11, 28 (wherein Trooper Gilbert testified that, after calling for a tow of the vehicle, he conducted an inventory search pursuant to department policy, which was to perform an inventory search for valuables when a vehicle is being towed). Accordingly, we conclude that the trial court did not err in denying Berger's Motion to suppress.

Next, Berger contends that the trial court erred in sustaining the Commonwealth's objection to evidence of Berger's continued drug use after the incident, including evidence of drug testing showing use of cocaine and PCP, which would have supported Berger's claim of use of and addiction to drugs as a defense to the charge of possession with intent to deliver.

> The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that a trial court abused its discretion. In determining whether evidence should be admitted, the trial court must weigh the relevance and probative value of the evidence against the prejudicial impact of that evidence. Evidence is relevant if it logically tends to establish a material fact in the case or tends to support a reasonable inference regarding a material fact.

Commonwealth v. Alderman, 811 A.2d 592, 595 (Pa. Super. 2002). Evidence that is not relevant is not admissible. Pa.R.E. 402.

In the present case, Berger testified at trial that he was addicted to the drugs PCP and cocaine. N.T., 3/7/11, at 94-96. Berger admitted to possessing cocaine, but testified that he possessed it for personal use, not for the purpose of selling or delivering it. ***Id.*** at 93, 97. Berger testified that, after the incident in question, he applied for a new job, and had to undergo drug testing. ***Id.*** at 98. Berger attempted to offer into evidence the results of the drug testing to show that he had a drug addiction and that he had tested positive for cocaine. ***Id.*** at 99. The Commonwealth objected to the evidence on the basis that it was not relevant to the time-period in issue. ***Id.*** The trial court sustained the objection. ***Id.*** at 101.

Upon review, we conclude that the trial court did not abuse its discretion in denying admission of the above evidence. The proffered evidence could not substantiate that Berger was addicted to drugs at the time of the incident at issue. Evidence that Berger tested positive for cocaine at a later date also could not establish that he lacked the intent to deliver the cocaine he possessed on the date at issue. Therefore, the proffered evidence was not relevant.

Berger next contends that the trial court erred in denying his post-sentence Motions for judgment of acquittal and in arrest of judgment on the charge of possession with intent to deliver. Similarly, Berger contends that

the evidence was insufficient to support his conviction of possession with intent to deliver.

"A motion for judgment of acquittal challenges the sufficiency of the evidence to sustain a conviction on a particular charge, and is granted only in cases in which the Commonwealth has failed to carry its burden regarding that charge." ***Commonwealth v. Hutchinson***, 947 A.2d 800, 805-06 (Pa. Super. 2008).

> 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.

Id. (emphasis omitted).

In order to convict an accused of possession with intent to deliver under 35 P.S. § 780-113(a)(30), "the Commonwealth must prove that he 'both possessed the controlled substance and had an intent to deliver that substance.'" ***Commonwealth v. Koch***, 39 A.3d 996, 1001 (Pa. Super.

2011) (citation omitted). "When determining whether a defendant had the requisite intent to deliver, relevant factors for consideration are 'the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large sums of cash[.]'" ***Id.*** (citation omitted). "[E]xpert testimony is … admissible 'concerning whether the facts surrounding the possession of controlled substances are consistent with an intent to deliver rather than an intent to possess it for personal use.'" ***Id.*** (citation omitted). "[P]ossession with intent to deliver can be inferred from the quantity of the drugs possessed and other surrounding circumstances, such as lack of paraphernalia for consumption." ***Commonwealth v. Ratsamy***, 934 A.2d 1233, 1237-38 (Pa. 2007).

In the present case, our review of the record shows that the testimony given at trial was consistent with that given at the pretrial hearing, as summarized above. Officer Ulery additionally testified that a cocaine user normally would possess about half of a gram of cocaine. N.T., 3/7/11, at 84. He also indicated that a user of cocaine normally possesses some sort of drug paraphernalia, with which to ingest the cocaine. ***Id.*** at 84-85. We conclude that the evidence before the trial court was sufficient to sustain Berger's conviction of possession of cocaine with intent to deliver. Further, the trial court has correctly addressed this claim, and we affirm on the basis of the trial court's well-reasoned Opinion with regard to this issue. ***See*** Trial Court Opinion, 6/16/11, at 2-5.

Berger also contends that his conviction of possession with intent to deliver was against the weight of the evidence. Our standard of review of a weight of the evidence claim is as follows:

> The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses. As an appellate court, we cannot substitute our judgment for that of the finder of fact. Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice….
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> Furthermore,
>
> > where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Rabold, 920 A.2d 857, 860-61 (Pa. Super. 2007) (citations omitted).

After reviewing the record, we conclude that the trial court did not abuse its discretion in denying Berger's weight of the evidence challenge, as to his conviction of possession with intent to deliver. The trial court has correctly addressed this claim, and we affirm on the basis of the trial court's well-reasoned Opinion with regard to this issue. ***See*** Trial Court Opinion, 6/16/11, at 2-5.

Next, Berger raises three sentencing claims. Berger first contends that the trial court erred by denying his Motion to modify sentence because the

trial court had imposed a consecutive sentence. Berger asserts that a lesser or concurrent sentence was warranted under the circumstances. This claim raises a challenge to the discretionary aspects of Berger's sentence.

> Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. Prior to reaching the merits of a discretionary sentencing issue:
>
> [W]e conduct a four part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. [720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).
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> When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. Pa.R.A.P. 2119(f)….
>
> The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. A substantial question exists "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process."

Commonwealth v. Phillips, 946 A.2d 103, 112 (Pa. Super. 2008) (some citations omitted).

Here, Berger filed a timely Notice of appeal, preserved his issue in a Motion to modify sentence, and has included a Rule 2119(f) statement in his

appellate brief. Therefore, we must determine whether Berger has raised a substantial question.

"[A]n allegation that the sentencing court failed to consider mitigating factors generally does not raise a substantial question for our review." ***Commonwealth v. Rhoades***, 8 A.3d 912, 918-19 (Pa. Super. 2010).

> Moreover, where … the sentencing court had the benefit of a pre-sentence investigation report, "we can assume the sentencing court 'was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.'"

Id. (citations omitted).

Bald allegations of excessiveness of sentence also do not raise a substantial question. ***Commonwealth v. Titus***, 816 A.2d 251, 255 (Pa. Super. 2003). Further, in determining the sentence to be imposed, the court may impose sentences consecutively or concurrently. 42 Pa.C.S.A § 9721(a).

Here, Berger asserts in his Rule 2119(f) statement that his sentence "was unnecessarily harsh, severe, cruel, and in violation of [Berger's] constitutionally protected rights against cruel and unusual punishment when [Berger] could be amenable and rehabilitated by a lesser, concurrent sentence." Brief for Appellant at 25.

Berger's Rule 2119(f) statement does not articulate how the imposition of consecutive sentences herein was "unnecessarily harsh, severe, [and] cruel." Brief for Appellant at 25. Further, Berger's assertion that he could

be rehabilitated by a lesser, concurrent sentence suggests that the trial court did not adequately consider mitigating factors. Here, the record shows that the trial court was informed by a pre-sentence report. N.T., 3/23/11, at 2. For these reasons, we conclude that Berger has not stated a substantial question.

Berger raises another claim challenging the discretionary aspects of his sentence, *i.e.*, that the trial court erred in imposing the statutory maximum sentence for his conviction of driving under the influence of a controlled substance because Berger admitted to the jury that he had committed that offense and expressed his remorse. This claim also suggests that the trial court did not adequately consider mitigating factors in imposing sentence. Such a claim does not raise a substantial question justifying our review. ***See Rhoades***, 8 A.3d at 918-19.

Even if Berger had raised a substantial question with regard to the discretionary aspects of his sentence, his sentencing claim lacks merit. Sentencing claims are reviewed under an abuse of discretion standard. ***Commonwealth v. Shugars***, 895 A.2d 1270, 1275 (Pa. Super. 2006).

Here, the trial court indicated that it had "careful[ly] consider[ed] … all pertinent factors" in imposing Berger's DUI sentence. Trial Court Opinion, 6/16/11, at 6. Further, the record shows that Berger had a prior record score of two. N.T., 3/23/11, at 4. The offense gravity score for his DUI conviction under 75 Pa.C.S.A. § 3802(d) is one. 204 Pa. Code § 303.15.

For these scores, the sentencing guidelines recommend a minimum sentence of "restorative sanctions to two months," plus or minus three months. 204 Pa. Code § 303.16. Thus, Berger's minimum sentence of three months was within the sentencing guidelines recommendation.

In addition, a person who violates section 3802(d) and has no prior DUI or related offenses may be sentenced to a maximum prison term of six months. 75 Pa.C.S.A. § 3803. Based on these factors, we conclude that the record reveals no abuse of discretion by the trial court in imposing sentence on Berger's DUI conviction.

Berger also challenges the trial court's imposition of a mandatory minimum sentence of seven to fourteen years on his conviction of possession with intent to deliver. Berger contends that the trial court erred in relying on his previous drug trafficking conviction that occurred in 1991. The relevant statute provides as follows:

> (3) A person who is convicted of violating section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance is coca leaves or is any salt, compound, derivative or preparation of coca leaves… shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:
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> …
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> (iii) when the aggregate weight of the compound or mixture of the substance involved is at least 100 grams; four years in prison and a fine of $25,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; **however, if at the time of sentencing the defendant has been convicted of another**

> **drug trafficking offense: seven years in prison** and $50,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity.

18 Pa.C.S.A. § 7508(a)(3)(iii) (emphasis added).

Berger claims that his 1991 drug trafficking conviction was too remote in time to be applied in this case. However, section 7508(a)(3)(iii) contains no time limit on previous drug trafficking offenses. As the trial court noted, Berger has cited no authority for his argument concerning his 1991 drug trafficking conviction. ***See*** Trial Court Opinion, 3/23/11, at 5. We conclude that this claim lacks merit.

Judgment of sentence affirmed.

J-A24031/12

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

vs. :

CHARLES J. BERGER, : No. 898 of 2008
Defendant

OPINION

Wagner, J.

Before the Court are Defendant's Post-Sentence Motions presenting challenges to the weight and the sufficiency of the evidence, as well as a request for modification of the sentence.

On March 8, 2011, Defendant was convicted in a jury trial of Possession with Intent to Deliver 125 grams of cocaine, Possession of 125 grams of cocaine, and Driving Under the Influence of a Controlled Substance. The cocaine was found in the center console of a vehicle driven by, and registered to, Defendant on April 13, 2008. N.T., pp. 22-23, 50, 93. The discovery of the drug was made by Pennsylvania State Troopers as they were investigating a one-vehicle accident wherein Defendant was the uncooperative driver of the vehicle involved. Id. p. 22-24. At trial Defendant admitted to the jury that he knowingly possessed the cocaine and was driving under the influence of the drug known as PCP. Id. pp. 93-94.

Pennsylvania State Police Corporal Dennis Ulery, testifying as an expert in the field of narcotics investigation, told the jurors that powder cocaine is generally sold to personal users in Fayette County in amounts of 0.10 to 2.5 grams, and a gram costs

approximately one hundred dollars ($100.00). The 125 grams of powder found in Defendant's possession is exactly one-eighth of a kilogram or 4.5 ounces, a very common amount to be sold or purchased by dealers. Id. pp. 81-82. Corporal Ulery opined, based upon the weight and the packaging of the cocaine, that Defendant possessed the cocaine with the intent to deliver it. In the Trooper's expert opinion, the possessor of such an amount in such a package had just purchased it himself and had not yet broken it down into smaller amounts. Id. p. 85, 88-89. He also stated that if the powder was broken down into smaller amounts for resale, the street value would be $12, 500.00, but if purchased as it was found by the officers, the value would be about $5,625.00. Id. pp. 86-87.

DISCUSSION

1. Sufficiency of Evidence, Judgment of Acquittal[1], and Verdict Against the Weight

Defendant now alleges that the Commonwealth failed to prove that he possessed the cocaine with the intent to deliver it, claiming instead that he is an addict who uses that drug to come down from the highs he gets when he uses PCP. Defendant testified to those claims at trial, and insisted to the jury that he bought the very large quantity of cocaine because it was cheaper that way. He said that on the day he was involved in the accident that led to his arrest on these charges, he had had the cocaine at his house for the past four days, but put it into his vehicle to take it to a storage locker so as to keep it safe for his own future use. Id. pp. 104-106. In his instant motion, Defendant contends that his own testimony, as to the whereabouts of the cocaine and the reason for the drug being

[1] As the defense motion for judgment of acquittal during trial challenges the sufficiency of the evidence, *see* Commonwealth v. Hutchinson, 947 A.2d 800 (Pa.Super.2008), there is no need for the Court to address this issue separately now that it is subsumed within Defendant's post-sentence claim of insufficient evidence.

in his car, was uncontradicted, and the testimony of the Commonwealth's expert witness that Defendant intended to deliver the cocaine, based only on the quantity of the drug, was insufficient to prove beyond a reasonable doubt that he did so. Defendant also asserts that the verdict is so contrary to the weight of the trial evidence that a new trial is imperative because "the jury wrongfully ignored" Defendant's testimony about his intended personal use of the drug.

In reviewing a claim of insufficient evidence, the issue is whether viewing all of the evidence admitted at trial in the light most favorable to the Commonwealth as verdict winner and giving it the benefit of all reasonable inferences based thereon, there is sufficient evidence to enable the fact-finder to find every element of the crime charged beyond a reasonable doubt. Commonwealth v. LaBenne, __A.3d__, 2011 WL 2078746 (Pa.Super). The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence, and it may sustain its burden wholly through circumstantial evidence. Id. "[P]ossession with intent to deliver an illegal substance can be inferred from the quantity of the drugs possessed and other such surrounding circumstances, such as lack of paraphernalia for consumption." Commonwealth v. Ratsamy, 594 Pa. 176, 185, 934 A.2d 1233, 1238 (2007).

Defendant admitted to possessing and transporting a very large quantity of cocaine which, as set forth above, was packaged in one large plastic bag. It is true, as Defendant argues, that the expert witness stated that drug dealers often are found with a supply of smaller baggies and other accoutrements of their business. However, the same expert also said that if the Defendant had recently purchased this quantity and had not yet re-packaged it, it could be expected that the drug would still be in the original packaging

as sold to Defendant by his source. Moreover, the cocaine was found in Defendant's vehicle, not his residence, so it is hardly surprising that cutting tools, scales and other packaging materials were not found with the drug. Although Defendant claimed to be an addict who regularly consumes large amounts of cocaine so as to overcome the effects of his addiction to PCP, significantly no paraphernalia or tools for using the drug were found in his vehicle or on his person.

Such evidence --- the extremely large quantity of the cocaine possessed by Defendant, the one large bag containing the drug, and the absence of any items associated with ingesting or injecting the substance, as well as the opinion of the expert witness as to the street value for resale --- reasonably leads to an inference that Defendant possessed the cocaine with the intent to deliver it. See Ratsamy, *supra*. There is, thus, no basis on which to set aside Defendant's conviction on that charge.

The jury obviously believed the testimony of the expert witness, Pennsylvania State Police Corporal Ulery, regarding Defendant's apparent intention to deliver the drug, and gave weight to the trooper's expert opinion concerning the amount of cocaine an addict who intends to use it would generally possess. Just as obviously, the jurors disbelieved Defendant's claim that he was transporting the cocaine to a storage facility so as to personally use it later. The credibility of trial witnesses and the weight to be accorded to their testimony are matters within the province of the jury as fact-finder, and the fact-finder is free to believe all, part or none of the evidence presented to it. Commonwealth v. Brooks, 7 A.3d 852 (Pa.Super.2010). The guilty verdict relative to the intent to deliver 125 grams of cocaine does not shock the Court's conscience so as to

require the grant of a new trial in order to prevent a miscarriage of justice. *See* Commonwealth v. Sullivan, 820 A.2d 795, fn 11 (Pa.Super.2003).

2. Sentence

Lastly, Defendant seeks a modification of his sentence of not less than seven(7) nor more than fourteen(14) years of incarceration, claiming the same is too harsh and the Court should have exercised its discretion to impose a lesser penalty. As conceded by defense counsel with no questions or objection from Defendant at sentencing on March 23, 2011, Defendant is subject to a mandatory sentence on his conviction for driving under the influence of a controlled substance. Sentencing Proceedings, March 23, 2011, p. 3. Nevertheless, citing the provisions of 18 Pa.C.S. §7508(a)(3)(iii) relative to a mandatory minimum term of incarceration for four years when the amount of the illegal substance is at least 100 grams, he argues that he should have been sentenced in accordance therewith. He concedes that the latter part of said statute provides for a seven year minimum term of imprisonment if at the time of sentencing, the defendant has been convicted of another drug trafficking offense. While admitting that he does have a prior drug trafficking offense, Defendant contends that, because it occurred in 1991, it is too remote to be considered, and the Court should have used its discretion to decide more information was needed so as to determine if the mandatory sentence is appropriate in this case.

As noted by the Court during sentencing, Defendant has a prior record score of 2, an offense gravity score of 11, and is subject to the mandatory penalties set forth in the statute, 18 Pa.C.S.§ 7508. Id. p.11. He cites no authority for his argument that his 1991 conviction is so remote in time that it should not be considered for sentencing purposes

under this statute. Additionally, the Court notes that where a mandatory minimum sentence has been provided by the legislature, a court does not have discretion to impose a lesser sentence. See Commonwealth v. Brougher, 978 A.2d 373 (Pa.Super.2009).

Defendant also takes issue with the Court's decision to sentence him to a consecutive term of imprisonment of three(3) to six(6) months for the driving under the influence conviction, rather than running that sentence concurrent with the sentence for the intended delivery. As the Court explained at the sentencing proceeding, Defendant has actually been convicted of driving under the influence three times, but due to the timing of those convictions could only be sentenced as if the instant driving under the influence of a controlled substance conviction was his first. Although a concurrent sentencing scheme was within the Court's discretion, after careful consideration of all pertinent factors, the Court determined that the imposition of a sentence running consecutive to the possession with intent to deliver sentence is the most appropriate disposition of the driving under the influence conviction. The Court sees no need to reconsider its decision.

Accordingly, in light of the foregoing discussion, the Court enters the following:

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

vs. :

CHARLES J. BERGER, : No. 898 of 2008
Defendant

ORDER

Wagner, J.

AND NOW, June 16, 2011, the within Post-Sentence Motions filed by Defendant are hereby DENIED.

BY THE COURT:

_____, J.

ATTEST:

Janice Snyder/mm
Clerk Of Courts

6-17-11 10:00
DIST/DATE

PET _____
DEF _____
DA I
PO I
PD _____
WARD I
SHER _____
CA I
ATTY Proden-R
CC _____

JANICE SNYDER
CLERK OF COURTS
FAYETTE COUNTY, PA

2011 JUN 17 A 9:28

FILED