

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

BRUCE LESTER

Appellant

No. 1215 WDA 2012

Appeal from the Judgment of Sentence March 8, 2012
In the Court of Common Pleas of Cambria County
Criminal Division at No(s): CP-11-CR-0000716-2011

BEFORE: BENDER, J., MUNDY, J., and STRASSBURGER, J.*

MEMORANDUM BY MUNDY, J.:

Filed: March 15, 2013

Appellant, Bruce Lester, appeals from the March 8, 2012 aggregate judgment of sentence of 24 to 48 months' imprisonment imposed after he was found guilty of unlawful delivery of a controlled substance, possession of a controlled substance, and criminal use of a communication facility.¹ After careful review, we affirm the judgment of sentence.

The relevant facts and procedural history of this case may be summarized as follows. On March 31, 2011, Appellant was arrested and charged with the aforementioned offenses after selling crack cocaine to an

* Retired Senior Judge assigned to the Superior Court.

¹ 35 Pa.C.S. §§ 780-113(a)(30), 780-113(a)(16) and 18 Pa.C.S.A. § 7512, respectively.

undercover informant during a controlled buy. On January 13, 2012, following a two-day jury trial, Appellant was found guilty on all counts. Subsequently, on March 8, 2012, the trial court imposed the aforementioned aggregate sentence of 24 to 48 months' imprisonment. On March 15, 2012, Appellant timely filed a post-sentence motion wherein he challenged the weight and sufficiency of the evidence in support of his convictions. The trial court denied said motion on July 11, 2012. This timely appeal followed.²

On appeal, Appellant raises the following issue for our review.

1. Whether the verdict reached by the jury, and sustained by the trial court on post-sentence motions, was against the weight of the evidence presented by the Commonwealth?

Appellant's Brief at 4.

We begin by noting, "[a] true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed." ***Commonwealth v. Morgan***, 913 A.2d

² The record reveals that Appellant's Rule 1925(b) statement was filed one day late. We note that the untimely filing of a concise statement is the equivalent of a complete failure to file, which results in waiver of all claims on appeal and constitutes *per se* ineffectiveness. ***Commonwealth v. Burton***, 973 A.2d 428, 432-433 (Pa. Super. 2009). Generally, such failure would compel remand. **See** Pa.R.A.P. 1925(c)(3) (requiring remand for filing of a concise statement *nunc pro tunc* in instances of counsel's *per se* ineffectiveness). However where, as here, the late filing did not prevent the trial court from addressing the merits of Appellant's issues in its 1925(a) opinion, this Court may decide the appeal on the merits. **See *Commonwealth v. Thompson***, 39 A.3d 335, 340 (Pa. Super. 2012), *citing *Burton, supra**.

906, 909 (Pa. Super. 2006) (citation omitted), *appeal denied*, 927 A.2d 623 (Pa. 2007). As such, an allegation that a “verdict was against the weight of the evidence is addressed to the discretion of the trial court.” ***Commonwealth v. Diggs***, 949 A.2d 873, 879 (Pa. 2008), *cert. denied*, ***Diggs v. Pennsylvania***, 129 S.Ct. 1580 (2009). Where the trial court has ruled on a weight claim, an appellate court’s role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, “[our] review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.” ***Commonwealth v. Shaffer***, 40 A.3d 1250, 1253 (Pa. Super. 2012) (citation omitted). “The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact.” ***Id.***

Prior to addressing the merits of Appellant’s weight claim, we must first ascertain whether he has properly preserved the issue for appellate review. Pennsylvania Rule of Criminal Procedure 607 provides, in pertinent part, that a claim that the verdict was against the weight of the evidence “shall be raised with the trial judge in a motion for a new trial: (1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion.” Pa.R.Crim.P. 607(A). “The purpose of this rule is to make it clear that a challenge to the weight of

the evidence must be raised with the trial judge or it will be waived.” ***Commonwealth v. McCall***, 911 A.2d 992, 997 (Pa. Super. 2006). Following our careful review, we conclude that Appellant has properly preserved his weight of the evidence claim by raising it in his March 15, 2012 post-sentence motion. We now turn to the merits of said claim.

Instantly, Appellant asserts that his conviction was against the weight of the evidence since the Commonwealth’s case largely relied upon the testimony of a confidential informant whose criminal record includes numerous convictions of crimes involving deceit and dishonesty. Appellant’s Brief at 8. Specifically, Appellant avers the following.

The Commonwealth produced two witnesses [who] were supposed to provide direct evidence of the crimes allegedly committed by Appellant. One of these witnesses ... Appellant’s co-defendant ... testified that she did not see Appellant commit any of the crimes charged against [him].

The second witness ... was a confidential informant. The Commonwealth relied heavily on said confidential informant to substantiate alleged illegal activity on behalf of Appellant. Said confidential informant’s record is littered with numerous *crimen falsi* convictions. Further, the record supporting Appellant’s utilization of a communication facility to facilitate alleged drug deliveries is based solely on ... said confidential informant’s version of an alleged conversation.

Id. at 8-9.

Upon careful review of the record, including the briefs of the parties, the applicable law, and the well-reasoned findings of the trial court, it is our

determination that there is no merit to Appellant's weight claim. The record indicates that defense counsel emphasized the confidential informant's criminal record during closing arguments. Specifically, counsel argued that the informant's testimony should be regarded with skepticism given his numerous convictions for crimes involving dishonesty and deceit. N.T., 1/13/12, at 10-11. Ultimately, however, the requisite credibility determinations rested in the sound discretion of the jury. **See Shaffer, supra.** Herein, the jury concluded that the Commonwealth's witnesses were credible, and elected not to believe Appellant's version of events. We are precluded from reweighing the evidence and substituting our judgment for that of the fact-finder. **Id.**

In reaching this decision, we further note that,

[w]hen the challenge to the weight of the evidence is predicated on the credibility of trial testimony, our review of the trial court's decision is extremely limited. Generally, unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, these types of claims are not cognizable on appellate review.

Commonwealth v. Gibbs, 981 A.2d 274, 282 (Pa. Super. 2009) (citations and internal quotation marks omitted), *appeal denied*, 3 A.3d 670 (Pa. 2010).

Accordingly, for all the foregoing reasons, we affirm Appellant's March 8, 2012 judgment of sentence.

Judgment of sentence affirmed.