

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

LARRY WOODSON

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1378 MDA 2011

Appeal from the Order Entered June 30, 2011  
In the Court of Common Pleas of Luzerne County  
Criminal Division at No(s): CP-40-CR-0002033-2007

BEFORE: OLSON, J., OTT, J., and FITZGERALD, J.\*

DISSENTING STATEMENT BY FITZGERALD, J. Filed: March 12, 2013

I respectfully dissent because, in my view, Appellant established that trial counsel was ineffective for failing to challenge his convictions for conspiracy.

Appellant was convicted and sentenced to separate, consecutive terms of imprisonment for three counts of criminal conspiracy related to three deliveries of cocaine to undercover officers. Those deliveries were arranged by a confidential informant. In each instance, an undercover officer met with the confidential informant and directed him to arrange a delivery. The confidential informant called Appellant while under the supervision of the

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\* Former Justice specially assigned to the Superior Court.

officer. Appellant then arrived at the confidential informant's apartment, where the undercover officer was waiting, and delivered the cocaine directly to the officer. The confidential informant was compensated by the Commonwealth for arranging these controlled purchases. I would thus hold that the confidential informant was acting as a government agent at all times relevant to the Commonwealth's case against Appellant.

It is well settled that the essence of a conspiracy is the criminal agreement between co-conspirators. **See generally Commonwealth v. Murphy**, 844 A.2d 1228, 1238 (Pa. 2004). The touchstone of that conspiratorial agreement is the existence of shared criminal intent,<sup>1</sup>

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<sup>1</sup> While the majority suggests that the convictions for conspiracy were proper in light of 18 Pa.C.S. § 904, I am of the view that Section 904 does not alter the essential elements of the crime of conspiracy. Rather, the decisional law establishes that Pennsylvania continues to follow the doctrine that conspiracy is a "bilateral" rather than "unilateral" offense. **See Murphy**, 844 A.2d at 1238; **Johnson**, 719 A.2d at 784. **Accord People v. Hensley**, Ill.App.3d 224 (2004); **State v. Pacheco**, 125 Wash.2d 150 (1994). **But see State v. Roldan**, 714 A.2d 351 (N.J. Super. App. Div. 1998) (distinguishing between bilateral and unilateral conspiracy and holding that New Jersey's similar Model Penal Code-based statute established a unilateral theory of conspiracy). Thus, while Section 904 excludes former common law defenses to a charge of conspiracy, including acquittal or immunity from prosecution of the co-conspirator, mistake of fact, and the impossibility of the shared criminal object, it does not relieve the Commonwealth of its fundamental burden to prove shared criminal intent between co-conspirators. Moreover, while the rationale of the majority is persuasive, I would conclude that such an expansion in the application of the law of conspiracy would require action by the General Assembly. **See generally** Wash. Rev. Code § 9A.28.040(2)(f) (1997) (specifying that it is not defense to conspiracy where alleged co-conspirator "[i]s a law enforcement officer or government agent who did not intend that a crime be committed").

***Commonwealth v. Johnson***, 719 A.2d 778, 784 (Pa. Super. 1998) (*en banc*).

Here, the confidential informant, who was the sole possible co-conspirator in this case, neither was a co-conspirator, nor possessed the requisite criminal intent. Accordingly, I would conclude that the Commonwealth failed to prove the existence of a conspiratorial agreement necessary under Pennsylvania law. Therefore, there was merit to Appellant's underlying claim that the convictions for conspiracy were illegal.<sup>2</sup>

Moreover, trial counsel, when explaining his decision to forego a challenge on this issue, asserted that the charges and convictions for conspiracy were proper. However, trial counsel believed that Appellant could have been convicted, beyond a reasonable doubt, based on sheer speculation that Appellant must have been a member of a larger network of individuals. **See** N.T., 2/23/11, at 6. Indeed, trial counsel provided no rationale for his decision not to challenge the conspiracy charges based on the lack of shared criminal intent between Appellant and the confidential

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<sup>2</sup> The majority suggests that the issue of the legality of the conspiracy convictions was considered in our prior decision affirming the judgment of sentence. However, I would not find statements made in our prior discussion on Appellant's challenge to the weight of the evidence to be binding upon the present challenge. **See *Commonwealth v. Woodson***, No. 2108 MDA 2008 at 3–4 (Pa. Super. unpublished memorandum filed Apr. 9, 2010).

informant. Consequently, I would find that trial counsel failed to articulate any reasonable tactical basis for not challenging the conspiracy convictions.

Lastly, Appellant proved prejudice in this case, that is, the existence of illegal convictions for conspiracy upon which he was sentenced to serve an additional eight and three-quarters years' to seventeen years' imprisonment. Therefore, I would conclude that Appellant is entitled to post conviction relief based on his claim that trial counsel was ineffective for failing to challenge his conspiracy convictions, that those convictions must be vacated, and that the case be remanded for resentencing.

For the foregoing reasons, I dissent.