2013 PA Super 303

COMMONWEALTH OF PENNSYLVANIA Appellee v. ANDRE RAYMELLE WATLEY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1480 EDA 2011

Appeal from the Judgment of Sentence September 17, 2010
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-CR-0001701-2009

BEFORE: STEVENS, P.J.,* FORD ELLIOTT, P.J.E., BOWES, J., GANTMAN, J., PANELLA, J., SHOGAN, J., LAZARUS, J., MUNDY, J., and OTT, J.

DISSENTING OPINION BY LAZARUS, J. **FILED NOVEMBER 25, 2013**

I respectfully dissent. The majority today allows a jury's speculative verdict to withstand muster. Viewing the evidence in the light most favorable to the Commonwealth, as verdict winner, together with all reasonable inferences therefrom, I believe that the trier of fact could not have found each and every element of PWID beyond a reasonable doubt. Specifically, the evidence at trial was insufficient to allow the jury to properly draw the inference that Watley had the specific intent to deliver or distribute Ecstasy.

In this case, the jury needed expert testimony to make the crucial determination as to whether possession of 34 pills of Ecstasy represents an amount an individual intends to sell or personally use. Without such

*President Judge Stevens did not participate in the consideration or decision of this case.

testimony, the jury's verdict is infirm and Watley's conviction for PWID must be reversed. The majority's statement that "no case has ever held that the absence of [expert] testimony automatically renders the evidence insufficient to sustain a PWID conviction," Majority Opinion, at 10, completely misses the mark. There is abundant case law indicating that there are many instances where it is not clear whether a substance is being used for personal consumption or distribution. While expert evidence on whether a given quantity of a drug may not be necessary in *every* PWID case, in cases like this where a fact finder, based upon a totality of the circumstances, simply does not have enough evidence to make that determination, it is critical.

Specifically, in these types of cases the Commonwealth must present evidence of other factors, such as the manner of drug packaging (individual baggies/glassine packets), presence of drug distribution paraphernalia (scales, razor blades), large sums of cash found on the defendant, and/or behavior of the defendant, in order to prove, beyond a reasonable doubt, that the defendant possessed the given drug with the intent to deliver. In many of those cases, expert testimony is the critical "other factor" that proves PWID. ***See Commonwealth v. Jackson***, 645 A.2d 1366 (Pa. Super. 1994) (where it is not clear whether substance is being used for personal consumption or distribution, final factor to be considered is expert testimony). ***See also Commonwealth v. Kirkland***, 831 A.2d 607, 612 (Pa. Super. 2003) (case "demonstrate[ing] the importance of expert

testimony in drug cases where the other evidence does not overwhelmingly support the conclusion that the drugs were intended for distribution" even where razor blades and unused ziplock (drug paraphernalia) baggies found in car with drugs).

As our Court recognized in ***Commonwealth v. Bagley***, 442 A.2d 287 (Pa. Super. 1982):

> Expert opinion testimony elicited to determine whether the quantity of [drugs] seized from a defendant was consistent with possession for personal use or with sale or distribution has been admitted in a number of cases to support the inference that the controlled substance was possessed with the intent to deliver or distribute. ***See, e.g., Commonwealth v. Wallace***, 401 A.2d 816 ([Pa. Super.] 1979); ***Commonwealth v. Sojourner***, 408 A.2d 1100 ([Pa. Super.] 1978), affirmed on rehearing, modified on other grounds, 408 A.2d 1108 ([Pa. Super.] 1979); ***Commonwealth v. Harris***, 359 A.2d 407 ([Pa. Super.] 1976); ***Commonwealth v. Brown***, 335 A.2d 782 ([Pa. Super.] 1975). . . . ***Compare Commonwealth v. Sojourner***, ***supra***, 268 Pa. Super. at 477, 408 A.2d at 1102 (the expert testimony of a police officer experienced as an undercover narcotics agent that a person who had fifty bags of heroin more than likely had them for sale was sufficient to permit the jury to infer intent to deliver); and ***Commonwealth v. Brown***, ***supra***, 232 Pa. Super. at 466, 335 A.2d at 784 (where appellant possessed three bundles of glassine packets and the bundles contained 25, 25, and 21 packets respectively for a total of seventy-one packets, and an experienced police narcotics agent testified that street vendors of heroin frequently package their product in bundles of twenty-five glassine envelopes, such evidence was sufficient to support the inference that the possessor intended to distribute the drugs rather than retain them for personal use).

Id. at 290-91.

Here, the trial judge, himself, acknowledged that "[t]he quantity [of Ecstasy] does not suggest in and of itself that this was, *per se*, with intent to

deliver." N.T. Trial, 7/14/2010, at 73 (emphasis added). Therefore, because the intent to distribute could not be inferred by the sheer quantity of the seized drugs, the fact-finder had to analyze additional factors to make a final legal determination on the issue. ***Commonwealth v. Jackson***, 645 A.2d 1366, 1368 (Pa. Super. 1994). Instantly, the officers did not observe any exchange or transaction of the controlled substances between Watley and a third party, nor did they find drug-dealing paraphernalia in Watley's vehicle where the drugs were recovered. Moreover, to the extent that the Majority uses the facts that there were firearms and ammunition found in Watley's vehicle and that Watley fled from police and provided the authorities false identification to support the PWID conviction, I would again disagree. These facts may bear on Watley's consciousness of guilt or an increased likelihood of being involved in drugs, but these additional factors do not substantiate that he possessed the Ecstasy pills with the intent to deliver them. Such evidence could just as easily support a verdict of possession with intent to use drugs.

Finally, the Majority places great emphasis on Hayward's post-arrest (and later recanted) statement, indicating that he drove through Allentown with Watley while Watley made "drops and transactions." Commonwealth Exhibit 6, Hayward's Custodial Written Statement, 2/20/2009. While we cannot second-guess the trier of fact's credibility determinations, nor are we permitted to re-weigh evidence, I do not believe that this fact establishes that Watley intended to distribute Ecstasy beyond a reasonable doubt.

For these reasons, I must dissent and would reverse Watley's PWID conviction. Moreover, without sufficient evidence to prove that Watley intended to commit or aid in the commission of possessing the Ecstasy with the intent to deliver, Watley's conviction for conspiracy (PWID) should also be reversed.