NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. WILLIE MELENDEZ, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1489 EDA 2011

Appeal from the Judgment of Sentence January 24, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0006975-2010

BEFORE: STEVENS, P.J., BOWES, J., and PLATT, J.*

MEMORANDUM BY STEVENS, P.J. Filed: February 25, 2013

This is an appeal from the judgment of sentence entered in the Court of Common Pleas of Philadelphia County, after a jury convicted Appellant of Possession with the Intent to Deliver a Controlled Substance, to wit, Heroin and Criminal Conspiracy. Sentenced to a mandatory minimum term of five to ten years' imprisonment for possessing a controlled substance with the intent to deliver it, and a concurrent one to two year sentence for conspiracy, Appellant challenges the denial of his suppression motion, the denial of his motion for new trial, the discretionary aspects of his sentence, the preclusion of character evidence, and the weight of the evidence. We affirm.

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* Retired Senior Judge assigned to the Superior Court.

The trial court provides an apt summary of facts and procedural history as follows:

> Appellant was originally before th[e trial] court, sitting with a jury, on November 18, 2010 and convicted of Possession with intent to deliver Heroin (PWID) and Conspiracy. Appellant was sentenced on January 24, 2011 to a mandatory five to ten year term of incarceration for the PWID conviction based on the amount of Heroin (5.6 grams) and a concurrent one to two year term of incarceration for the criminal Conspiracy conviction.
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> **FACTS**
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> Appellant's convictions stem from his involvement in the sale of Heroin on April 8, 2010, at the corner of "D" and Hilton Streets in the city of Philadelphia. Officer Patrick Banning, an eight year veteran of the Narcotics Strike Force, and twelve year veteran of the Philadelphia Police Department set up surveillance from an unmarked vehicle parked on North "D" Street near the residence along with another male, Sean Flemming, from a distance of roughly seven feet.
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> Within a few minutes after starting his surveillance, Officer Banning observed a white van pull up to the residence and a white male get out of the driver's side. The unknown white male approached Flemming and handed him money in exchange for a number of small packets pulled from a bundle in his left pocket. Banning gave a description of the male to back-up officers, but they failed to stop him.
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> At approximately 7:40 a.m., Officer Banning observed a white female approach Flemming while he and Appellant stood on the porch of 3218 D Street and hand Flemming money in exchange for small packets pulled from the same bundle in his left pants pocket. The female left northbound on D Street and Banning gave a description to back-up officers who failed to stop her as well.
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> Immediately after Flemming handed the packets over to the female, he went to Appellant and said something unintelligible to the officer from his location. Appellant went inside the house for approximately 10 seconds, and returned with two bundles identical to the one pulled from Flemming's left pocket, which he

handed to Flemming. Flemming put one of the bundles in his left pants pocket. The other he put in a discarded potato chip bag that was lying on the ground. He put the bag containing the bundle on the porch of 3220 D Street, and walked across the street to the intersection of Hilton and D Streets.

At approximately 7:45 a.m. a white male, later identified as Frank O'Brian, approached Flemming in the street and engaged [him] in a very brief conversation before handing him money. Flemming again went into his pants pocket and handed O'Brian a number of packets and O'Brian left southbound on D Street. Banning again gave back-up officers a description of the white male and this time they were successful in stopping him a short distance away. From O'Brian, officers recovered one clear, heat-sealed packet stamped with the word "Viagra" and [another] containing a smaller glassine packet itself containing an off-white, powdery substance [that] tested positively as Heroin.

Roughly fifteen minutes later, Appellant noticed the van [from which] Officer Banning was conducting surveillance, became suspicious, and walked over to it. Appellant began peering through the tinted windows trying to see if anyone was inside. At that point Officer Banning radioed for backup officers who flooded the area and arrested Appellant and Flemming. As the uniformed officers approached the area, Banning observed Flemming Take one of the bundles from his left pocket and put it in his mouth. The uniformed officers placed both men under arrest, and retrieved the bundle from Flemming's mouth and pocket as well as the bundle that was placed inside the potato chip bag and placed on the porch of 3220 D Street.

Recovered from Flemming's mouth were 6 clear, heat-sealed plastic packets, each containing themselves a white glassine packet stamped with the word "Viagra" on it and containing an off-white powdery substance later identified as Heroin. From Flemming's left pocket an additional bundle containing 14 packets stamped with the word "Viagra" and each containing Heroin. Both bundles were bound with a black rubber band. $249 in U.S. currency was recovered from Flemming's right pants pocket.

Recovered from Appellant were 13 packets, bound with black rubber band, and identical to the ones found on Flemming,

> stamped with the word "Viagra" and containing the smaller, glassine packets of Heroin. $49 in U.S. currency was recovered from Appellant's right pants pocket.
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> Pursuant to the arrest, officers secured the residence at 3218 D Street for a pending search warrant. In the course of securing the residence, officers found no other adults present in the property, but a baby found in the second floor bedroom.
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> A search warrant was executed on the property that same day at 11:50 a.m. There, they recovered three pieces of mail addressed to Appellant as Willie "Hernandez" with the address of 3218 North D Street, from the floor bedroom (where they also recovered the baby earlier). From inside a sofa cushion in the first floor living room, officers recovered 11 more bundles of Heroin, each containing 14 packets, for a total of 154 packets of Heroin. All of the items recovered were field tested and found to be positive for Heroin, and they and the money recovered were all placed on property receipts.
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> On February 3, 2011, Appellant filed a post-sentence motion which was denied by operation of law pursuant to Pa.R.Crim.P. 720.B(3) on June 2, 2011. On that same day, June 2, 2011, Appellant filed a timely notice of appeal. On March 15, 2012, counsel was ordered to file a self-contained and intelligible statement of the matters intended to be raised on appeal....

Pa.R.A.P. 1925(a) Opinion, dated 4/18/12 at 1-4.

In his appellate brief, Appellant raises the following issues for our review:

> **I. [DID] THE TRIAL COURT ERR[] IN FINDING THAT THE POLICE HAD PROBABLE CAUSE TO SEARCH APPELLANT'S PERSON AND LATER HOME WHEN THE POLICE DID NOT HAVE SPECIFIC, ARTICULABLE FACTS THAT WOULD LINK APPELLANT TO CRIMINAL ACTIVITY?**
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> **II. [DID] THE TRIAL COURT ERR[] IN DENYING APPELLANT'S POSTTRIAL MOTION FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE WHEN THE NEW EVIDENCE COULD NOT HAVE BEEN DISCOVERED**

> **BEFORE TRIAL, AND GREATLY SUPPORTS APPELLANT'S TESTIMONY, WHILE CASTING DOUBT ON THE OFFICERS' TESTIMONY?**
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> **III. [DID] THE TRIAL COURT ERR[] IN PRECLUDING EVIDENCE THAT APPELLANT WAS SEEKING TO BECOME AN ADOPTIVE FATHER WHEN IT IS PART OF CHARACTER EVIDENCE THAT SPEAKS TO APPELLANT'S REPUTATION IN THE COMMUNITY?**
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> **IV. [DID] AN AGGRAVATED SENTENCE OF FIVE TO TEN YEARS PROVE UNFOUNDED AND EXCESSIVE WHEN APPELLANT'S PAST CONVICTIONS HAPPENED YEARS AGO AND THERE WAS EVIDENCE THAT APPELLANT HAD TURNED HIS LIFE AROUND?**
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> **V. [DID] THE JURY'S FINDING [GO] AGAINST THE WEIGHT OF THE EVIDENCE WHEN THE POLICE OFFICER'S TESTIMONY DID NOT SHOW THAT IT WAS CLEAR TO THEM THAT APPELLANT WAS ENGAGED IN A DRUG TRANSACTION AND WHEN THE TESTIMONY OF APPELLANT AND HIS SISTERS DIRECTLY CONTRADICTED THAT OF THE OFFICERS?**

Brief of Appellant at viii.

In Appellant's first issue, he challenges the denial of his motion to suppress evidence obtained from a search of his person and apartment. Our standard of review is well-settled.

> In an appeal from the denial of a motion to suppress our role is to determine whether the record supports the suppression court's factual findings and the legitimacy of the inferences and legal conclusions drawn from those findings. In making this determination, we may consider only the evidence of the prosecution's witnesses and so much of the defense as, fairly read in the context of the record as a whole, remains uncontradicted. When the factual findings of the suppression court are supported by the evidence, we may reverse only if there is an error in the legal conclusions drawn from those factual findings.

Commonwealth v. Griffin, 24 A.3d 1037, 1041 (Pa. Super. 2011) (quotation omitted).

As a threshold matter, however, we must determine whether Appellant properly preserved the issue he now raises. Any issues not raised in a Pa.R.A.P.1925(b) statement will be deemed waived." ***Commonwealth v. Lord***, 553 Pa. 415, 719 A.2d 306, 309 (1998). ***See also Commonwealth v. Castillo***, 585 Pa. 395, 888 A.2d 775, 780 (2005) (reaffirming "bright-line rule first set forth in ***Lord***").

Instantly, the relevant part of Appellant's 1925(b) statement provides: "The Court was in error in denying Defendant's Motion to Suppress was in error [sic] as the Commonwealth that probable cause existed [sic] for the issuance of the warrant and that the search of Defendant's residence was conducted after the warrant was issued." Concise Statement of Matters Complained of on Appeal dated 4/4/12 at 1. The Rule 1925(b) statement contains no other issue relating to the court's order denying the motion to suppress. Ignoring the several grammatical errors within this somewhat confounding statement, we infer from it a challenge only to the search of Appellant's apartment. As such, to the extent Appellant has briefed an argument challenging the search of his person, that claim is waived. ***See Commonwealth v. Northrip***, 945 A.2d 198 (Pa. Super. 2008) (holding any issue not raised in court-ordered Rule 1925(b) statement is waived).

As for his challenge to the search of his apartment, we note well-settled authority that:

> Search warrants must be supported by probable cause. Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted. In considering an affidavit of probable cause, the issuing magistrate must apply the "totality of the circumstances test" which requires her to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit ... including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. A court reviewing a search warrant determines only if a substantial basis existed for the magistrate to find probable cause.

Commonwealth v. Johnson, --- Pa. ----, 42 A.3d 1017, 1031 (2012) (internal quotation marks and citations omitted).

Upon close inspection of Appellant's challenge to the search of his apartment, it becomes clear that he does not assail the sufficiency of the affidavit of probable cause so much as simply advance a fruit of the poisonous tree argument originating with what he deems the unconstitutional search of his person. Because police unconstitutionally searched his person, he argues, the fruits of that search could not properly support the search warrant.

This attempt to bootstrap a waived challenge to the search of his person by reintroducing it in a challenge to the search notwithstanding, his challenge to the apartment search is unavailing. Our review of the

application for search warrant of Appellant's premises and the three-page affidavit of probable cause in support thereof discloses a thorough description of the officers' observations made during the morning surveillance of April 8, 2010. Specifically, the affidavit set forth every fact appearing *supra*, including the observation of Appellant briefly talking to Fleming, walking inside 3218 N. "D" Street for approximately ten seconds, and coming back out to hand two white bundles (heroin) to Flemming, who placed the bundle in his left front pocket Five minutes later, the affidavit continues, Flemming retrieved this bundle from his left front pocket and exchanged it with a man later determined to be Frank O'Brien for cash. The bundle "NIK" tested positive for heroin. Approximately fifteen minutes later, officers observed Appellant looking inside of the surveillance vehicle and, fearing their position was compromised, called on back-up officers to descend upon the scene and arrest Fleming and Melendez. A search of Melendez's person uncovered 13 plastic packets of heroin. Affidavit of Probable Cause, 4/8/10 at pages 1-2.

Notably, Appellant cites no authority to support his position that the search of his person in light of this record was unlawful, and on this basis, we may waive the claim. ***See Commonwealth v. Simmons***, 56 A.3d 1280 (Pa. Super. 2012) (holding claim unsupported by citation to pertinent authority as required by Pa.R.A.P. 2119(a) is waived). Nevertheless, it is well-settled that probable cause to arrest, and a search incident thereto,

attaches upon a single observation of one's handling contraband typically involved in an illicit transaction. ***See Commonwealth v. Burnside***, 625 A.2d 678 (Pa. Super. 1993) (probable cause to arrest held to exist where defendant, while standing in a high drug-trafficking area, observed holding packets typically used to store contraband). The totality of circumstances described on the affidavit of probable cause implicated Appellant as part of a drug distribution enterprise taking place directly in front of his apartment. The affidavit identified him as going in the apartment, retrieving packets that just minutes later tested positive for heroin, and giving the packets to Fleming, who exchanged them for money. These facts gave rise to probable cause justifying the issuance and execution of a search warrant for the apartment in question. We therefore reject Appellant's claim to the contrary.

Appellant next argues that after-discovered evidence of an investigation into misconduct committed by police officers from the unit involved in his case entitles him to a new trial. Appellant cites an article published by Philly.com, an online newspaper, reporting on the recent suspension of an officer in "Strike Force North" for alleged theft of suspects and arrestees. Specifically, the article describes accusations that several officers had arrested persons or searched their homes and taken money from them without generating property receipts for the money. Two officers

involved in the case *sub judice*--including chief witness Patrick Banning--were present at one of the incidents in which an officer was accused.

However, neither officer involved in Appellant's case was accused of stealing money in the reported cases, nor does it appear from Appellant's proffer of evidence that the officers have been placed under investigation in the other cases. Nevertheless, Appellant argues their possible involvement in thefts from suspects could have been enough to alter the course of the trial. Appellant nevertheless contends the report provides additional support for his sister's testimony that all the money from the apartment was taken prior to the time police executed the search warrant.

Our standard of review is limited in the context of a claim of after-discovered evidence:

> After-discovered evidence is the basis for a new trial when it: 1) has been discovered after the trial and could not have been obtained at or prior to the conclusion of trial by the exercise of reasonable diligence; 2) is not merely corroborative or cumulative; 3) will not be used solely for impeaching the credibility of a witness; and 4) is of such nature and character that a new verdict will likely result if a new trial is granted. ***Commonwealth v. Boyle***, 533 Pa. 360, 625 A.2d 616, 622 (1993); ***Commonwealth v. Smith***, 518 Pa. 15, 540 A.2d 246 (1988). Further, the proposed new evidence must be "producible and admissible." Smith [518 Pa. at 50], 540 A.2d [at] 263; ***Commonwealth v. Scott***, 503 Pa. 624, 470 A.2d 91, 93 (1983).

Commonwealth v. Chamberlain, 612 Pa. 107, 30 A.3d 381, 414 (2011).

Recently, this Court, by a 5-4 majority while sitting *en banc,* vacated judgment of sentence and remanded for an evidentiary hearing on an

appellant's claim of after discovered evidence of alleged police corruption. In ***Commonwealth v. Castro***, 55 A.3d 1242 (Pa. Super. 2012), the appellant was arrested as a result of a controlled buy orchestrated by a police officer later accused in a news article of fabricating evidence crucial to the controlled buys. Specifically, the article reported that surveillance video from a convenient store implicated by the purported controlled buy showed that the officer must have falsified statements in his search warrant application, as the continuous video never depicted the confidential informant's presence in the store. Notably, the officer used the same confidential informant in appellant Castro's case.

The Majority determined that Castro had met all four parts to the after-discovered evidence test and thus remanded for a new trial. Pertinent to the case *sub judice*, is the Majority's rationale with respect to parts three and four to the test:

> Third, while the evidence in the Daily News article may be used to impeach the credibility of Officer Richard Cujdik, the evidence will not be used solely for that purpose. The Daily News article alleges that Officer Richard Cujdik falsified information in his warrant application by claiming that CI–142—the same confidential informant used to investigate Castro—had purchased drug paraphernalia from the corner grocery store, despite video surveillance showing that no purchase or inquiry was made. Thus, Castro may use this evidence in filing a motion to compel the identity of CI–142 in order to determine whether Officer Richard Cujdik also made false claims in applying for a warrant to search Castro's home. ***See Commonwealth v. Hritz***, 444 Pa.Super. 264, 663 A.2d 775, 778 (1995) (trial court may compel disclosure of confidential informant's identity to defendant where disclosure is reasonable, would yield information material to the defense and is in the interests of

> justice); ***Commonwealth v. Bing***, 551 Pa. 659, 713 A.2d 56, 58 (1998) (disclosure more likely to be in the interest of justice where guilt was based solely on police testimony). Additionally, Castro could use the evidence to file a motion to suppress the evidence recovered from the search. []
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> [Fourth], the evidence would likely result in a different verdict if a new trial were granted because it shows that Officer Richard Cujdik, the only witness to testify at Castro's trial, engaged in a pattern of fabricating controlled buys in order to procure and execute search warrants. Significantly, the Daily News article provided a link to video surveillance tapes that directly contradict statements made in Officer Richard Cujdik's search warrant affidavit. Further, the confidential informant used in applying for that warrant was the same one used to investigate Castro. Thus, there was evidence, independent from the news article itself, to support the allegations of corruption against Officer Richard Cujdik.

Id. at 1248.

As can be seen, there are a number of glaring dissimilarities between ***Castro*** and the case *sub judice*. First, in ***Castro***, the news article not only involved the lead officer in appellant Castro's case, it also reported on his pattern of corrupting the very process—use of confidential informants—used to implicate Castro. In contrast, in the case *sub judice,* the news article alleges that an officer not involved in Appellant's case had been suspended on accusations he took money from suspects. While two officers involved in Appellant's case had worked with this other officer on two occasions, neither was accused of wrongdoing. Moreover, unlike in ***Castro***, the alleged corruption here did not involve police practices used to obtain an arrest, but involved, instead taking money from suspects after the fact. As deplorable and unacceptable a practice as that is, it does not compare to the fabrication

of evidence upon which a prosecution and conviction is founded. Indeed, there is no suggestion in either the news article or Appellant's argument that the officers involved in his surveillance and arrest demonstrated a pattern of fabricating or "planting" evidence in the past or did so in Appellant's case.

Confronted with these differences, we find Appellant simply has not shown another purpose for the after-discovered evidence other than to impeach the credibility of Officer Banning. Nor can he demonstrate that the accusations made in the news article, if brought to light at his trial, would likely result in a different verdict in a new trial. The article is largely immaterial to the highly inculpatory evidence admitted at trial, namely, that officers on surveillance: observed Appellant assist in a Heroin distribution enterprise; detained a customer; field-tested a packet purchased by the customer to confirm the presence of Heroin; and, upon seizing Appellant, uncovered numerous packets of Heroin upon his person and in his apartment. Consequently, we find Appellant's after-discovered evidence claim as to the possible involvement of these officers in improper taking of money from suspects deficient as to the third and fourth prong of the test such that it is devoid of merit.

In his next argument, Appellant contends the court erred in precluding what he calls valuable character evidence about his attempts to adopt his baby niece. The record demonstrates, however, that there is no factual basis for this claim. At a pretrial hearing, the Commonwealth moved to

exclude such evidence, and the court advised defense counsel that placing defendant's character in issue would open the door to other crimes evidence. Defense counsel replied that he understood and would discuss it with Appellant. See N.T. at 11/17/10 at 57-58. No further discussion with the court about the matter took place. At trial, Appellant called his sister to the stand and she testified that Appellant was in the process of seeking adoption of his niece. N.T. 11/22/10 at 7. The Commonwealth offered no objection to this testimony. Accordingly, we find the record of trial to belie Appellant's claim.

In his next question presented, Appellant presents a challenge to the discretionary aspects of his sentence in which he claims an aggravated sentence of five to ten years was unfounded, excessive, and should be vacated. Because he has failed to include the required Pa.R.A.P. 2119(f) statement in his appellate brief and the Commonwealth has objected to its omission, this claim is waived. ***See Commonwealth v. Tuladziecki,*** 513 Pa. 508, 522 A.2d 17 (1987); ***Commonwealth v. Pardo***, 35 A.3d 1222, 1231 (Pa. Super. 2011).

Finally, Appellant argues that the jury's verdict went against the weight of the evidence presented. We evaluate such claims under settled precepts.

> [W]e may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, 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. Champney, 574 Pa. 435, 832 A.2d 403, 408 (Pa.2003) (citations omitted). Hence, a trial court's denial of a weight claim "is the least assailable of its rulings." ***Commonwealth v. Diggs***, 597 Pa. 28, 949 A.2d 873, 880 (Pa.2008). Conflicts in the evidence and contradictions in the testimony of any witnesses are for the fact finder to resolve. ***Commonwealth v. Tharp***, 574 Pa. 202, 830 A.2d 519, 528 (Pa.2003). As our Supreme Court has further explained,

> A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice."

Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 752 (Pa.2000) (citations omitted). In addition, a weight of the evidence claim must be preserved either in a post-sentence motion, by a written motion before sentencing, or orally prior to sentencing. Pa.R.Crim.P. 607; ***Commonwealth v. Priest***, 18 A.3d 1235, 1239 (Pa.Super.2011). Failure to properly preserve the claim will result in waiver, even if the trial court addresses the issue in its opinion. ***Commonwealth v. Sherwood***, 982 A.2d 484, 494 (Pa.2009).

Commonwealth v. Lofton, 2012 WL 6062578, 2 (Pa. Super. December 7, 2012).

As Appellant preserved his claim in a post-sentence motion, we have reviewed his argument against the record and found it unavailing. Specifically, when he argues it was his testimony that was credible and not that of the officers, he assigns error with the trial court for failing to undo the jury's credibility determinations. As noted above, a plea to reweigh credibility of witnesses may not be the basis for the granting of a new trial. Nor did Appellant's sister's testimony as to the disarray of his apartment—as if it had already been searched before the search warrant was executed—provide a basis upon which to set aside Appellant's verdicts of PWID and Criminal Conspiracy to deliver Heroin. Indeed, the jury rejected this evidence and the trial court reasonably determined there was no reason to disturb that decision. Accordingly, Appellant's weight of the evidence claim fails.

Judgment of sentence is affirmed.