NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOHN MCFARLAND, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1489 EDA 2012

Appeal from the Judgment of Sentence of April 18, 2012,
in the Court of Common Pleas of Delaware County,
Criminal Division, at No. CP-23-CR-0005123-2011

BEFORE: OLSON, WECHT and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: Filed: February 1, 2013

This case is a direct appeal from the judgment of sentence imposed on Appellant after he was convicted of possessing a controlled substance with intent to deliver it ("PWID") under 35 P.S. § 780-113(a)(30), possessing a controlled substance ("possession") under 35 P.S. § 780-113(a)(16), and possessing drug paraphernalia ("paraphernalia") under 35 P.S. § 780-113(a)(32). He contends the evidence was insufficient to support his PWID conviction. He also argues the court erred in denying his pretrial motion to suppress evidence. Finding no merit to his claims, we affirm the judgment of sentence.

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* Retired Senior Judge assigned to the Superior Court.

The record reveals the following facts. At the time this case arose, Appellant was serving state parole. Appellant's parole agent, John Giunta, along with other parole agents, intended to patrol a certain neighborhood by car in order to determine if any of their assigned parolees were in violation of an evening curfew that local police had instituted. The agents were driving in the neighborhood roughly thirty minutes before the curfew. In addition to checking for curfew violations, the agents intended to make unannounced home visits at the residences of parolees living in the area. Giunta's testimony would later indicate that he and other agents often did not plan such visits in advance but, rather, would decide to conduct those visits from time to time, occasionally while in the midst of other duties. Giunta would also testify that unannounced home visits were a routine part of parole supervision.

While driving in the aforesaid area, Giunta saw Appellant on the street. The time was shortly before the established curfew. Appellant was walking away from his home. Giunta decided to approach Appellant and to have him return to his house so that Giunta could conduct a home visit at Appellant's residence. Giunta later testified to his reasons for that decision. In particular, he had recently completed Appellant's annual evaluation, and one significance of having done so was that a new supervision year had thus begun for Appellant. Giunta testified that the start of the new supervision year, as well as the fact that he had not been to Appellant's home in roughly three months, meant that a home visit was, at that point, timely. Accordingly, upon seeing Appellant, Giunta decided to conduct a home visit.

Giunta stopped Appellant and patted him down. Giunta claimed he did so to ensure his safety. During the pat down, Giunta felt certain objects and asked Appellant what they were. Appellant indicated he had keys and a lighter in his pocket. Upon feeling an unknown item that he believed was not a set of keys or a lighter, Giunta "pushed it up" and saw that it consisted of rolling papers. N.T., 12/21/11, at 19. At some point, Giunta also determined that Appellant possessed a cell phone and cash. Giunta then told Appellant that he (Giunta) wanted to conduct a home visit. Appellant complied with Giunta's request to enter Giunta's car. Giunta, along with the other agents, transported Appellant to his home.

Upon entering Appellant's home, one of the other parole agents, Brian Fallock, passed through one room and entered Appellant's kitchen. Fallock saw ammunition, a digital scale, plastic bags, and glassine baggies on Appellant's kitchen counter. Fallock related what he saw to Giunta who, in turn, handcuffed Appellant and asked Appellant where his drugs were. Appellant then stated that the drugs were in his pants. Giunta searched Appellant's underwear and found a plastic bag containing twenty smaller baggies. The baggies contained marijuana.

As a result of the foregoing incident, Appellant faced criminal charges. He moved to suppress all the evidence obtained by authorities during the events described *supra*. The court denied the motion. Appellant proceeded to a non-jury trial and was convicted of PWID, possession and paraphernalia. He later filed this timely appeal.

Appellant first argues the evidence was insufficient to support his PWID conviction. More specifically, he claims the Commonwealth needed to prove, but did not prove, that he intended to sell, rather than just convey, the marijuana found on him. Appellant is not entitled to relief on this claim.

To secure a conviction for PWID, the Commonwealth must prove the defendant possessed a controlled substance with the intent to deliver it. 35 P.S. § 780-113(a)(30). The term "deliver" means the actual, constructive, or attempted transfer from one person to another. ***Id.*** § 780-102. To constitute a delivery, the transfer need not involve profit or the exchange of money, but need only involve the conveyance of the controlled substance. ***Commonwealth v. Morrow***, 650 A.2d 907, 912 (Pa. Super. 1994); ***Commonwealth v. Metzger***, 372 A.2d 20, 22 (Pa. Super. 1977).

All the facts and circumstances surrounding a defendant's possession of drugs are relevant when determining whether the defendant had the intent to deliver those drugs. ***In re R.N.***, 951 A.2d 363, 367 (Pa. Super. 2008). Some particular facts and/or circumstances that may inform an evaluation of whether a defendant had the intent to deliver a controlled substance are the packaging of the substance and the absence of drug-use paraphernalia. ***Id.*** In contrast to drug-use paraphernalia, the presence of paraphernalia consistent with drug delivery (*e.g.*, scales for weighing drugs and empty baggies for packaging drugs) tends to show the intent required under Section 780-113(a)(30). ***Commonwealth v. Keefer***, 487 A.2d 915, 918 (Pa. Super. 1985). Expert testimony is admissible to show the intent to

deliver a controlled substance. ***Commonwealth v. Carpenter***, 955 A.2d 411, 414 (Pa. Super. 2008).

We evaluate sufficiency claims in the following way.

> . . . [O]ur standard is whether, viewing all the evidence and reasonable inferences in the light most favorable to the Commonwealth, the factfinder reasonably could have determined that each element of the crime was established beyond a reasonable doubt. This Court considers all the evidence admitted, without regard to any claim that some of the evidence was wrongly allowed. We do not weigh the evidence or make credibility determinations. Moreover, any doubts concerning a defendant's guilt were to be resolved by the factfinder unless the evidence was so weak and inconclusive that no probability of fact could be drawn from that evidence.

Commonwealth v. King, 990 A.2d 1172, 1178 (Pa. Super. 2010) (internal citations omitted).

Appellant's sufficiency argument is premised on his largely undeveloped assertion regarding one of the essential elements of PWID. More particularly, he essentially asserts that the term "intent to deliver" in Section 780-113(a)(30) must mean the intent to sell when the amount of marijuana is not more than thirty grams, such as in this case. We reject his premise for the reasons that follow. Moreover, as we will show, the evidence did, in fact, show he intended to sell the marijuana.

In making his assertion regarding the element of intent to deliver, Appellant points to 35 P.S. § 780-113(a)(31), the provision dealing with

small amounts (≤ 30.00 grams) of marijuana. Part of that provision prohibits the possession of a small amount of marijuana with the intent to distribute it but not sell it. 35 P.S. § 780-113(a)(31)(ii).

Appellant seems to contend that, because Subsection (a)(31)(ii) relates specifically to the intended distribution of a small amount of marijuana when no selling is intended, Subsection (a)(30), when applied to small amounts of marijuana, must be related to the intended distribution by selling. As such, he claims the Commonwealth needed to prove he had the intent to sell the small amount of marijuana, not the intent to distribute or otherwise to convey it without actually selling it.

Beyond making his claim, Appellant gives no discussion convincing us that the wording of Subsection (a)(31)(ii) should make us conclude that the term "deliver" in Subsection (a)(30) must be limited to sales when the amount of marijuana is not more than thirty grams. His limited argument that the term "deliver" in the PWID statute must mean "sell" because he possessed a small amount of marijuana does not convince us. We find no reason to reject the statutory definition of the term "deliver" as we discussed it *supra* and as it is set forth in 35 P.S. § 780-102. Accordingly, we find the essential element of intent to deliver for PWID required the Commonwealth to prove that Appellant intended to transfer the marijuana to another person, whether by sale or otherwise.

Putting aside Appellant's faulty premise regarding the meaning of the term "deliver," it is clear that the Commonwealth proved the elements of

PWID. The evidence showed Appellant possessed twenty bags of marijuana. The aggregate amount of marijuana in all the bags was 15.70 grams. The Commonwealth's expert explained that the small bags were considered to be nickel bags because each contained an amount that would sell individually on the street for a price of $5.00. Sale of all twenty bags would thus yield a total of $100.00 for the seller. Additionally, the expert essentially indicated that a person who was solely a drug user could purchase a single package of one ounce (approximately 28.00 grams) of marijuana for $100.00. The expert's point was that a drug user would not normally buy and possess twenty nickel bags which aggregated to only 15.70 grams. Instead, a drug user willing to spend $100.00 would likely buy and possess a single package of one ounce.

Furthermore, the expert testified it was common for sellers to buy drugs in bulk and then to repackage them in smaller amounts for resale. Along these lines, his testimony made note that there were used and unused bags or baggies with dolphin logos found in Appellant's home. It appears the dolphin logos matched dolphin logos on the baggies found in Appellant's underwear. The expert's testimony thus allowed for the inference that Appellant intended to utilize the unused bags/baggies for repackaging. Additionally, the expert indicated the scale seized from Appellant's home was consistent with scales commonly used by drug sellers to weigh and repackage marijuana.

Based on his foregoing testimony, the Commonwealth's expert offered his opinion that Appellant possessed the marijuana in question with the

intent to deliver it. Moreover, although we have explained that the intent to deliver does not require proof of the intent to sell, a fair reading of the expert's testimony (*e.g.* his repeated references to sale prices and sale repackaging) permits the reasonable inference that, in his opinion, Appellant had the intent to sell the marijuana in question, not to transfer it for free.

Viewing the evidence, including the testimony from the Commonwealth's expert, in the light most favorable to the Commonwealth, we conclude the factfinder could have determined beyond a reasonable doubt that Appellant possessed the marijuana with the intent to deliver it. Any doubts about the evidence were for the factfinder to resolve. We surely cannot say that the evidence was so weak and inconclusive that no probability of guilt could have been based thereon. Accordingly, Appellant's sufficiency claim fails.

Appellant also argues the court erred by denying his suppression motion. He cites the statutory provision, 61 P.S. § 6153(d), authorizing parole agents to search the person of a parolee if the agent has reasonable suspicion to believe the parolee possesses contraband or other evidence of a parole violation. Appellant also cites two cases for the proposition that, in addition to being based on reasonable suspicion, the search must be reasonably related to the parole agent's duties.

After quoting a portion of Giunta's testimony indicating that Giunta, upon seeing Appellant on the street, stopped Appellant and patted him down, Appellant asserts that Giunta lacked reasonable suspicion for his

actions. Appellant then claims that the evidence obtained from his home and the drugs found in his underwear were the direct result, and the unlawful fruit, of the illegal pat down and/or search conducted by Giunta on the street. Appellant's argument does not entitle him to relief.

Our standard for reviewing suppression issues is as follows:

> When considering the denial of a suppression motion, this Court's review is limited to determining whether the court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed in the suppression court, we consider only the Commonwealth's evidence and so much of the appellant's evidence as is uncontradicted when read in the context of the record as a whole. Where the record supports the suppression court's factual findings, we are bound by those facts and may reverse only if the legal conclusions drawn from them are erroneous.

Commonwealth v. West, 937 A.2d 516, 527 (Pa. Super. 2007) (internal citations omitted).

Initially, we note that Appellant ignores wholesale the portions of the suppression testimony from Commonwealth witness Giunta indicating that the agents' trip to Appellant's home and the discovery of contraband while there did not derive from the pat down and/or search that Giunta conducted on the street. For example, Giunta indicated that, without regard to anything he found during the pat down and/or search on the street and, in fact, before he conducted the pat down and/or search, Giunta had decided to approach Appellant for the purpose of conducting a home visit. Moreover,

Giunta testified he was not concerned about the rolling papers and did not think, after finding them on Appellant, that Appellant was involved in any illegal activity. More particularly, Giunta stated, "I wasn't really even concerned about the rolling papers based [on Appellant's] supervision history." N.T., 12/21/11, at 36. Referencing the discovery of the rolling papers, Giunta further testified, "That was not the reason why we went back to the house . . .." ***Id.*** Giunta further explained, " . . . I needed—it was the beginning of his supervision year and I'm like . . . I can get a good home visit in and get the new supervision year started." ***Id.***

In the course of ignoring the foregoing testimony, Appellant fails to provide us with any factual or legal analysis demonstrating that the evidence obtained while authorities were at his home resulted from the pat down and/or search on the street. This failure is significant because, under the fruit-of-the-poisonous-tree doctrine, the exclusionary rule bars evidence that was secured **as a result** of earlier, unlawful conduct by police. ***See Commonwealth v. Williams***, 2 A.3d 611, 619 (Pa. Super. 2010). Accordingly, even aside from questions regarding the legality of the pat down and/or search on the street, Appellant has not demonstrated any causal link between that activity and the seizure of evidence at his home. Therefore, he has necessarily not proven his claim that the court should have suppressed the evidence in question on the grounds that it was the unlawful fruit of what happened on the street.

In light of our foregoing discussion, we conclude Appellant has not persuaded us the suppression court made any factual findings unsupported

by the record and/or erroneous legal conclusions such that he deserves a remedy. Accordingly, Appellant's suppression-related claim fails.

Having found Appellant's sufficiency and suppression-related issues meritless, we affirm the judgment of sentence.

Judgment of sentence affirmed.