NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. SEAN REEDER, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1718 EDA 2012

Appeal from the Judgment of Sentence of May 18, 2012,
in the Court of Common Pleas of Bucks County,
Criminal Division at No. CP-09-CR-0005357-2011

BEFORE: STEVENS, P.J., LAZARUS and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.: **FILED JUNE 03, 2013**

This case is a direct appeal from the judgment of sentence imposed on Appellant after he was convicted of possession with intent to deliver a controlled substance ("PWID," 35 P.S. § 780-113(a)(30)), possession of a controlled substance (35 P.S. § 780-113(a)(16)), and possession of drug paraphernalia (35 P.S. § 780-113(a)(32)). He raises issues regarding the sufficiency of the PWID evidence, the denial of his pretrial request(s) to suppress evidence and to reveal the identity of a confidential police informant ("CI"), the admission of evidence, and the imposition of a mandatory minimum sentence on him. We affirm the judgment of sentence.

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* Retired Senior Judge assigned to the Superior Court.

The record reveals the following facts. Police Officer Soto interviewed a CI who indicated he had purchased crack cocaine from Herman Gibson at 621 Race Street. The CI also informed Soto that other persons had likewise bought crack from Gibson at the same location. Soto then arranged for the CI to make a controlled buy of crack from Gibson. For that buy, police observed the CI as he went to the aforesaid address. Police saw Gibson exit the residence. The CI purchased crack from Gibson and eventually turned it over to police.

Several days later, and based essentially on the aforesaid facts, police obtained a warrant to search 621 Race Street. It appears that residence belonged to Appellant's great grandmother. Appellant's mother was Gibson's fiancée. Police executed the warrant one day after obtaining it. Upon entering the home, police found no one on the first floor. They then ascended to the second floor and found a locked door. Hearing a fumbling noise behind the door, police made forcible entry into the room and saw Appellant kneeling on the ground. Within reach of Appellant, two or three feet from him, was a loaded handgun sitting in a blue tote. The tote did not have a top on it. Police took the gun.

Three to four feet from the tote was a dresser. On the dresser, and/or on a paper towel that was on the dresser, there was cocaine. Additionally, moist crack cocaine was in a cup sitting on the dresser. Trial testimony would reveal that the moisture indicated the crack had been manufactured in the room/residence. The total amount of cocaine seized from the room was 0.82 grams. Also from the room, police seized marijuana totaling 17 grams,

currency (approximately $1,392.00), spoons and scales with cocaine residue, baking soda, lighters, Ziploc bags, a birth certificate, and at least one item of mail. The certificate and the mail contained Appellant's name. Police did not find any crack pipes during the search. At some point on the date of the search, Appellant gave police a statement in which he indicated the drugs and gun were his.

Following the aforesaid events, police charged Appellant with drug offenses. He moved to suppress the items seized from the residence as well as his statement. He also sought disclosure of the CI's identity. After the court denied Appellant's aforesaid pretrial requests, he proceeded to a nonjury trial. At that trial, the Commonwealth presented expert testimony indicating, *inter alia*, that 0.05 grams could be the size of a unit sale of crack. The expert's testimony also indicated that that the packaging, baking soda, spoons, scales, and firearm seized by police were consistent with the manufacture and/or distribution of crack. Overall, the expert opined that the cocaine seized during the aforesaid search had been "manufactured for distribution." N.T., 01/23/12, at 77. His opinion on that point did not relate to the marijuana.

Appellant was convicted of PWID cocaine, possession of cocaine and marijuana, and possession of drug paraphernalia. At sentencing, the court imposed incarceration of not less than five years and not more than ten years on the PWID count. The five-year minimum imprisonment was intended as a mandatory term pursuant to 42 Pa.C.S.A. § 9712.1 (setting

forth mandatory terms for drug offenses committed with firearms). Appellant later filed this timely appeal.

Appellant argues the evidence was insufficient to support his PWID conviction. He notes the Commonwealth's expert acknowledged that a person could cook crack cocaine for personal use. Appellant also relies on the expert's testimony that a user could consume several grams of crack per day while only 0.82 grams were seized in this case. Furthermore, Appellant points out that some of the bags in the room contained cocaine residue and that police found lighters. He then relies on testimony in which police acknowledged that a crack user at the address may have taken crack from the aforesaid bags, thus leaving behind residue, and may have used a lighter or lighters to smoke the crack. Appellant also argues that the police investigation initially focused on Gibson's alleged drug sales and not on Appellant. Appellant concludes the Commonwealth proved that he possessed the cocaine in question but not that he had the intent to deliver it. Appellant is not entitled to relief.

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.

All the facts and circumstances surrounding a defendant's possession of drugs are relevant to determine 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, weaponry and the lack or presence of drug-use paraphernalia. ***Id.*** In contrast to drug-use paraphernalia, the presence of paraphernalia consistent with drug delivery (*e.g.*, scales and empty glassine baggies) 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 an intent to deliver. ***Commonwealth v. Carpenter***, 955 A.2d 411, 414 (Pa. Super. 2008).

We have discussed our review of sufficiency claims as follows:

> . . . [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).

When viewed under the aforesaid Commonwealth-favorable standard, the evidence in this case could reasonably lead a factfinder to conclude Appellant possessed the crack with the intent to sell it. The moist crack

cocaine in the room where Appellant was found, and the testimony relating to that crack, could reasonably support the inference that he had cooked cocaine into crack. Moreover, the money, scales, spoons, gun, packaging, and the expert's testimony about those items, along with the expert's testimony about the potential size of sale-units of crack, could lead to the conclusion that Appellant possessed the crack not for his own use but, instead, to sell it to someone else.

Appellant's sufficiency arguments that we summarized *supra* do point out the existence of testimony that might have led a factfinder to find he possessed the cocaine only for personal use, not for delivery. However, it was for the factfinder to weigh that evidence in light of the total trial record and to decide the material elements of the offenses, including intent. We certainly cannot say that the evidence of intent to deliver was so weak and inconclusive that no probability of guilt could be based thereon. Appellant's sufficiency issue fails.

Appellant next contends the trial court erred in denying his pretrial motion to suppress the physical evidence seized from 621 Race Street during the execution of the aforesaid search warrant. In support of this general issue, he argues that the court should have found the warrant invalid because it was based on material misrepresentations made by police in the affidavit and because the affidavit supporting the warrant did not establish probable cause for the search. He then concludes the seizure of physical evidence was unlawful.

The record of the suppression proceeding does not demonstrate Appellant had a privacy interest in the subject residence. Without a privacy interest, he was not entitled to challenge the search of the home. ***Commonwealth v. Cruz***, 21 A.3d 1247, 1251-52 (Pa. Super. 2011). Therefore, we will not disturb the trial court's denial of Appellant's request to suppress the aforesaid evidence.[1]

Appellant also contends that his statement to police resulted from the search of the residence. He reasons that, because the search warrant was invalid and because the search of the residence was therefore illegal, the court should have suppressed his statement.[2] That is, he contends his statement was the unlawful fruit of the illegal search. Once again, Appellant has not demonstrated he had a privacy interest in the residence that would entitle him to challenge the legality of the warrant and the resulting search. Because Appellant has based his challenge to the legality of his statement

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[1] The trial court denied the suppression motion because the court rejected Appellant's claims that the affidavit contained false police statements and/or lacked probable cause. We affirm on the grounds we have stated herein. ***See Commonwealth v. West***, 937 A.2d 516, 531 (Pa. Super. 2007) (indicating this Court may affirm on grounds different from those of the lower court).

[2] Appellant's brief claims the trial court should not have "admitted" his statement. Appellant's Brief at 14-15. However, his argument, in which he again alleges the illegality of the search, is plainly a suppression claim, not an admission-of-evidence claim. We note Appellant did preserve this suppression claim in his pretrial motion in which he asked the court to suppress his statement as having been the illegal fruit of the allegedly unlawful search.

solely on the alleged illegality of the residence search, and because he is not entitled to challenge that residence search, his claim fails.[3]

In his next issue, Appellant complains the trial court wrongly denied his pretrial motion to reveal the identity of the CI. In large measure, Appellant appears to mean that the court should have revealed the CI's identity so that Appellant could have properly challenged the validity of the warrant and residence search (*e.g.*, by questioning the CI during the suppression hearing regarding whatever information he allegedly gave to police). To the extent this is Appellant's claim, it fails for the reason we have already made plain: Appellant has not demonstrated he had a privacy interest in the residence such that he might be entitled to suppression of the evidence seized during the warrant search. Accordingly, he has not shown he was entitled to disclosure of the CI's identity in order to pursue suppression.

To some limited extent, it appears Appellant may also mean the court should have disclosed the CI's identity so that Appellant could defend himself against the substantive charges at trial. This contention also fails.

If a defendant shows that disclosure of a CI's identity would yield information material to the defense and shows that the request for

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[3] Appellant does not, for example, develop any argument that his statement was obtained in violation of his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966).

disclosure is otherwise reasonable, the court must then balance relevant factors to determine, in its discretion, whether it should grant the request. ***Commonwealth v. Marsh***, 997 A.2d 318, 321 (Pa. 2010). Balancing relevant factors requires the court to consider such matters as the public interest in protecting the flow of information, the defendant's right to prepare a defense, the possible defenses, the crime charged, the possible significance of the CI's testimony, and any other factors relevant under the particular circumstances of each case. ***Id.*** at 322. The court need not engage in balancing the various considerations if the defendant fails to make the initial showing of materiality and reasonableness. ***Id.*** at 321.

It appears the information supplied by the CI to the police related largely, if not exclusively, to the eventual warrant request. That is, the CI was involved with the drug purchase from Gibson and otherwise claimed that Gibson was selling drugs from the residence in question. It does not appear that the CI provided information regarding Appellant. Moreover, Appellant was not prosecuted for the controlled drug purchase made by the CI from Gibson. Rather, Appellant was charged, tried and convicted based on the contraband police found in the residence and based on what the court, sitting in the nonjury trial, believed was Appellant's connection to that contraband.

Appellant has not shown that the information the CI knew and/or relayed to police was material to Appellant's defense of the charges against him. Consequently, he has not shown the trial court erred in not disclosing the CI's identity.

Appellant's final issue is that the court erred in finding him subject to 42 Pa.C.S.A. § 9712.1. On this matter, Appellant argues the Commonwealth did not prove that he lived at 621 Race Street or that he was part of any drug sales. In this regard, he is essentially repeating his contention that the Commonwealth simply did not prove PWID by sufficient evidence and, as such, he should not be subject to Section 9712.1. He relies also on his sentencing testimony that he bought the gun legally to protect his grandmother from neighborhood violence, not to use it as part of any drug crime. As such, he concludes the mandatory penalty of Section 9712.1 should not apply to him. For the reasons that follow, Appellant's contentions warrant no relief.

The sentencing provision in question provides, in pertinent part:

> **(a) Mandatory sentence.--**Any person who is convicted of a violation of section 13(a)(30) of the act of April 14, 1972 (P.L. 233, No. 64), . . . known as The Controlled Substance, Drug, Device and Cosmetic Act, when at the time of the offense the person or the person's accomplice is in physical possession or control of a firearm, whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or in close proximity to the controlled substance, shall likewise be sentenced to a minimum sentence of at least five years of total confinement.
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> **(c) Proof at sentencing.--**Provisions of this section shall not be an element of the crime . . .. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

> **(d) Authority of court in sentencing.--**There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence.

42 Pa.C.S.A. § 9712.1(a), (c), (d) (footnote omitted).

Generally, a challenge to the applicability of a mandatory sentence is a challenge to the legality of the sentence. ***Id.*** Our standard of review is *de novo*. ***Id.***

As we have already determined, Appellant was convicted of PWID, 35 P.S. § 780-113(a)(30), on sufficient evidence. Any contention he makes to the contrary in order to exclude himself from the mandated minimum term of Section 9712.1 fails.

Appellant's claim of legal ownership is also unavailing. The statute in question does not require that the gun possession itself be illegal. ***Commonwealth v. Stein***, 39 A.3d 365, 369 (Pa. Super. 2012). Likewise, Appellant's assertion that the gun was not used to commit PWID does not warrant any relief. A gun need not be employed as part of a PWID offense for the mandatory sentencing provision to apply. ***Id.*** Rather, the gun need only be possessed during the PWID crime.

In sum, Appellant's arguments do not convince us that the court wrongly imposed the mandatory minimum term under 42 Pa.C.S.A. § 9712.1. He is not entitled to relief.

Based on our foregoing discussion, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 6/3/2013