

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ANTOINETTE RENEE MACK,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2898 EDA 2013

Appeal from the Judgment of Sentence entered September 4, 2013,
in the Court of Common Pleas of Lehigh County,
Criminal Division, at No(s): CP-39-CR-0001389-2013

BEFORE: GANTMAN, P.J., ALLEN and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.:

FILED JULY 09, 2014

Antoinne Renee Mack ("Appellant") appeals from the judgment of sentence entered after a jury found him guilty of delivery of heroin and possession of heroin.¹

The trial court summarized the pertinent facts as follows:

On March 20, 2013, Detective [Joseph] Graves received a call from a confidential informant [that] a black male with a street name of Antique [was] selling heroin and that [the confidential informant] could buy two bundles of heroin for \$170 from Antique.

Based upon this conversation, Detective Graves obtained \$170 from his police supervisor and then made photocopies of the cash with serial numbers showing on the copies. Detective Graves took the cash and met the confidential informant at a secluded portion of the

¹ 35 Pa.C.S.A. §§ 780-113(a)(30) and (16).

*Former Justice specially assigned to the Superior Court.

Parkettes parking lot several city blocks from where the drug transaction later took place. The informant drove to this lot in his older model Infiniti. Detective Graves thoroughly searched the informant and his vehicle and satisfied himself that the informant did not have any weapons, drugs, other contraband or currency. Several police officers, including Detective Matthew Karnish ... arrived at this parking lot.

Detective Graves and the informant got into the front seats of the vehicle the detective was driving. Detective Graves told the informant to call Antique to arrange the purchase of two bundles of heroin. Graves watched the informant dial a number on a cell phone. This was the number that the informant claimed was Antique's. Detective Graves heard both sides of the phone conversation in the arranging of a drug transaction. When the conversation ended, Detective Graves advised the other police officers that the drug sale would take place in the parking lot at Hamilton Towers. This is located at 4044 West Hamilton Street in Allentown, several blocks from where Graves and the informant were then located.

The drug deal was supposed to take place in the informant's automobile. Graves advised the informant that he should pump the brakes to his vehicle when the deal was completed. The activation of the brake lights would be the signal to the police that the deal was completed. Graves briefed the other police officers. This included the description of Antique given by the confidential informant. Antique was described as a black male with a muscular build and short hair. The confidential informant was given the prerecorded buy money.

The police set up surveillance in the Hamilton Towers parking lot where the transaction was to take place. When Graves was notified that surveillance was set up, the informant drove to the scene of the planned buy while Detective Graves followed him. Graves did not lose sight of the informant during this route. He witnessed the informant pull into the Hamilton Towers parking lot. The informant made no stops along the way, he drove alone in the car, and he did not leave the car during the brief trip.

Shortly after Graves's and the informant's arrival at the Hamilton Towers lot, the police saw a male fitting Antique's description leave the Hamilton Towers building, walk to the informant's car and get into the front passenger side. This person was [Appellant], Antoine Mack. No one else entered the vehicle while the informant sat in the driver's seat. After about 45 seconds, the brake lights went on and off twice. Detective Graves radioed the other police officers to "move in; the signal has been given."

Detective Graves went to the front passenger side of the informant's vehicle where [Appellant] was seated. [Appellant] had his head down. Graves saw him counting United States currency. Detective Graves and Detective Jason Krasely opened the front passenger door, grabbed [Appellant] and put him on the ground. [Appellant] was handcuffed and made to stand up. Graves took the money from him. Detective Krasely took a pack of suspected heroin from the right front pocket of [Appellant] and handed it to Detective Graves. A search of [Appellant] revealed that he had nothing on his person which could be used to ingest heroin. The police at the scene were undercover officers but uniformed officers soon arrived. Graves formally placed [Appellant] under arrest and handed him to a uniformed officer for transportation to the police station.

[Two bundles of heroin were recovered from the confidential informant, which were identical to the packet of heroin taken from Appellant's pocket.]

Trial Court Opinion, 12/18/13, at 3-5 (citations to notes of testimony omitted).

Appellant was arrested and charged with the aforementioned crimes. A trial commenced on August 28, 2013, at the conclusion of which the jury rendered its verdicts.

Following a hearing on September 4, 2013, the trial court sentenced Appellant to 27 months to 6 years of imprisonment for delivery, and a

concurrent 6 to 12 months for possession. Appellant filed a post-sentence motion on September 13, 2013, which the trial court denied on September 17, 2013. This appeal followed. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues for our review:

1. DID THE [TRIAL] COURT ERR IN PERMITTING STATEMENTS FROM A NON-TESTIFYING CONFIDENTIAL INFORMANT WHICH IMPLICATED [APPELLANT'S] INVOLVEMENT IN EARLIER DRUG ACTIVITY AND THEREFORE PUT [APPELLANT'S] CHARACTER OR PRIOR CRIMINAL ACTIVITY INTO ISSUE?
2. WHETHER THE VERDICT OF THE JURY WAS AGAINST THE WEIGHT OF THE EVIDENCE AS IT RELATES TO THE PROOF THAT [APPELLANT] DID DELIVER DRUGS TO THE CONFIDENTIAL INFORMANT?

Appellant's Brief at 7.

In his first issue, Appellant argues that the trial court committed reversible error when it permitted the testimony of Officer Graves, who stated that the confidential informant had provided him with information that Appellant was selling heroin. Appellant's Brief at 10-14. "The admission or exclusion of evidence is within the sound discretion of the trial court, and in reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law. Thus, our standard of review is very narrow. To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." **Commonwealth v. Lopez**, 57 A.3d 74, 81 (Pa. Super. 2012) quoting **McManamon v.**

Washko, 906 A.2d 1259, 1268–1269 (Pa. Super. 2006). Appellant specifically objects to the following testimony:

Assistant District Attorney: Were you involved in an investigation regarding somebody name Antique?

Officer Graves: Yes Sir.

Assistant District Attorney: Can you first tell me how you became involved in that investigation?

Officer Graves: **I received a call from a confidential informant stating --**

N.T., 8/28/13, at 63.

Appellant’s counsel promptly raised a hearsay objection to any testimony from Officer Graves that the confidential informant told him Appellant was selling drugs. *Id.* However, the trial court overruled Appellant’s objection and admitted the testimony on the basis that it was not hearsay because it was not offered for the truth of the matter asserted. The trial court then provided the following cautionary instruction to the jury:

Trial Court: Ladies and gentlemen, apparently you are about to hear a portion of the conversation between the officer and somebody else. I am allowing the conversation, but for a very limited purpose, and only for the purpose of explaining what the officer did as a result of that conversation. So it’s only offered – it’s only allowed to be considered by you to explain the officer’s actions, what he does as a result of that conversation.

Id. at 65.

The Commonwealth proceeded with its direct examination of Officer Graves as follows:

Assistant District Attorney: Detective Graves, can you tell us what initial information you received and who the person was you received it from?

Officer Graves: **Okay, I received it from a confidential informant that a black male with a street name of Antique was selling heroin, and that he could buy two bundles of heroin for \$170 from Antique.**

Trial Court: I'm going to interrupt. So it's clear, that's not any proof at all that whoever Antique is was selling heroin. This is just to explain what the officer does next. That's it. All right. ...

Assistant District Attorney: Now, based on that information, what steps did you take, Detective?

Officer Graves: I went to my supervisor and explained that I may have a buy bust going for two bundles for \$170. ...

Id. at 65-66.

"Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted." ***Commonwealth v. Buchanan***, 689 A.2d 930, 934 (Pa. Super. 1997). "Nevertheless, certain out-of-court statements offered to explain the course of police conduct are admissible; such statements do not constitute hearsay because they are offered not for the truth of the matters asserted but merely to show the information upon which

police acted.” **Commonwealth v. Akbar**, --- A.3d ----, 2014 WL 1697016 (Pa. Super. 2014). Here, the out-of-court statement was offered for the purpose of showing the effect of the confidential informant’s statements on Officer Graves and the actions the officer took based on those statements, and was therefore admissible since it was not offered for the truth of the matter asserted. Moreover, the trial court twice instructed the jury that the testimony was to be considered for no purpose other than the effect it had on Officer Graves and the actions he took based on that information. **See Commonwealth v. DeJesus**, 860 A.2d 102, 110 (Pa. 2004) (“[A] jury is presumed to have followed the instructions of the trial court.”) (citations omitted). We find no error in the trial court’s discretion to admit the challenged testimony.

In his second issue, Appellant raises a challenge to the weight of the evidence. Our scrutiny of whether a verdict is against the weight of the evidence is governed by the principles set forth in **Commonwealth v. Champney**, 832 A.2d 403, 408 (Pa. 2003) (citations omitted):

The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we 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.

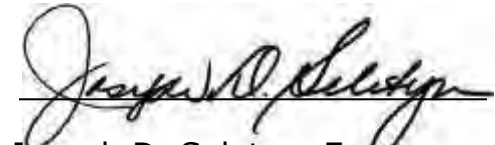
In his weight of the evidence claim, Appellant argues that the Commonwealth failed to present conclusive evidence that Appellant was the individual who delivered the drugs to the confidential informant, since there was no direct evidence presented that Appellant had the heroin on his person when he entered the confidential informant's car, and none of the police witnesses observed any transfer of items between Appellant and the confidential informant. Appellant's Brief at 14-15. We find no merit to Appellant's claim.

In the absence of direct evidence of a hand-to-hand transaction between Appellant and the confidential informant, the jury, within its discretion, was entitled to give full weight to the circumstantial evidence presented by the Commonwealth. The Commonwealth presented testimony, which the jury found credible, that the confidential informant had no heroin on him before he met with Appellant, that the confidential informant did not interact with any other person before he met with Appellant, and that following his meeting with Appellant, two bags of heroin were found on the confidential informant, which were identical to a bag of heroin found on Appellant. The jury, within its province, found the testimony of the Officer Graves and Officer Karnish credible, and we will not disturb such credibility determinations on appeal. As the trial court explained: "There was little conflict in the testimony of the police officers so the jury did not have

significant conflicts to resolve. On the other hand, the testimony of the officers was crucial to the Commonwealth's case. Obviously, by their verdict, the jury resolved any credibility determination in favor of the Commonwealth. ... There was nothing about the evidence that was received and the jury's verdict after consideration of the evidence which could shock a reasonable person's sense of justice." Trial Court Opinion, 12/18/13, at 7. Again, we find no abuse of discretion.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014