

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

LISA ANN HITZ

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 937 MDA 2013

Appeal from the Judgment of Sentence of October 31, 2012
In the Court of Common Pleas of Lebanon County
Criminal Division at No.: CP-38-CR-0001690-2011

BEFORE: MUNDY, J., WECHT, J., and FITZGERALD, J.*

MEMORANDUM BY WECHT, J.:

FILED APRIL 15, 2014

Lisa Ann Hitz ("Hitz") appeals from her October 31, 2012 judgment of sentence. Hitz challenges the weight and sufficiency of the evidence presented against her at trial. We affirm.

The trial court aptly set forth the facts and procedural history of this case as follows:

On October 15, 2011, members of the Lebanon County Drug Task force conducted an undercover purchase of crack cocaine. During this transaction, Sergeant Brett Hopkins had contact with an unidentified male "JB". JB agreed to contact his drug dealer to obtain crack cocaine for Sgt. Hopkins. Sergeant Hopkins gave JB fifty dollars (\$50) and JB told him he was going to "call his girl Lisa." JB went into his apartment and came back approximately ten (10) minutes later and said he called Lisa. While waiting with Sergeant Hopkins in his undercover car, JB placed several calls to Lisa. Finally Sergeant Hopkins heard a

* Former Justice specially assigned to the Superior Court.

female voice over the phone letting JB know she would be there soon. JB received another phone call and told Sergeant Hopkins "she's here." JB exited the vehicle and walked east on Willow Street to Gannon Street, where he turned up an alley and left Sergeant Hopkins's line of vision. Sergeant Hopkins contacted the surveillance officers [*sic*] that the dealer, Lisa, had arrived.

Sergeant Richard Radwanski was part of the Task Force Surveillance. He stated that he observed a car, driven by Jason Lilly, park in a parking lot on North 9th Street. A woman, later identified as . . . Lisa Hitz, exited the vehicle and [began] walking down Gannon Street. Sergeant Radwanski observed [Hitz] and JB meet up, have hand-to-hand contact, separate and go their individual ways. Sergeant Radwanski noted that JB did not have contact with any other individuals on his walk back down Gannon to Willow. Once back in the undercover vehicle, JB handed two baggies of crack cocaine to Sergeant Hopkins.

Sergeant Radwanski directed a Lebanon City Police patrol officer to stop the vehicle with the female in it. After her arrest, [Hitz] was searched and found to be in possession of the recorded funds provided to JB by Sergeant Hopkins. [Hitz] consented to a search of her vehicle. Police located two baggies of crack cocaine in the glove box. Marijuana, a pipe, grinder, and cigars were found in [Hitz'] purse. When Detective Ryan Mong interviewed [Hitz] about the contraband found, she indicated that the crack cocaine belonged to her and that she was selling it for someone else.

Trial Court Opinion ("T.C.O."), 4/25/2013, at 3-4 (internal citations to notes of testimony omitted).

Hitz was charged with delivery of a controlled substance,¹ conspiracy to deliver a controlled substance,² criminal use of a communications facility,³

¹ 35 P.S. § 780-113(a)(30).

² 18 Pa.C.S. § 903 (35 P.S. § 780-113(a)(30)).

³ 18 Pa.C.S. § 7512(a).

conspiracy to commit criminal use of a communications facility, possession of a controlled substance with intent to deliver,⁴ possession of a controlled substance,⁵ possession of a small amount of marijuana,⁶ and possession of drug paraphernalia.⁷

The case proceeded to a jury trial, which commenced on April 16, 2012. On April 20, 2012, the jury returned a verdict of guilty on all counts except conspiracy to commit criminal use of a communications facility. On October 31, 2012, Hitz was sentenced to an aggregate of three to eight years' imprisonment. On December 26, 2012, Hitz filed post-sentence motions challenging the weight and sufficiency of the evidence adduced at trial. On April 25, 2013, the trial court filed an order and opinion denying Hitz' post-sentence motions.

On May 20, 2013, Hitz filed a notice of appeal. The following day, the trial court directed Hitz to file a concise statement of errors complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Hitz filed a 1925(b) statement on June 5, 2013.

Hitz raises the following issues for our review:

⁴ 35 P.S. § 780-113(a)(30).

⁵ 35 P.S. § 780-113(a)(16).

⁶ 35 P.S. § 780-113(a)(31).

⁷ 35 P.S. § 780-113(a)(32).

1. Whether [Hitz'] motion for acquittal should be granted because the Commonwealth failed to provide sufficient evidence at trial to prove beyond a reasonable doubt that [Hitz] was guilty of Delivery of Crack Cocaine (Count 1) and Possession with intent to deliver Crack Cocaine (Count 3)?
2. Whether the jury's verdict was against the weight of the evidence as to Delivery of Crack Cocaine (Count 1) and Possession with intent to Deliver (Count 3)?

Brief for Hitz at 4.

We begin by reiterating our standard of review for challenges to the sufficiency of the evidence:

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact[,] while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Troy, 832 A.2d 1089, 1092 (Pa. Super. 2003) (quoting ***Commonwealth v. Bullick***, 830 A.2d 998, 1000 (Pa. Super. 2003)) (internal citations omitted).

The Controlled Substance, Drug, Device and Cosmetic Act provides, in relevant part, as follows:

§ 780-113. Prohibited acts; penalties

(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

* * *

(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act

35 P.S. § 780-113(a)(30).

In her first issue, Hitz contests the sufficiency of the evidence offered at trial to convict her of possession with intent to deliver and delivery of a controlled substance. Brief for Hitz at 8-9.⁸ Hitz claims that Sergeant Hopkins never personally exchanged drugs with Hitz, that the dealer was identified as “Lee” (not Hitz), and that Hitz only conspired with another party to provide the drugs. Furthermore, Hitz states that, because she did not

⁸ We note that, despite the fact that Hitz’ concise statement challenges the sufficiency of the evidence to support the entirety of the jury verdict, Hitz fails in her brief to address her conviction for criminal use of a communication’s facility, possession of a small amount of marijuana, and possession of drug paraphernalia. In addition, Hitz admits in her brief that the evidence supports the conspiracy charges. Brief for Hitz at 8. Accordingly, we need not address these other charges. ***Commonwealth v. Montalvo***, 956 A.2d 926, 931-32 (Pa. 2008); ***Commonwealth v. Spatz***, 716 A.2d 580, 585 n.5 (Pa. 1998).

have access to the crack-cocaine found in the glove box of her car, she cannot be convicted of possession with intent to deliver.

We first address whether there was sufficient evidence to conclude that Hitz possessed the crack-cocaine, as possession is a necessary element of possession with intent to deliver. Because the police did not find any drugs on Hitz' person but rather in her car, the Commonwealth must have proved that she constructively possessed the crack-cocaine beyond a reasonable doubt. The Pennsylvania Supreme Court has defined constructive possession as follows:

[T]he ability to exercise conscious dominion over the illegal substance: the power to control the contraband and the intent to exercise that control. Constructive possession may be found in one or more actors where the item in issue is in an area of joint control and equal access. . . . [T]his Court has further determined that [a]n intent to maintain a conscious dominion may be inferred from the totality of the circumstances . . . [and], circumstantial evidence may be used to establish a defendant's possession of drugs or contraband.

Commonwealth v. Valette, 613 A.2d 548, 549-50 (citations and quotations omitted). Here, the evidence was sufficient to prove that Hitz possessed the crack-cocaine that was found in the glove compartment of the vehicle. Hitz was a co-owner of the vehicle, and she was in the passenger's seat, where the crack-cocaine was within arm's length at the time of the arrest. In addition, Hitz was found to be in possession of the marked bills following the drug deal. Furthermore, Hitz admitted to ownership of the crack-cocaine to Detective Mong (N.T. at 56), and admitted to exercising

control over the drugs when she stated that she was “selling them for someone else.” Brief for Hitz at 9. This evidence is sufficient to demonstrate that Hitz had conscious dominion over the crack-cocaine and intended to exercise that control.

Having established possession, we now turn to the question of whether Hitz intended to deliver the crack-cocaine. Hitz admitted to Detective Mong that the drugs in the glove box were hers and that she was selling them for someone else. Brief for Hitz at 9, N.T. at 56. In addition to this admission, the Commonwealth presented evidence that Hitz was found with marked bills from the drug transaction and a significant amount of crack-cocaine still in the vehicle. This evidence was sufficient to establish that Hitz intended to deliver the crack-cocaine found in her vehicle.

We next address whether there was sufficient evidence to support Hitz’ conviction for delivery of a controlled substance. Sergeant Hopkins’ contact repeatedly referred to his dealer as either “Lee” or “Lisa”, which is Hitz’ first name. JB then went to retrieve the drugs from his dealer, where Sergeant Radwanski, as part of the surveillance team, saw JB make hand contact with Hitz before the two parted ways. After this clandestine encounter, JB returned to Sergeant Hopkins with crack-cocaine and Hitz was found with the marked bills from the exchange. This testimony by Sergeant Radwanski and Sergeant Hopkins was sufficient for a reasonable jury to conclude beyond a reasonable doubt that Hitz delivered the crack-cocaine to JB.

Having demonstrated that there was sufficient evidence to uphold Hitz' jury conviction, we now address her claim that the jury's verdict was against the weight of the evidence. Our standard of review is well-settled:

The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses. **See Commonwealth v. Champney**, 832 A.2d 403, 408 (Pa. 2003), *cert. denied*, 542 U.S. 939 (2004).

As an appellate court, we cannot substitute our judgment for that of the finder of fact. **Id.** Therefore, we will reverse a jury's verdict and grant a new trial only where the verdict is so contrary to the evidence as to shock one's sense of justice. **See Commonwealth v. Passmore**, 857 A.2d 697, 708 (Pa. Super. 2004), *appeal denied*, 868 A.2d 1199 (Pa. 2005). A verdict is said to be contrary to the evidence such that it shocks one's sense of justice when "the figure of Justice totters on her pedestal," or when "the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience." **Commonwealth v. Davidson**, 860 A.2d 575, 581 (Pa. Super. 2004) (citations omitted), *appeal granted on other grounds*, 871 A.2d 185 (Pa. 2005).

Furthermore,

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, 832 A.2d 403, 408 (Pa. 2003).

Commonwealth v. Cruz, 919 A.2d 279, 281-82 (Pa. Super. 2007) (citations modified).

Hitz alleges that her convictions for possession with intent to deliver and delivery of a controlled substance were against the weight of the evidence.⁹ Again, Hitz contends that she never met with Sergeant Hopkins, that she did not have access to the crack-cocaine in the car, and that she only conspired with another party to provide the drugs.

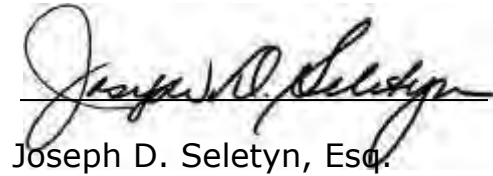
We find that the trial court did not abuse its discretion in finding that the verdict was not against the weight of the evidence. Hitz' statement that she was merely selling the drugs for someone else is equivalent to an admission to possession with the intent to deliver. Furthermore, the combined testimony of Sergeant Radwanski and Sergeant Hopkins, the fact that Hitz was found with the marked bills, and the many other circumstances surrounding her arrest which we have discussed above, in detail, demonstrate that the conviction for delivery of a controlled substance was not against the weight of the evidence. Based upon our standard of review, we find no abuse of discretion in the trial court's order denying Hitz' weight of the evidence claim.

Judgment of sentence affirmed.

Mundy J. concurs in the result.

⁹ We note that despite the fact that Hitz' concise statement challenges the entirety of the jury verdict, Hitz does not challenge the weight of any other convictions in her brief. Accordingly, we will not address these issues. ***See Montalvo, Spatz, supra*** n.8.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/15/2014