NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
AARON SMITH,	:	
	:	
Appellant	:	No. 1642 EDA 2015

Appeal from the Judgment of Sentence April 30, 2015
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No(s): CP-51-CR-0001699-2014

BEFORE: FORD ELLIOTT, P.J.E., STABILE, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED AUGUST 16, 2016**

Aaron Smith (Appellant) appeals from the judgment of sentence entered April 30, 2015, after he was found guilty of possession with intent to deliver (PWID) and possession of a controlled substance. We affirm.

To provide background, we summarize the testimony of Sergeant Donna Stewart, which was presented at the hearing on December 15, 2014 on Appellant's motion to suppress evidence. Philadelphia police officers, Sergeant Stewart and her partner, Officer Long, set up a narcotics surveillance location in the area of 2517 Myrtlewood Street on December 27, 2013.[1] On that date, at approximately 6:35 p.m., while looking through her binoculars, she observed an individual, later identified as Appellant, standing

[1] Sergeant Stewart testified that she has been a member of the police force for 17 years and has received training in narcotics packaging and enforcement. She has conducted or been part of 300 to 400 surveillances in that area, which is known as a high crime and drug area.

*Retired Senior Judge assigned to the Superior Court.

on the corner of Cumberland and Myrtlewood Streets. Appellant "was approached by a heavy-set male, and they both walked together to 2517 Myrtlewood Street, where [Appellant] dipped a cigarette in a substance and then had an exchange of money … for the cigarette." N.T., 12/15/2014, at 56. The heavy-set male was "then lost in the area." ***Id***. at 57.

At 6:45 p.m., Sergeant Stewart observed "a nearly identical transaction" between Appellant and a man later identified as Carnez Boone. Boone was stopped by Police Officer Anthony, who recovered "one cigarette that had been browned in alleged PCP oil." ***Id***. Sergeant Stewart then directed Officer Kenner to stop Appellant.

Appellant was stopped and arrested by Officer Kenner, who recovered $1,368 from his person along with PCP oil from the front porch of 2517 Myrtlewood Street. Sergeant Stewart also testified that Officer Kenner "recovered from [Appellant's] pocket one empty pack of Newport cigarettes, and one pack with cigarettes in it." ***Id***. at 27.[2] Appellant was charged subsequently with possession of a controlled substance and PWID.

Appellant filed an omnibus pre-trial motion arguing, *inter alia*, that police lacked probable cause to arrest and search Appellant. The trial court

[2] On cross-examination, counsel for Appellant pointed out that this testimony is different from the testimony Sergeant Stewart offered at Appellant's preliminary hearing. At the preliminary hearing, Sergeant Stewart testified that "the cigarettes were found on the pavement" rather than in Appellant's pocket. ***Id***. at 29. Sergeant Stewart testified that she was incorrect at the preliminary hearing, and that the cigarettes were found in Appellant's pocket.

denied the motion. ***Id***. at 58. The trial court then asked Appellant whether he wished to proceed to a bench trial or a jury trial. Counsel for Appellant responded that Appellant has "elected to stay here." ***Id***. The trial court then confirmed with Appellant that he had signed a waiver of jury trial colloquy and went over the colloquy with him. ***Id***. at 59-62.

By agreement, the parties offered no additional testimony, but stipulated to the testimony presented at the hearing on the motion to suppress. Thereafter, the trial court found Appellant guilty of both charges.

On April 30, 2015, Appellant was sentenced to 18 to 36 months of incarceration.[3] No post-sentence motions were filed. On May 26, 2015, Appellant *pro se* filed a notice of appeal. Thereafter, the trial court ordered Appellant to file a concise statement of errors complained of on appeal. New counsel was appointed, and he filed a concise statement.[4] The trial court subsequently filed an opinion.

On appeal, Appellant sets forth three issues for our review.

> I. Whether the verdict was contrary to law in that the elements of the crime of [PWID] were not proven by the Commonwealth.

[3] The sentencing transcript is not included in the certified record.

[4] The record is not clear as to why counsel did not file a notice of appeal on Appellant's behalf. However, because the notice of appeal was timely-filed, and new counsel was appointed, we need not consider whether this was procedurally proper.

> II. Whether the [trial] court erred in failing to grant Appellant's motion to suppress.
>
> III. Whether the trial court was in error in not colloguing [*sic*] Appellant about agreeing to a stipulated trial.

Appellant's Brief at 8.

We address Appellant's sufficiency-of-the-evidence claim mindful of the following standard of review.

> [O]ur standard of review of sufficiency claims requires that we evaluate the record in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty. Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Lynch, 72 A.3d 706, 707-08 (Pa. Super. 2013) (internal citations and quotation marks omitted). The Commonwealth may sustain its burden by means of wholly circumstantial evidence, and we must evaluate the entire trial record and consider all evidence received against the defendant. ***Commonwealth v. Markman***, 916 A.2d 586, 598 (Pa. 2007).

Instantly, Appellant contends that "the Commonwealth failed to establish that [] Appellant had the specific intent or goal of delivering the controlled substance to another person." Appellant's Brief at 14. Appellant points to the fact that the heavy-set male was never found, so police were

never able to confirm that this transaction involved narcotics. Moreover, Appellant suggests that even though Stewart saw Appellant reach under the porch steps, she was not able to identify exactly "which item he was reaching for at that location." ***Id***. at 15. Finally, Appellant points out inconsistencies between Sergeant Stewart's testimony at the preliminary hearing and her testimony at trial to undermine the sufficiency of the evidence. ***Id***.

The trial court set forth the following.

> Here, the evidence included facts from which drug transactions could be readily inferred, the expertise and training of Stewart, the PCP laced cigarette recovered from the second transaction, and the fact that the jar of PCP oil was seized from [Appellant]. Additionally, the amount and denomination of the currency recovered from [Appellant], in combination with other evidence, supported [Appellant's] possession of the PCP oil was for the purposes of delivery.

Trial Court Opinion, 11/2/2015, at 5.

The trial court's conclusions are supported by the record. Stewart testified that she observed Appellant conduct two drug transactions and the trial court credited this testimony. Moreover, to the extent Appellant is challenging Stewart's credibility, we bear in mind that "[a] determination of credibility lies solely within the province of the factfinder." ***Commonwealth v. Page***, 59 A.3d 1118, 1130 (Pa. Super. 2013). "[A]ny conflict in the testimony goes to the credibility of the witnesses and is solely to be resolved by the factfinder." ***Id***. Instantly, the trial court, as factfinder, concluded that

it "has no difficulty in reconciling the conflicts in [Stewart's] testimony" in denying Appellant's pre-trial motion. N.T., 12/15/2014, at 58. Accordingly, we hold the evidence was sufficient to sustain Appellant's convictions, and Appellant is not entitled to relief on this basis.

Appellant next argues that the trial court erred in denying his motion to suppress. Specifically, Appellant contends the trial court erred in concluding that Officer Kenner had "probable cause … to stop Appellant." Appellant's Brief at 16. Appellant argues that the conduct witnessed by Stewart "was not sufficient to provide … probable cause to believe that a crime had been committed." ***Id***. at 18.

> Probable cause is made out when the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime. The question we ask is not whether the officer's belief was correct or more likely true than false. Rather, we require only a probability, and not a *prima facie* showing, of criminal activity. In determining whether probable cause exists, we apply a totality of the circumstances test.

Commonwealth v. Thompson, 985 A.2d 928, 932 (Pa. 2009) (citations and quotation marks omitted).

Here, the trial court concluded that "[Stewart's] ample experience, the observed transactions and the recovery of the apparent drug proceeds of the second transaction, all combined to provide probable cause to arrest [Appellant] and search his person incident to that arrest." Trial Court

Opinion, 11/2/2015, at 4. These conclusions are supported by the record. Under a totality of the circumstances test, Stewart presented ample testimony to support her conclusion that conduct of Appellant which she observed created a probability of criminal activity giving rise to probable cause to stop Appellant. Accordingly, we discern no error on this basis.

Finally, Appellant contends that the trial court erred when it did not colloquy Appellant prior to his agreeing to a stipulated trial. Appellant's Brief at 19. Even if we were to conclude that the trial court was required to colloquy Appellant under these circumstances, and erred by failing to do so, Appellant is not entitled to relief. Counsel for Appellant agreed to conducting a trial based upon the testimony presented immediately prior at the suppression hearing. ***See*** N.T., 12/15/2014, at 62 ("Your Honor, there's been a stipulation by and between counsel to incorporate all non-hearsay relevant testimony from the motion to suppress…."). Because counsel for Appellant never asked the trial court to conduct a colloquy, nor object to the trial court's failure to do so, the issue is waived on appeal. ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.

Prothonotary

Date: 8/16/2016