

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
DAVID FRENCH,	:	
	:	
Appellant	:	No. 3196 EDA 2015

Appeal from the Judgment of Sentence September 15, 2015
in the Court of Common Pleas of Philadelphia County,
Criminal Division, No(s): CP-51-CR-0003504-2015

BEFORE: GANTMAN, P.J., MOULTON and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED DECEMBER 22, 2016**

David French ("French") appeals from the judgment of sentence imposed following his conviction of possession of a controlled substance and possession with intent to deliver ("PWID").¹ We affirm.

In its Opinion, the trial court set forth the relevant factual and procedural history, which we adopt for the purpose of this appeal. **See** Trial Court Opinion, 1/11/16, at 1-4.

On appeal, French raises the following issues for our review:

- i. Did the trial court err in failing to grant [French's] Motion to Suppress evidence where the arresting officers searched [French] and his backpack without probable cause or a search warrant to do so[?]
- ii. Did the trial court err in finding [French] guilty of [PWID] where there was [in]sufficient evidence that [French] sold or intended to sell a controlled substance[?]

¹ **See** 35 Pa.C.S.A. § 780-113(A)(16), (30).

- iii. Did the trial court err in finding [French] guilty of PWID[,]
as the verdict was against the weight of the evidence[?]

Brief for Appellant at 10 (capitalization omitted).

In his first issue, French contends that the facts within the knowledge of Officer Joseph Ferrero (“Officer Ferrero”) and his partner, at the time they placed French under arrest, were insufficient to create probable cause to arrest him. **Id.** at 17. French concedes that there were general complaints about narcotics in the surveilled area, but asserts that the sales complained of were “concentrated three addresses west from where [he] was first observed.” **Id.** at 17-18. French also asserts that the “ cursory surveillance took place in the afternoon, a time when the sale of narcotics was known by the officers to be slow.” **Id.** at 18. French claims that the trial court relied on Officer Ferrero’s experience as a narcotics officer, and his participation in more than a thousand narcotics surveillances, as strong factors in denying the Motion to Suppress. **Id.** French argues that there was an insufficient “nexus” between the officers’ experience and their observations of French to create the appropriate level of probable cause to arrest him. **Id.** at 19. French contends that the trial court erred by determining that the officers’ “limited observations and police experience [were] enough to establish the requisite probable cause for a proper arrest and search of [French], and wrongly denied [his] Motion to Suppress.” **Id.** at 20.

Our standard of review of a denial of suppression is whether the record supports the trial court’s factual findings and whether the legal conclusions drawn therefrom are free from

error. Our scope of review is limited; we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the findings of the suppression court, we are bound by those facts and may reverse only if the court erred in reaching its legal conclusions based upon the facts.

Commonwealth v. Galendez, 27 A.3d 1042, 1045 (Pa. Super. 2011) (*en banc*) (citation omitted).

In its Opinion, the trial court addressed French's first issue, set forth the relevant law, and determined that the issue lacks merit. **See** Trial Court Opinion, 1/11/16, at 4-6. Based on our review, we agree with the reasoning of the trial court, which is supported by the record, and affirm on this basis as to French's first issue. **See id.**

In his second issue, French contends that the evidence was insufficient to support his conviction of PWID. Brief for Appellant at 21. French points out that, at the time of his arrest, he was in possession of both controlled and non-controlled substances, and asserts that the Commonwealth did not establish that he intended to deliver a controlled substance to the unknown buyer, as two of the four amber pill bottles contained non-controlled substances. **Id.** at 21, 23. French claims that the evidence of record is weak and inconclusive, and does not establish beyond a reasonable doubt that he provided a controlled substance to the unknown buyer. **Id.** at 23-24.

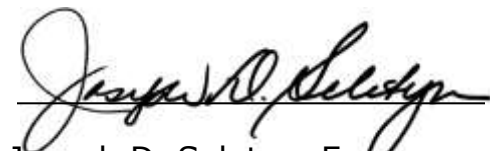
In its Opinion, the trial court addressed French's second issue, set forth the relevant law, and determined that the issue lacks merit. **See** Trial Court Opinion, 1/11/16, at 6-7. Viewing the evidence in the light most favorable to the Commonwealth, as the verdict winner, we agree with the reasoning of the trial court, and affirm on this basis as to French's second issue. **See id.**

In his third issue, French contends that the verdict was against the weight of the evidence presented at trial. Brief for Appellant at 25. French asserts that the trial court abused its discretion by "ignor[ing] the facts in the record that there were more non-controlled substances recovered from [French,] and most of these non-controlled substances were present in 2 of the 4 amber pill bottles." **Id.** at 26.

In its Opinion, the trial court addressed French's third issue, set forth the relevant law, and determined that the issue lacks merit. **See** Trial Court Opinion, 1/11/16, at 8-9. We agree with the reasoning of the trial court, and affirm on this basis as to French's third issue. **See id.**

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/22/2016

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL

COMMONWEALTH OF PA

CP-51-CR-0003504-2015

v.

DAVID FRENCH

FILED
JAN 11 2016
Criminal Appeals Unit
First Judicial District of PA
MEMORANDUM OPINION

CAMPBELL, J.

January 11, 2016

Procedural History

On September 15, 2015, Defendant David French proceeded to trial before this Court, sitting without a jury, following denial of a motion to suppress physical evidence. Defendant was convicted of Possession with Intent to Deliver Controlled Substances (35 Pa.C.S. § 780-113(A)(30)), and Possession of a Controlled Substance (35 Pa.C.S. § 780-113 (A)(16)).

Immediately thereafter Defendant was sentence to a period of three years probation. The Possession of Controlled Substance conviction merged for purposes of sentencing.

A timely Notice of Appeal was filed on, October 8, 2015.

Pursuant to Pa.R.A.P. 1925(b)(2) and (3), the Court entered an order on October 23, 2015, directing the filing of a Statement of Errors Complained of on Appeal, not later than twenty-one (21) days after entry of the order. That Order was reissued on November 20, 2015.

On December 2, 2015, a Statement of Errors Complained of on Appeal was filed.

Factual History

Officer Joseph Ferrero testified that on December 30, 2014, at approximately 2:15 PM, he was on duty as a plain clothes office on narcotics enforcement in the vicinity of 9th and Market Streets in Philadelphia. NT 9/15/15, pp. 6-7. He established this surveillance as a result

of complaints of narcotics use and sales, including several times a month from the manager of the McDonald's at 10th & Market Streets. NT 9/15/15, pp. 10.

The location is a high drug sale location during the day, when the Methadone clinic on the south side of the 900 block of Market street is open. From his 20 years experience working in the 6th Police District, Officer Ferrero knew that location draws pill sales. From his training, Officer Gallaher knew that certain pills were taken in connection with Methadone to enhance the high. He testified that Clonidine, a heart medication, acts as an accelerant to enhance the user's "high". Additionally, forms of Xanax, whether Alprazolam or Clonazepam, prolong the effects of intoxication.. NT 9/15/15, pp. 11-12.

During his 20 years working in the 6th District, Officer Ferrero had done narcotics works for 11 years. He had performed thousands of surveillances in that area and made arrests in 90 percent of those surveillances. NT 9/15/15, pp. 11-12, 13.

Using binoculars, Officer Ferraro observed Defendant standing outside the Dunkin' Donuts at 938 Market Street, when Defendant was approached by an unknown male. After a short conversation, the male handed Defendant an unknown amount of United States Currency (USC). Defendant placed the USC in his drawstring bag and retrieved from the bag an amber pill bottle, from which he handed the male two small objects. NT 9/15/15, pp. 7-8. The officer and his partner attempted to stop the male after he left Defendant, but lost him inside the Gallery shopping mall. NT 9/15/15, pp. 8-9.

Based upon his observations, including the short conversation, the USC and delivery of small items from a pill bottle, Officer Ferrero concluded Defendant was involved in a narcotics transaction with the unknown male. NT 9/15/15, p. 12.

The officer returned and approached Defendant who had moved two properties west on Market Street. Recovered from Defendant's bag was \$482 USC, a plastic baggy containing five patches of Suboxone, a Schedule III narcotic, an Advil PM bottle with one yellow pill and one white pill, later identified as Alprazolam, a Schedule IV narcotic, an amber pill bottle containing 12 green pills, later identified as Clonazepam, a Schedule IV narcotic, an amber pill bottle containing 12 Alprazolam pills, a red pill bottle with Tylenol and Ibuprofen, an amber pill bottle containing 30 orange pills later identified as Citalopram, and an amber pill bottle containing seven orange pills, later identified as Clonidine.

At the close of the testimony, the Court made the following findings of fact and conclusions of law:

The defendant filed a motion to suppress all physical evidence recovered from his person and the bag that he was carrying, asserting that the search of his bag and his person as well as his arrest were all lacking probable cause and the stop -- to the extent that the stop preceded the arrest -- lacked reasonable suspicion. Pursuant to which the Commonwealth called Officer Ferrero to testify, who indicated that on the date, time, and location in question, he was conducting a confidential surveillance location with his partner, Officer Grant, of the area surrounding 938 Market Street with the use of binoculars. He was there in response to numerous complaints of pill sales and use in the immediate area. He knew that particular area to be high for the incidence of use and sales. He also indicated that he had made arrests earlier that day and had participated -- in one way or another -- in at least 1000 surveillances of that precise area. He testified that he observed a white male with large sunglasses and black puffy coat approach this defendant and hand him US currency. After which this defendant retrieved an amber pill bottle from a drawstring bag that he'd been wearing as a backpack, from which he retrieved an amber pill bottle and extracted two small pills that he then gave to this unknown male with a pinching motion. He then immediately left and went into the mall and was lost in the area. Police Officer Ferrero notified Officer Grant that the alleged buyer was lost in the area. The defendant was seen a short time later about two blocks away at McDonald's at which point -- as he was recognized as the alleged seller -- he was stopped and arrested. Recovered from him were \$482 and a bag containing numerous pills, alleged different schedules -- alleged controlled substances.

The Commonwealth bears the burden to prove by a preponderance of the evidence that all police activity was lawful. I find that the officer testified credibly in this case. I also find that under the totality of the circumstances, there was probable cause

to justify the defendant's search and arrest, which includes, but is not limited to, the exchange of US currency for two pills with someone who left immediately thereafter. The use of a pinching motion, the fact that the defendant placed the pill bottle back in his bag, the police officer's experience in that particular specific location in which he participated in at least a thousand surveillances -- including the fact that he had made an arrest earlier that day at that precise location. The area is known as an area high in narcotics sales and use, especially pills -- unlawful pill sales and use. Therefore, the defendant's arrest and search were lawful and the motion to suppress is denied.

NT 9/15/15, pp. 21-23.

Following denial of the motion to suppress, the relevant non-hearsay testimony from the motion was incorporated and the analysis of the seized items was admitted by stipulation. NT 9/15/15, pp. 23, 27-29.

Discussion

Defendant alleges three errors on appeal: 1) failure to grant the motion to suppress, 2) the evidence was insufficient to support the conviction Possession with Intent to Deliver Controlled Substances, and 3) the verdict was against the weight of the evidence.

1. Defendant's Motion to Suppress was properly denied.

Defendant argued at the motion to suppress hearing that the conduct observed by Officer Ferrero was not sufficient to provide either reasonable suspicion or probable cause to believe that a crime had been committed. The evidence here establishes that Officer Ferrero stopped and searched Defendant. This was not an investigatory stop with an accompanying frisk, but rather a full blown arrest. Accordingly, the inquiry is whether there was probable cause for that arrest.

“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 [person] of reasonable caution in the belief that the

suspect has committed or is committing a crime." *Commonwealth v. Thompson*, 985 A.2d 928, 931, 604 Pa. 198, 203 (Pa. 2009) (internal quotations and citations omitted).

In determining whether probable cause exists:

The time is important; the street location is important; the use of a street for commercial transactions is important; the number of such transactions is important; the place where the small items were kept by one of the sellers is important; the movements and manners of the parties are important.

Thompson, 985 A.2d at 932 (citing *Commonwealth v. Lawson*, 454 Pa. 23, 309 A.2d 391, 394 (Pa. 1973)).

In *Thompson*, a police officer observed the defendant hand money to another individual in exchange for a small object in a high crime area. *Thompson*, 985 A.2d at 930. Relying upon his nine years' experience, the officer reasonably believed he had observed a drug transaction. He stopped Thompson, and found drugs in his pocket. *Id.*

Commonwealth v. Delvalle, 74 A.3d 1081 (Pa. Super. 2013), is factually similar to the instant case. Therein, undercover Philadelphia police officers in "plainclothes" conducted surveillance for drug sales. The surveillance officer observed four exchanges of money for a small object over a short period of time. The officer was a four year member of a narcotics enforcement team, and was familiar with the location has a high crime area and the specific block a high drug sales area. The officer had conducted 30 to 40 prior surveillances for narcotic transactions at the location, leading to 75 to 100 arrests as a result of drug transactions "very similar" to the interactions which he observed. *Id.* at 1082-1083.

In *Delvalle*, unlike here and in *Thompson*, the officer did not explicitly connect his observations and his experience as part of the foundation for his belief. Nonetheless, the trial court properly found that the officer's conclusions were informed by his experience and that the

observed conduct established probable cause, even without the officer testifying that his belief was based on his experience. *Delvalle*, 74 A.3d at 1086.

Instantly, the officer's ample relevant experience with drug sales in general and at that location specifically, the fact that the scene was a high drug crime area (for pill sales in particular), and the observed transaction itself, all combined to provide probable cause to arrest Defendant and search his person incident to that arrest.

Accordingly, the arrest and seizure of evidence from Defendant's bag were lawful and the motion to suppress was properly denied.

2. The evidence was sufficient to establish the crime of Possession with Intent to Deliver Controlled Substances.

A claim challenging the sufficiency of the evidence presents a question of law. *Commonwealth v. Widmer*, 560 Pa. 308, 744 A.2d 745, 751 (2000). We must determine "whether the evidence is sufficient to prove every element of the crime beyond a reasonable doubt." *Commonwealth v. Hughes*, 521 Pa. 423, 555 A.2d 1264, 1267 (1989). We "must view evidence in the light most favorable to the Commonwealth as the verdict winner, and accept as true all evidence and all reasonable inferences therefrom upon which, if believed, the fact finder properly could have based its verdict." *Id.*

Our Supreme Court has instructed:

[T]he 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. 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. Ratsamy*, 594 Pa. 176, 934 A.2d 1233, 1236 n. 2 (2007).

Commonwealth v. Thomas, 65 A.3d 939, 943 (Pa.Super. 2013).

Moreover, a conviction may stand on circumstantial evidence. *Commonwealth v. Roscioli*, 309 A.2d 396, 398 (1973) ("Although the Commonwealth does not have to establish guilt to a mathematical certainty, and may in the proper case rely wholly on circumstantial evidence, the conviction must be based on more than mere suspicion or conjecture."); *Commonwealth v. Brewer*, 876 A.2d 1029, 1032 (Pa.Super. 2005) ("[T]he fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence." (quoting *Commonwealth v. Murphy*, 795 A.2d 1025, 1038-39 (Pa.Super. 2002))).

The Commonwealth was required to prove both possession of the controlled substance and the intent to deliver the controlled substance. The facts and circumstances surrounding possession are relevant in making a determination of whether contraband was possessed with the intent to deliver. *Commonwealth v. Ramos*, 573 A.2d 1027, 1032 (Pa. Super. 1990). A fact finder may consider all of the facts and circumstances surrounding the possession of the controlled substance. *Commonwealth v. Torres*, 617 A.2d 812 (Pa. Super. 1992) Appeal denied 629 A.2d 1379 (1993).

Here, Defendant possessed a number of pills, in multiple unmarked containers, and a large amount of cash. He conducted a transaction from one of those containers, in a high drug activity area, and he possessed drugs peculiar to the historic drug activity at that location. Under all the facts and circumstances, we concluded that this evidence demonstrated that Defendant possessed the controlled substances with intent to deliver.

3. The verdicts were not against the weight of the evidence.

Defendant asserts that the verdict was against the weight of the evidence and a new trial is necessary in the interests of justice.

The Supreme Court has explained:

A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. *Commonwealth v. Whiteman*, 336 Pa. Super. 120, 485 A.2d 459 (Pa. Super. 1984). Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. *Tibbs*, 457 U.S. at 38 n. 11. [footnote omitted] An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. *Commonwealth v. Brown*, 538 Pa. 410, 648 A.2d 1177 (Pa. 1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. *Thompson*, supra. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." *Id.*

Commonwealth v. Widmer, 560 Pa. 308, 319-320, 744 A.2d 745, 751-752 (Pa. 2000). Further:

The decision of whether to grant a new trial on the basis of a challenge to the weight of the evidence is necessarily committed to the sound discretion of the trial court due to the court's observation of the witnesses and the evidence. *Brown*, 538 Pa. 410, 648 A.2d 1177. A trial court should award a new trial on this ground only when the verdict is so contrary to the evidence as to shock one's sense of justice. *Commonwealth v. Whitney*, 511 Pa. 232, 512 A.2d 1152 (Pa. 1986). A motion alleging the verdict was against the weight of the evidence should not be granted where it merely identifies contradictory evidence presented by the Commonwealth and the defendant.

Commonwealth v. Chamberlain, 612 Pa. 107, 133-134, 30 A.3d 381, 396 (Pa. 2011).

Here, the evidence was that Defendant possessed a number of pills, in multiple unmarked containers, and a large amount of cash. He conducted a transaction from one of those

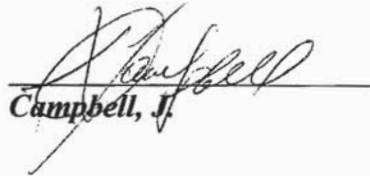
containers, in a high drug activity area, and he possessed drugs peculiar to the historic drug activity at that location.

The verdict was not was not at all contrary to this evidence and our sense of justice is not shocked by the verdict.

Conclusion

Accordingly, for all the reasons set forth here, Defendant's conviction should be affirmed.

By The Court:


Campbell, J.