

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

DWANE SIMMONS

Appellant

No. 2133 EDA 2012

Appeal from the Judgment of Sentence June 22, 2012  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0901071-2005

BEFORE: ALLEN, J., OTT, J., and COLVILLE, J.\*

MEMORANDUM BY OTT, J.

**FILED DECEMBER 20, 2013**

Dwane Simmons appeals from the judgment of sentence imposed on June 22, 2012, in the Court of Common Pleas of Philadelphia County. Following a non-jury trial, Simmons was found guilty of possession with intent to deliver a controlled substance (heroin), possession of a controlled substance (heroin), criminal conspiracy, and criminal use of a communication facility.<sup>1</sup> Simmons was sentenced to a term of imprisonment of 11½ months' to 23 months, to be followed by 7 years' probation. Based upon the following, we affirm on the basis of the trial court's opinion.

---

\* Retired Senior Judge assigned to the Superior Court.

<sup>1</sup> 35 P.S. § 780-113(a)(30), 35 P.S. § 780-113(a)(16), 18 Pa.C.S. § 903, and 18 Pa.C.S. § 7512, respectively.

The trial court has aptly summarized the facts and procedural history in its Pa.R.A.P. 1925(a) opinion and we adopt its recitation. **See** Trial Court Opinion, 11/15/2012, at 1–4. In this appeal, Simmons challenges the sufficiency of the evidence to sustain his convictions for possession with intent to deliver a controlled substance and conspiracy.<sup>2</sup>

The trial court has provided a thorough and well-reasoned discussion of Simmons’s sufficiency claims. **See** Trial Court Opinion, *supra*, at 5–7 (explaining: (1) the evidence at trial established that Simmons illegally possessed a controlled substance, where police observed Simmons hand an object to another individual, William Palazzo, in exchange for money, after which police followed Palazzo and recovered 13 packets of heroin, each stamped with the words “Scar Face,” that Palazzo had thrown out of his car

---

<sup>2</sup> While Simmons’s Statement of Matters Complained of Pursuant to Pa.R.A.P. 1925(b) simply states, in relevant part, “the evidence was legally insufficient to support the convictions of PWID and conspiracy,” without specifying the elements or elements upon which the evidence was insufficient, we decline to find waiver. **See *Commonwealth v. Laboy***, 936 A.2d 1058, 1060 (Pa. 2007) (vacating and remanding matter for Superior Court to conduct sufficiency review; overlooking Pa.R.A.P. 1925(b) statement’s lack of specificity in “relatively straightforward drug case” where the trial court apprehended defendant’s claim and addressed the merits of sufficiency challenge).

In the present case, the issues framed by Simmons in his Rule 1925(b) statement are very similar to the issues set forth in the concise statement filed in ***Laboy***. **See *id.*** at 1058 (“I. Evidence of drug trafficking and conspiracy was insufficient. II. Evidence of conspiracy was insufficient.”). Furthermore, in this case, like ***Laboy***, the trial court filed an opinion addressing the sufficiency claims.

window; in addition, police had observed Simmons participating in two similar transactions the evening prior to the incident, and Simmons was present at a transaction on the following evening during which police bought heroin from another individual, Daniel Ruiz; (2) the evidence at trial established that Simmons illegally possessed a controlled substance with the intent to deliver, where police observed Simmons engage in a number of transactions in which he accepted money in exchange for small objects, each time retrieving those objects from the same white car, and, minutes after the Palazzo transaction, police followed Palazzo and recovered heroin thrown from Palazzo's vehicle, and (3) the evidence at trial established that Simmons conspired with another to illegally possess a controlled substance with intent to deliver, specifically, Ruiz drove Simmons to the Palazzo transaction where Simmons gave Palazzo heroin marked with the words "Scar Face," Simmons was with Ruiz when Ruiz sold heroin marked with the words "Scar Face" to an undercover police officer in the presence of Simmons, and 824 additional packets of heroin marked with the words "Scar Face" were recovered from a property rented to a woman named Roman, who was also present at the latter sale, on the same night). We agree with the analysis of the trial court and adopt its sound reasoning. Accordingly, we affirm.

Judgment of sentence affirmed.

Colville, J., concurs in the result.

J-S56012-13

Judgment Entered.

A handwritten signature in black ink, written in a cursive style, reading "Joseph D. Seletyn". The signature is written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 12/20/2013

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0901071-2005  
: :  
vs. : :  
: : SUPERIOR COURT  
DWANE SIMMONS : NO. 2133 EDA 2012

**FILED**

OPINION  
NOV 20 2012

BELOFF, ADAM M., J.

NOVEMBER 15, 2012

Criminal Appeals Unit  
First Judicial District of PA

I. OVERVIEW, FACTS, AND PROCEDURAL HISTORY

On May 22, 2012, Dwane Simmons (“Defendant” or “Appellant”) was tried before this Court without a jury.<sup>1</sup> At trial, Philadelphia police officer Myers testified that he was assigned to the Narcotic Strike Force in January of 2005. N.T. from 5/22/2012, p. 10. Officer Myers testified that he participated in a multi-day investigation related to sales of heroin in Philadelphia in January of 2005. N.T. from 5/22/2012, pp. 9-56.

On January 24, 2005, Officer Myers and other officers went to the 5100 block of Mebus Street in Philadelphia at approximately 7:30 p.m. N.T. from 5/10/2012, pp. 15-19. That night, the officer saw Defendant seated in a white car. *Id.* The officer then observed the following. A white man approached the white car. *Id.* Defendant got out of the car and spoke to the white man. *Id.* The white man handed Defendant money. *Id.* Defendant reached inside of the white car, retrieved an object, and then handed that object to the white man. *Id.* The white man left the area immediately and was not stopped by police. *Id.*

<sup>1</sup> Defendant knowingly, intelligently, and voluntarily waived his right to a trial by jury and elected to proceed with a bench trial. N.T. from 5/22/2012, pp. 4-6.

Approximately 20 minutes later, Officer Myers observed the following. Another white man approached the white car which Defendant was sitting inside. *Id.* Defendant got out of the car and spoke to the second white man. *Id.* The second white man handed Defendant money. *Id.* Defendant again retrieved an object from inside of the white car, and then handed that object to the second white man. *Id.* The second white man left the area immediately and was not stopped by police. *Id.*

On January 25, 2005, Officer Myers and other officers went back to the 5100 block of Mebus Street in Philadelphia at approximately 7:45 p.m. N.T. from 5/10/2012, pp. 19-23. That night, the officer saw Defendant standing outside of the same white car. *Id.* The white car was parked in almost the same spot as the prior night. *Id.* Defendant was standing with a man named Ruiz. *Id.* Defendant appeared to have a conversation on a cell phone. *Id.* Defendant and Ruiz then entered the white car: Ruiz drove and Defendant sat in the front seat. *Id.* Officer Myers followed the white car to a gas station on Roosevelt Boulevard in Philadelphia. *Id.* At the gas station, Defendant exited the white car. *Id.* A man named Palazzo exited a pickup truck that was parked at the gas station, walked over to Defendant, and spoke with Defendant. *Id.* Palazzo handed Defendant money. *Id.* Defendant reached inside of the white car, retrieved an object, and then handed that object to Palazzo. *Id.*

Palazzo got back into the pickup truck parked at the gas station. *Id.* Police followed the pickup truck from the gas station and stopped it a few blocks away. N.T. from 5/22/2012, pp. 19-23, 59-66. Officer Riley saw Palazzo throw an object out of the window of the pickup truck as police pulled the truck over. *Id.* Officer Riley recovered the object which proved to be 13 packets of heroin rubber banded together. N.T. from 5/22/2012, pp. 19-23, 59-66, 79-81. The packets were stamped with the words "Scar Face." *Id.*

On January 26, 2005, Officer Myers placed a phone call in an attempt to make a controlled purchase of narcotics. N.T. from 5/22/2012, pp. 23-39. Based upon that conversation, Officer Myers went to a restaurant located on the corner of 2<sup>nd</sup> Street and Allegheny Avenue in Philadelphia. *Id.* At the restaurant, Officer Myers met Ruiz and sat at a table with Ruiz, Defendant, and a woman named Roman. *Id.* Officer Myers spoke only to Ruiz. *Id.* Myers told Ruiz "I need two" and handed Ruiz \$20 in pre-recorded money. *Id.* Ruiz handed the officer two packets of heroin. *Id.* The packets were stamped with the words "Scar Face." *Id.* A short time later, officers arrested Defendant, Roman, and Ruiz at the restaurant. *Id.*

Ruiz had the pre-recorded buy money and the cell phone which Officer Myers called earlier that night in his possession when he was arrested. N.T. from 5/22/2012, pp. 50-56. Ruiz also had 98 packets of heroin stamped with the words "Scar Face" in his possession when he was arrested. N.T. from 5/22/2012, pp. 78-81.

Roman had the keys to a property located at 3310 I Street in Philadelphia in her possession when she was arrested. N.T. from 5/22/2012, pp. 50-56. On January 26, 2005, Philadelphia police officers executed a search pursuant to a warrant at 3310 I Street as Roman was being arrested at the restaurant. N.T. from 5/22/2012, pp. 28-38. At 3310 I Street, police recovered, *inter alia*, 824 packets of heroin stamped with the words "Scar Face", \$1,410 in cash, photographs of Ms. Roman, and a rental agreement for the property in Ms. Roman's name.

At trial, Defendant offered no evidence.

Accordingly, this court found Defendant guilty of: possession of a controlled substance, *i.e.*, heroin, with the intent to deliver, 35 P.S. §780-113(a)(30) with respect to the 13 packets confiscated from Palazzo (an ungraded felony); knowing and/or intentional possession of a controlled substance, *i.e.*, heroin, 35 P.S. §780-113(a)(16) with respect to the 13 packets

confiscated from Palazzo (a misdemeanor); criminal conspiracy, 18 Pa.C.S. § 903 relating to the ongoing narcotic distribution operation involving Defendant and Ruiz (an ungraded felony); and, criminal use of a communication facility, 18 Pa.C.S.A. § 7512.

On June 22, 2012, this Court held a sentencing hearing at which the Court reviewed a pre-sentence investigation report. Based upon that report and other relevant factors, this Court imposed a sentence<sup>2</sup> of:

- Eleven and one-half (11 ½) months to twenty-three (23) months incarceration followed by five (5) years of probation on the charge of possession with the intent to deliver (“PWID”);
- Eleven and one-half (11 ½) months to twenty-three (23) months incarceration followed by five (5) years of probation on the charge of criminal conspiracy to run concurrently with the sentence for PWID;
- Seven (7) years of probation on the charge of criminal use of a communication facility to run concurrently with the sentence for PWID;
- the simple possession charge merged for sentencing purposes.

No post-trial or post-sentence motions were filed by Defendant. Defendant filed a timely Notice of Appeal. On appeal, Defendant alleges “that the evidence was legally insufficient to support the convictions of PWID and conspiracy.” *Defendant’s Rule 1925(b) Statement*, ¶ 2.

---

<sup>2</sup> This sentence is within the mitigated range recommended by the sentencing guidelines given Defendant’s prior record score of four and the applicable offense gravity score of six. The sentencing guidelines recommend a minimum sentence of incarceration between 15 and 21 months plus-or-minus 6 months. 204 Pa. Code § 303.16.



## II. DISCUSSION

### A. **The Evidence at Trial Establishes that Defendant Illegally Possessed a Controlled Substance**

The evidence at trial established beyond a reasonable doubt that a police officer observed Defendant hand an object to Palazzo in immediately after receiving money from Palazzo. This transaction was similar to two transactions which Defendant participated in the evening before. This transaction was also similar to a transaction which Defendant was present for on the following evening in which Officer Myers bought heroin from Ruiz.

After his transaction with Defendant, police followed Palazzo and recovered 13 packets of heroin which Palazzo threw out of his vehicle's window. Each of those packets had the words "Scar Face" stamped on them. It is undisputed that a sample of those packets was tested and found to be heroin. N.T. from 5/22/2012, pp. 79-81. It is an indisputable matter of law that heroin is a "controlled substance." 35 P.S. § 780-104(1)(ii)(10).

Pennsylvania law provides that individuals are prohibited from "Knowingly or intentionally possessing a controlled ... substance ... ." 35 P.S. § 780-113(a)(16). Because heroin is a controlled substance which Defendant possessed, this Court finds that he violated 35 P.S. § 780-113(a)(16) beyond a reasonable doubt.

### B. **The Evidence at Trial Establishes that Defendant Illegally Possessed a Controlled Substance with the Intent to Deliver the Same**

Pennsylvania law also prohibits "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance ... ." 35 P.S. § 780-113(a)(30).

In this case Defendant engaged in engaged in a number of similar transactions in which he accepted money in exchange for small objects. In each instance, Defendant retrieved those

objects from the same white car. Shortly after one such transaction, police stopped the individual that Defendant handed a small object to – *i.e.*, Palazzo. Police recovered heroin from the street minutes after his transaction with Defendant after police saw Palazzo throw that heroin out of his vehicle's window.

Because police observed the transactions involving Defendant, they were precluded from offering expert testimony at trial regarding Defendant's intent with respect to the drugs recovered. *See Commonwealth v. Carter*, 403 Pa. Super. 615, 589 A.2d 1133 (Pa. Super. 1991), appeal denied, 528 Pa. 621, 597 A.2d 1151 (Pa. 1991). However, as observed by the Superior Court in *Carter*, where trafficking is directly observed by police and offered into evidence, expert testimony is prejudicial, unnecessary and, in fact prohibited. As in *Carter*, "The facts presented were easily assessed by an ordinary layperson ... ." *Commonwealth v. Carter*, 589 A.2d at 1134.

This Court notes the Superior Court's holding in *Carter* that, "If the jury believed this testimony, they could conclude, based on common knowledge of what is happening when one person hands an object to another and in return receives U.S. currency, that a transaction had occurred." *Commonwealth v. Carter*, 589 A.2d at 1135. The Superior Court went on to note that "if they found credible the testimony that the person had previously retrieved the object from a container which is later found to contain heroin, they may conclude, using their experience with the ordinary affairs of life, that Appellant was selling heroin." *Id.* The Superior Court concluded that "No special knowledge or insight is required to reach this conclusion." *Id.*

Accordingly, this Court concludes, based upon the evidence presented at trial, together with all reasonable inferences to be drawn therefrom, this Court finds that Defendant violated 35 P.S. § 780-113(a)(30) beyond a reasonable doubt.

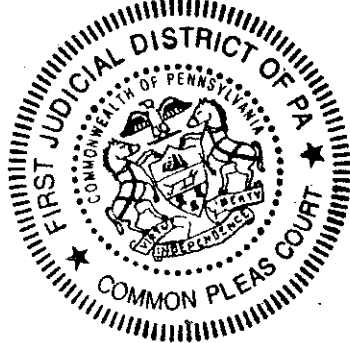
**C. The Evidence at Trial Establishes that Defendant Conspired with Another to  
Illegally Possess a Controlled Substance with the Intent to Deliver the Same**

In this case Ruiz drove Defendant to the location of the Palazzo transaction where Defendant gave Palazzo heroin marked with the words "Scar Face." In addition, Defendant was present with Ruiz sold heroin marked with the words "Scar Face" to Officer Myers. Roman was also present for the latter sale. Notably, 824 additional packets of heroin marked with the words "Scar Face" were recovered from a property rented to Roman on the night that Ruiz sold heroin to Officer Myers.


In this matter, the sales of heroin to the Palazzo and Officer Myers indisputably occurred in the presence of both Ruiz and Defendant. These overt acts furthered the conspiracy to illegally distribute narcotics.

**III. CONCLUSION**

In sum, the citations to the trial record set forth in this opinion led this Court to conclude that the evidence presented at trial, together with all reasonable inferences to be drawn therefrom, established beyond a reasonable doubt that Defendant committed the offenses of: possession of a controlled substance, *i.e.*, heroin, with the intent to deliver, 35 P.S. §780-113(a)(30) (an ungraded felony); knowing and/or intentional possession of a controlled substance, *i.e.*, heroin, 35 P.S. §780-113(a)(16) (a misdemeanor); criminal conspiracy, 18 Pa.C.S. § 903 relating to the ongoing narcotic distribution operation involving Defendant and Ruiz (an ungraded felony); and, criminal use of a communication facility, 18 Pa.C.S.A. § 7512.



BY THE COURT:

  
ADAM M. BELOFF, J.