NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
ALPHONSO REED,	:	
	:	
Appellant	:	No. 244 MDA 2013

Appeal from the Judgment of Sentence January 23, 2013
In the Court of Common Pleas of Lebanon County
Criminal Division No(s).: CP-38-CR-0001482-2011

BEFORE: BENDER, LAZARUS, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED NOVEMBER 25, 2013**

Appellant, Alphonso Reed, appeals from the judgment of sentence entered in the Lebanon County Court of Common Pleas following his convictions, after a bench trial, for possession with intent to distribute a controlled substance[1] ("PWID"), criminal use of a communication facility,[2] and conspiracy.[3] He challenges the sufficiency and weight of the evidence. We affirm.

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* Former Justice specially assigned to the Superior Court.

[1] 35 P.S. § 780-113(a)(30).

[2] 18 Pa.C.S. § 7512.

[3] 18 Pa.C.S. § 903.

We adopt the facts and procedural history set forth by the trial court's opinion. ***See*** Trial Ct. Op., 3/27/13, at 2-4. On January 23, 2013, the court sentenced Appellant to an aggregate term of four to ten years' imprisonment. Appellant did not file a post-sentence motion. Appellant filed a timely notice of appeal on January 29, 2013, and timely filed a court-ordered Pa.R.A.P. 1925(b) statement, which challenged the sufficiency and weight of the evidence, as follows:

> The trial court erred in its verdict against the Appellant as the Commonwealth's evidence was insufficient to support his conviction and the weight of the evidence was wrongly applied in the Commonwealth's favor.

Appellant's Pa.R.A.P. 1925(b) Statement, 3/4/13, at 1.

The issue Appellant raises in his appellate brief is essentially identical to the above. ***See*** Appellant's Brief at 8. In his brief, Appellant complains that the Commonwealth did not sufficiently establish him to be the perpetrator and that he delivered a controlled substance. He suggests that his convictions were against the weight of the evidence because the evidence was unreliable and contradictory. We hold Appellant is not entitled to relief.

We address Appellant's weight challenge first. Initially, we note that a challenge to the weight of the evidence "concedes that there is sufficient evidence to sustain the verdict." ***Commonwealth v. Widmer***, 744 A.2d 745, 751 (Pa. 2000). This Court cannot "entertain a challenge to the weight of the evidence since [its] examination is confined to the 'cold record.'"

Commonwealth v. Brown, 648 A.2d 1177, 1191 (Pa. 1994) (citation omitted). We only review whether the trial court abused its discretion when it evaluated the challenge. ***Id.*** (limiting review of weight of evidence to whether trial court abused discretion and not assessing credibility of witnesses). For these reasons, a challenge to the weight of evidence may not be raised for the first time on appeal. ***Id.***; ***see also*** Pa.R.A.P. 607(a). Thus, if the issue is not raised with the trial court initially, it is waived. ***Commonwealth v. Sherwood***, 982 A.2d 483, 494 (Pa. 2009).

Instantly, Appellant did not file a post-sentence motion. Further, Appellant has not indicated where in the record he raised his weight challenge with the court. ***See*** Pa.R.A.P. 2117(c), 2119(e). Pursuant to our Supreme Court's mandate in ***Sherwood***, we hold Appellant waived his challenge to the weight of the evidence. ***See id.***

With respect to Appellant's challenge to the sufficiency of the evidence, the standard of review for a challenge to the sufficiency of evidence is *de novo*, as it is a question of law. ***Commonwealth v. Ratsamy***, 934 A.2d 1233, 1235 (Pa. 2007).[4] Our Crimes Code defines the offense of PWID as follows:

[4] A claim that the evidence offered at trial was insufficient to sustain the verdict requires the defendant to identify the element or elements of the crimes which were allegedly not proven in the Rule 1925(b) statement; otherwise, the insufficiency claim is waived. ***Commonwealth v. Flores***, 921 A.2d 517, 522 (Pa. Super. 2007). Our Supreme Court, however, has found that when the basis for the sufficiency challenge is "relatively

> (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, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30). "In order to uphold a conviction for possession of narcotics with the intent to deliver, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance and did so with the intent to deliver it." ***Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa. Super. 2000) (*en banc*).

With respect to criminal use of a communication facility:

> the Commonwealth must prove beyond a reasonable doubt that: (1) Appellant[ ] knowingly and intentionally used a communication facility; (2) Appellant[ ] knowingly, intentionally or recklessly facilitated an underlying felony; and (3) the underlying felony occurred. The law of our Commonwealth compels this result. Facilitation has been defined as "any use of a communication facility that makes easier the commission of the underlying felony."

Commonwealth v. Moss, 852 A.2d 374, 382 (Pa. Super. 2004) (citation omitted) (construing 18 Pa.C.S. § 7512).

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straightforward," this Court should "conduct the requested sufficiency review." ***Commonwealth v. Laboy***, 936 A.2d 1058, 1060 (Pa. 2007) (holding, in "relatively straightforward drug case," Superior Court should review sufficiency challenge despite inadequate preservation of claim in Pa.R.A.P. 1925(b) statement). In this case, despite Appellant's failure to identify in the Rule 1925(b) statement the elements of the crimes allegedly not established by the Commonwealth, this is a "relatively straightforward drug case." ***See id.***; ***Flores***, 921 A.2d at 522.

Finally, in ***Commonwealth v. Knox***, 50 A.3d 732 (Pa. Super. 2012), *appeal denied*, 69 A.3d 601 (Pa. 2013), our Court set forth the elements of conspiracy:

> [T]o sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and (3) an overt act was done in furtherance of the conspiracy. This overt act need not be committed by the defendant; it need only be committed by a co-conspirator.
>
> The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation.

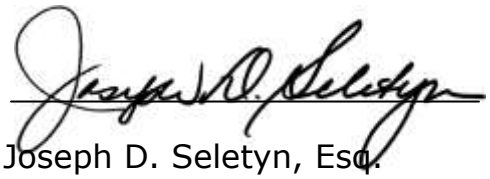
Id. at 740 (citations omitted) (discussing 18 Pa.C.S. § 903).

Instantly, after carefully reviewing the parties' briefs, the certified record including the trial transcript, and the decision of the Honorable Charles T. Jones, Jr., we affirm on the basis of the trial court's opinion. ***See*** Trial Ct. Op. at 5 (summarizing trial testimony and holding that evidence, viewed in light most favorable to Commonwealth, established that Appellant arrived in response to phone call from co-defendant and fact-finder can reasonably be inferred that Appellant gave bag of controlled substance to

co-defendant; thus, evidence was sufficient to sustain convictions for PWID, criminal use of communication facility, and conspiracy). Having discerned no error of law, we affirm the judgment of sentence. ***See Ratsamy***, 934 A.2d at 1235.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/25/2013

IN THE COURT OF COMMON PLEAS
OF LEBANON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	**CP-38-CR-1482-2011**
ALPHONSO REED, Defendant	:	

ORDER

AND NOW, this 26th day of March, 2013, upon careful consideration of the Appellant's Concise Statement of Errors Complained of on Appeal, we hereby ORDER that our Order dated January 23, 2013, in this case is **AFFIRMED**.

Pursuant to the requirements of Pa.R.A.P. 1931, the Clerk of Courts of the Court of Common Pleas of Lebanon County is hereby directed to transmit the record and this Order and Opinion in the above-captioned case to the Superior Court of Pennsylvania IMMEDIATELY.

BY THE COURT:

CHARLES T. JONES, JR., J.

Cc: Nichole Eisenhart, Esquire
Michael Bechtold, Esquire

IN THE COURT OF COMMON PLEAS
OF LEBANON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	**CP-38-CR-1482-2011**
ALPHONSO REED, Defendant	:	

APPEARANCES:

Nichole Eisenhart, Esquire — **For the Commonwealth**
District Attorney's Office

Michael Bechtold, Esquire — **For Defendant**
Buzgon Davis Law Offices

OPINION BY JONES, JR., J.:

Appellant alleges that this Court made the following errors: (1) the evidence presented by the Commonwealth at trial was insufficient to support his conviction, and (2) the jury's verdict was against the weight of the evidence. For the reasons set forth herein, we find the Appellant's arguments lack merit.

I. FACTUAL HISTORY

The facts are as follows. On or about June 2, 2011, Detectives Mong and Saul were conducting surveillance of an alleged drug sale between an unknown individual and an undercover officer. A confidential informant arranged for the undercover officer

to meet an individual identified as Charles Holloway. Holloway then made a phone call and a short time later an unidentified individual came onto the scene. Detective Mong described him as an older man with a graying beard. This individual handed an item to Holloway who then turned and immediately handed a bag of crack cocaine to the undercover officer. After the transaction was complete, the officers followed the individual on foot until they lost sight of him. That individual remained unknown and was identified in Lebanon County Detective Bureau Department Case Report 11-131-1 as merely Juan Doe.

On or about August 19, 2011, at approximately 7:30 p.m., Defendant was walking along the 800 block of Chestnut Street, Lebanon, PA, when Detectives Mong and Saul drove by in an unmarked vehicle. Detective Mong recognized Defendant as the Juan Doe with the graying beard from the June 2, 2011 incident. Defendant was then arrested.

II. PROCEDURAL HISTORY

Appellant was charges with one (1) count of Violation of the Controlled Substance, Drug, Device and Cosmetic Act (F), one (1) count of Criminal Use of Communication Facility (F3), and two (2) counts of Criminal Conspiracy[1]. A bench trial was held on November 15, 2012, where the Court found Appellant guilty on all Counts. On January 23, 2013, Appellant was sentenced by this Court to pay costs and fines in connection to his charges and on Count I to serve a minimum four (4) to ten (10) year sentence at a State Correctional Institution. On Count II, Appellant was sentenced to a minimum of twenty-seven (27) months to ten (10) years to be served concurrently with the sentence imposed on Count I. On Count III, Appellant was sentenced to a minimum of eighteen (18) months to seven (7) years to be served concurrently with the sentence imposed on

[1] **Counts 1** 35 P.S. §780-113(a)(30), **Count 2** 18 Pa.C.S.A. §903(a)(1), **Count 3** 18 Pa.C.S.A. §7512(a), **Count 4** 18 Pa.C.S.A. §903(a)(1).

Counts I and II[2]. Appellant now files the instant appeal alleging the Trial Court erred in its verdict as the Commonwealth's evidence was insufficient to support his conviction and the weight of the evidence was wrongly applied in the Commonwealth's favor.

III. DISCUSSION

a. Sufficiency of the Evidence

We find that the evidence was sufficient to support a guilty verdict in this case. In evaluating a challenge to the sufficiency of the evidence, the following standard is to be applied:

> Whether viewing the evidence in the light most favorable to the verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt. The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. However, any questions or doubts are to be resolved by the factfinder, unless the evidence is so weak and inconclusive that as a matter of law, no probability of fact may be drawn from the circumstances. The trier of fact is free to believe all, part or none of the evidence.

Commonwealth v. Newsome, 787 A.2d 1045, 1047 (Pa.Super.2001) (internal citations omitted).

The Controlled Substance, Drug, Device and Cosmetic Act ("Drug Act") prohibits the "manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance." **35 P.S. 780-113(a)(30)**. Under the Drug Act it is a felony if the Defendant "uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any felonious crime."**18 Pa.C.S.A. § 7512.** A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

[2] Count IV merged with Count II for sentencing purposes.

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa.C.S.A. § 903

In this case, the Commonwealth established that Defendant was the individual who sold crack cocaine to the undercover officer. Detective Mong testified that he recognized Defendant as the individual who had delivered the crack cocaine to Holloway during the June 2nd transaction. Sergeant Brett Hopkins, the undercover officer, testified that Holloway instructed him to follow Holloway while he made a call. Over the phone, Holloway told someone and said he needed $50 of hard and gave a location. Defendant then appeared at that location and handed something to Holloway. Sgt. Hopkins testified that Holloway immediately turned and handed a bag of crack cocaine to him with the same hand. Sgt. Hopkins stated he was roughly three to five feet away from the two men during their interaction. In viewing the evidence in the light most favorable to the Commonwealth, we find that Defendant's convictions were supported by sufficient evidence.

b. Weight of the Evidence

Defendant argues that the verdicts were against the weight of the evidence. The standard of review for weight claims is as follows:

> A verdict is against the weight of the evidence only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. A weight of the evidence claim is primarily directed to the discretion of the judge who presided at trial, who only possesses narrow authority to upset a jury verdict on a weight of the evidence claim. Assessing the credibility of witnesses at

> trial is within the sole discretion of the fact-finder. A trial judge cannot grant a new trial merely because of some conflict in testimony or because the judge would reach a different conclusion on the same facts, but should only do so in extraordinary circumstances, when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.

Commonwealth v. Blakeney, 946 A.2d 645, 652-53 (Pa. 2008) (internal citations omitted).

As the fact finder, the trial court is free to believe all, some, or none of the evidence presented. ***Commonwealth v. Miller,*** 724 A.2d 895, 901 (Pa. 1999). Credibility assessments of witnesses at trial are within the sole discretion of the fact finder. The Court observed witnesses' demeanor at trial and found the officers' testimony credible. The testimony of the officers and the identifications of Defendant demonstrate that the verdicts in this case are not so contrary to the evidence as to shock one's sense of justice.

In viewing the evidence in the light most favorable to the Commonwealth, we find that the evidence was sufficient to support the verdicts, and the verdicts were not against the weight of the evidence. An Order will be entered consistent with the foregoing.

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