NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JAMES WILLIAM BAILEY, Appellant	:	No. 381 WDA 2012

Appeal from the Judgment of Sentence entered on September 6, 2011
in the Court of Common Pleas of Lawrence County,
Criminal Division, No. CP-37-CR-0000712-2009

BEFORE: STEVENS, P.J., MUSMANNO and ALLEN, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: March 18, 2013

James William Bailey ("Bailey") appeals from the judgment of sentence imposed after he was convicted of four counts of possession with intent to deliver a controlled substance, two counts of possession of a controlled substance, and one count of criminal use of a communication facility.[1] We affirm.

Bailey was charged with the above crimes plus three other offenses on June 24, 2009. The charges arose from the alleged sale of illegal drugs by Bailey to a confidential informant, Charles Searcy ("Searcy"), on August 16, 2008, August 27, 2008, and September 18, 2008. After a preliminary hearing, the magisterial district judge bound the charges over for trial. The jury found Bailey guilty of the charges of possession with intent to deliver a

[1] 35 P.S. §§ 780-113(a)(30), (a)(16); 18 Pa.C.S.A. § 7512(a).

controlled substance and possession of a controlled substance related to the sales of August 16 and August 27, 2008, as well as the charge of criminal use of a communication facility, relating to all three dates.[2]

The trial court sentenced Bailey to an aggregate prison term of eighty-four months to eighteen years. Bailey filed post-sentence Motions, on which a hearing was held. Bailey's post-sentence Motions were denied by operation of law. Bailey then filed this timely appeal. The trial court ordered Bailey to file a concise statement of matters complained of on appeal, and Bailey timely complied with that Order. The trial court issued an Opinion on April 30, 2012.

Bailey raises the following issues on appeal:

> 1. Whether the trial court erred in not granting Bailey relief wherein there was an excessive police/sheriff presence in the courtroom during trial and said excessive police/sheriff presence had a chilling effect on the jury, effectively stripping Bailey of the presumption of innocence and creating an unacceptable risk of the jury considering impermissible factors?
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> 2. Whether the trial court erred in failing to admit (and/or by excluding) evidence from Stanley Booker, Esquire, regarding information provided to him by [] Searcy [], (the confidential informant in the case), at the hearing on the post-sentence Motions where it was alleged that the Commonwealth failed to disclose ***Brady*** [***v. Maryland***, 373 U.S. 83 (1963),] impeachment evidence?
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> 3. Whether the trial court erred in failing to grant Bailey's post-sentence Motion for a new trial where the verdict was against the weight of the evidence because of the

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[2] Bailey was found not guilty of the possession and possession with intent to deliver charges related to the alleged sale of September 18, 2008.

> inconsistencies in the testimony of the agents, police officers and confidential informant regarding, *inter alia*, locations and identification resulting in a verdict so contrary to the evidence as to shock one's sense of justice?

See Brief for Appellant at 4.

Bailey first contends that the trial court erred in not granting him relief when there was an excessive police/sheriff presence in the courtroom during the trial. Bailey asserts that the police/sheriff presence had a chilling effect on the jury, effectively stripping Bailey of the presumption of innocence and creating an unacceptable risk of the jury considering impermissible factors.

Proper security measures in the courtroom are within the sound discretion of the trial court, and will not be disturbed absent an abuse of that discretion. ***In re F.C. III***, 2 A.3d 1201, 1222 (Pa. 2010).

> [P]olice officers' attendance at trial may cause concern with regard to jurors' perceptions and courtroom atmosphere. However, where the record does not indicate the number of uniformed officers present or any disturbance caused thereby, we conclude that [a defendant] cannot demonstrate that an unacceptable risk of the jury considering impermissible factors was created.

Commonwealth v. Gibson, 951 A.2d 1110, 1139 (Pa. 2008).

The record shows that, prior to the testimony of Searcy, defense counsel requested that only one uniformed officer be present, and that the trial court advise the jury that no adverse inference should be drawn from the presence of uniformed officers. N.T., 6/22/11, at 103-04. In response to this request, the trial court gave the jury the following instruction:

> [C]ourtrooms are public places. Contrary to what you may have thought before, people are allowed to go in and come out of courtrooms basically at will. So, I would suggest to the jury we have a rather full courtroom. We have people viewing us. The jurors should infer nothing from that. These are people exercising their rights and responsibilities they have.

Id. at 106.

Prior to cross-examination of Searcy, defense counsel, outside of the presence of the jury, stated that he had learned that the uniformed officers were present at the request of the District Attorney. ***Id.*** at 136-37. The prosecutor responded that the case was being tried by the Office of the Attorney General, who had not asked the District Attorney for uniformed officers to be present. ***Id.*** at 137. The prosecutor stated, however, that he was "grateful that there was security in the back of the courtroom." ***Id.*** The trial court then responded as follows:

> THE COURT: Thank you. The Court would just for the completeness of the record note that the courtroom itself is separated from the hallway by a vestibule, and there is a glass picture window there. It appears to be four feet by maybe eight feet, nine feet in length, and that at times during the testimony of the C.I., the Court did note up to five deputy sheriffs in uniform standing in that vestibule separated from the courtroom proper. Most of the time during the testimony, the number of uniformed deputies in there, it would appear to the Court were three in number.
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> Very well. Anything else for the record? The Court would also note that you agreed the courtroom was rather packed. By the Court's estimate, there was somewhere in the proximity of 50 to 60 people in the courtroom itself. Counsel?
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> [The prosecutor]: Thank you. The only other thing I think we would want on the record is that the glass viewing area that the Court's describing is not in the direct view of the jury. It

> is neither in the direct view of the jury, which I would consider the far wall, nor is it in the view of the witness.
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> THE COURT: Okay. It is not in the direct view of the jury, but the Court would readily concede that the jury by turning their heads can observe the greatest portions of the vestibule.

Id. at 137-39.

Based on our review of the record, we discern no abuse of discretion by the trial court in its decision on this issue. We rely on and adopt the well-reasoned trial court Opinion with regard to this claim. ***See*** Trial Court Opinion, 4/30/12, at 2-3.

Bailey next contends that the trial court erred by excluding, at the hearing on post-sentence Motions, testimony from Stanley Booker, Esquire ("Booker"), Bailey's former pre-trial counsel,[3] that Searcy had told him, after the trial in this case, that he had testified for the Commonwealth in this case because "the Commonwealth was holding drug sales over his head." Brief for Appellant at 26. Bailey asserts that the Commonwealth had never provided him with information concerning other drug sales by Searcy as required by ***Brady***, and that the evidence was admissible under the Pennsylvania Rules of Evidence.

> The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that a trial court abused its discretion. In determining whether evidence should be admitted, the trial court must weigh the relevance and probative value of the evidence against the prejudicial impact

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[3] Booker was Bailey's initial counsel in this case, but the trial court permitted Booker to withdraw his appearance prior to trial.

> of that evidence. Evidence is relevant if it logically tends to establish a material fact in the case or tends to support a reasonable inference regarding a material fact. Although a court may find evidence is relevant, the court may nevertheless conclude that such evidence is inadmissible on account of its prejudicial impact.

Commonwealth v. Alderman, 811 A.2d 592, 595 (Pa. Super. 2002).

> [I]n order to establish a ***Brady*** violation, a defendant must show that: (1) evidence was suppressed by the state, either willfully or inadvertently; (2) the evidence was favorable to the defendant, either because it was exculpatory or because it could have been used for impeachment; and (3) the evidence was material, in that its omission resulted in prejudice to the defendant. However, "[t]he mere possibility that an item of undisclosed information *might* have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense." Rather, evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Commonwealth v. Willis, 46 A.3d 648, 656 (Pa. 2012) (citations omitted, emphasis in original).

Here, the trial court did not permit the testimony in question by Booker. In his post-sentence Motion, Bailey had requested a new trial on the basis that the substance of Searcy's statement to Booker was ***Brady*** information, which the Commonwealth had failed to disclose to Bailey. Supplemental Post-Sentence Motion, 10/21/11.

We find no merit to Bailey's allegation. Essentially, Bailey contends that the Commonwealth did not disclose ***Brady*** information to him. The record of the post-sentence Motions hearing shows that Bailey's trial counsel

Nicholas Frisk, III, Esquire ("Frisk"), testified that he had received a rap sheet on Searcy in discovery, which did not include any drug charges. N.T., 1/24/12, at 12-13. Further, Agent Jason Hammerman, of the Attorney General's Bureau of Narcotics Investigation and Drug Control, the chief investigator for the Commonwealth in this case, testified that he was not aware of any two-ounce sale of cocaine by Searcy. N.T., 2/8/12, at 38-39.

The record of the post-sentence Motions hearing demonstrates that the Commonwealth did not possess the allegedly non-disclosed evidence. ***See*** N.T., 2/8/12, at 38-39; N.T., 1/24/12, at 12-13. Thus, if Booker had been allowed to testify as to Searcy's statements to him, the trial court still had before it evidence that the Commonwealth's chief investigator was not aware of any sale of cocaine by Searcy, and that Searcy's "rap sheet" did not include any such charge. Therefore, we conclude that the trial court did not err or abuse its discretion in denying Bailey relief on his claim of a Commonwealth failure to disclose ***Brady*** information. Thus, we conclude that Bailey is not entitled to relief on this issue. We also adopt the trial court's analysis with regard to this issue. ***See*** Trial Court Opinion, 4/30/12, at 4-6.

Next, Bailey contends that the trial court erred in failing to grant his post-sentence Motion for a new trial on the basis that the verdict was against the weight of the evidence due to inconsistencies in the testimony of

the agents, police officers, and confidential informant as to, *inter alia*, locations and identification.

Our standard of review of a claim challenging the weight of the evidence is as follows.

> 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. As an appellate court, we cannot substitute our judgment for that of the finder of fact. 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....
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> Furthermore,
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>> 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. Rabold, 920 A.2d 857, 860-61 (Pa. Super. 2007) (citations omitted).

After having reviewed the record in light of Bailey's claims, we conclude that the trial court did not abuse its discretion in determining that the verdicts were not against the weight of the evidence. We adopt the trial court's Opinion with regard to this issue. ***See*** Trial Court Opinion, 4/30/12, at 8-9.

Judgment of sentence affirmed.

Stevens, P.J., concurs in the result.

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COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS
vs.	: LAWRENCE COUNTY, PENNSYLVANIA
	: NO. 712 of 2009, C.R.
JAMES WILLIAM BAILEY,	: OTN: K894077-2
Defendant.	:

APPEARANCES

FOR THE COMMONWEALTH:

Kristine M. Ricketts, Esquire
Deputy Attorney General
Office of the Attorney General
105 Independence Drive
Butler, PA 16001

FOR THE DEFENDANT:

Joseph V. Charlton, Esquire
CHARLTON & CHARLTON
617 South Pike Road
Sarver, PA 16055

OPINION

Piccione, J. April 30, 2012

This Opinion is issued pursuant to Pa.R.A.P. 1925(a) in support of the September 6, 2011 Order of Judgment of Sentence and the denial by operation of law of the Post Sentence Motions on February 14, 2012. The Defendant makes the following arguments on appeal: (1) this Court erred in not granting the Defendant relief wherein there was an excessive police/sheriff presence in the Courtroom during the trial; (2) this Court erred in failing to admit evidence from Attorney Stanley Booker regarding information provided to him by the confidential informant in this case at the hearing on the Defendant's Post-Sentence Motions; (3) this Court erred in failing to grant the Defendant's Post-Sentence Motion for a New Trial due to a verdict that was so against the weight of the evidence as to shock one's sense of justice ; (4) this Court

53RD JUDICIAL DISTRICT
LAWRENCE COUNTY PENNSYLVANIA

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erred in failing to grant the Defendant's Post Sentence Motion for a New Trial due to a verdict that was so against the weight of the evidence based on inconsistencies in the testimony presented at trial; and (5) this Court erred in failing to grant the Defendant's Post Sentence Motion where the Commonwealth failed to disclose Brady evidence to the prejudice of the Defendant.

The Defendant first argues this Court erred by failing to grant the Defendant relief where there was an excessive police presence in this Courtroom. The Supreme Court of Pennsylvania explained in Comm. v. Gibson, 951 A.2d 1110, 1139 (Pa. 2008) that although a courtroom condition will not inherently prejudice a defendant's right to a fair trial, "police officers' attendance at trial may cause concern with regard to jurors' perceptions and courtroom atmosphere." Additionally, in order to argue that the police presence in the courtroom during a trial created an unacceptable risk of the jury to consider impermissible factors, the court stated that there must be a record of the "number of uniformed officers present or any disturbance caused thereby." Id. See also Meadows v. State, 785 N.E.2. 1112, 1123-24 (Ind.App. 2003); Brown v. State, 132 Md.App. 250, 752 A.2d 620, 631 (2000); State v. Hill, 501 S.E.2d 122, 126 (S.C. 1998).

At the second day of the trial on June 22, 2011, the then counsel for the Defendant requested the number of uniformed officers to be limited to one in fear of the prejudicial effect it may have on the jury. The counsel stated that "bad things could be inferred for my client." (T.T. 6-22-11, page 104). Counsel then agreed to have this Court instruct the jury not to infer anything from anyone in the gallery. This Court stated as follows:

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> Contrary to what you may have thought before, people are allowed to go in and come out of courtrooms basically at will. So, I would suggest to the jury we have a rather full courtroom. We have people viewing us. The jurors should infer nothing from that. These are people exercising their rights and responsibilities they have.

(T.T. 6-22-11, page 106). There is no indication on the record as to how many uniformed officers were present in the courtroom or any disturbances thereby. After Defendant's counsel was informed that the District Attorney Lamancusa asked to have security placed in the courtroom while the Confidential Informant was testifying, he placed his objection to their presence on the record. The Commonwealth responded, that the courtroom "was packed with spectators, and at the most there were a couple of deputies in the back, maybe – I forget." The Commonwealth also pointed out that this case was being prosecuted by the Office of the Attorney General and not the District Attorney's Office; the Office of the Attorney General did not ask the District Attorney to request security presence. The Court noted approximately fifty to sixty people in the courtroom itself and as many as five uniformed deputies in the glass vestibule area separated from the courtroom and approximately three uniformed deputies in the courtroom itself.

As stated *supra*, such information is required to be placed on the record in order effectively to argue such error on appeal. The number of deputies present in and around the courtroom was indeed placed on the record. However, because there is no information regarding the existence of any disturbances by the deputies, as well as this Court's instructing the jury not to infer anything from anyone's presence in the courtroom, this Court finds that it did not error in allowing officers, as well as the general public, to be present in the courtroom.

Next, the Defendant argues that this Court erred by failing to admit evidence from Mr. Stanley Booker, Esquire regarding information provided to him by the Confidential Informant in this case at the Post Sentence Motions hearing. When the Defendant's counsel attempted to call Mr. Booker, the Commonwealth requested an offer of proof. The Defendant's counsel asserted that Mr. Booker would be testifying regarding an unsolicited and voluntary statement the Confidential Informant in this case made to him. Mr. Booker would testify that the Confidential Informant told Mr. Booker that he only testified against the Defendant at trial because the Commonwealth was holding an uncharged drug transaction over his head. The Commonwealth objected to this testimony, arguing that it was inadmissible hearsay. This Court sustained the Commonwealth's objection and refused to let Mr. Booker testify.

The Defendant first argues that Mr. Booker's testimony should have been permitted because it was admissible non-hearsay under Pennsylvania Rule of Evidence 803.03. Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801.01. Rule 803(3) provides that although hearsay, "a statement of the declarant's then existing state of mind ... such as intent, plan, motive" are not excluded from the hearsay rule. This Rule permits statements regarding a declarant's state of mind to be introduced as evidence only if the statements describe a then-existing intention or condition. Ickes v. Ickes, 591 A. 885, 888 (Pa. 1912). The Superior Court of Pennsylvania explained in Comm v. Hess, 548 A.2d 582, 586 (Pa. Super. 1988) that "the timeliness factor is crucial in a state of mind analysis." In Hess, the trial court refused to allow testimony regarding a written "correspondence [that]

would have tended to prove the involuntariness of [a] statement that [the declarant] made to the police at the time of his arrest." Id. The declarant alleged told a social worker that he was beaten by the police into confessing; however, the trial court reasoned that "[i]t is most unlikely that [the declarant] composed a letter to [the social worker] while still experiencing the fear and coercion which he suggests accompanied the arrest." Id.

In the present matter, Mr. Booker would have testified that the Confidential Informant told him that he only testified against the Defendant at his trial because the Commonwealth was holding a drug charge over him. This Court finds that this statement is too remote in time. Similarly to the circumstances in Hess, it is unlikely that the Confidential Informant was still experiencing the pressure he allegedly felt when he spoke to Mr. Booker. The Defendant's trial had completed and the Confidential Informant most unlikely continued to feel the alleged pressure from the Commonwealth as he suggested. Additionally, there was no evidence presented to suggest that the Confidential Informant's state of mind continued beyond the time he testified; this Court properly sustained the Commonwealth's objection to Mr.Booker's testimony.

Moreover, the Defendant argues that Mr. Booker's testimony should have been permitted because it was non-hearsay. However, the Defendant was attempting to introduce this evidence not only to prove the Confidential Informant's state of mind, but also for the truth of the matter asserted, as evidenced by the Defendant's assertion that this Court erred by failing to grant the Post Sentence Motion for a New Trial because the Commonwealth allegedly failed to disclose Brady evidence. However,

"where state of mind testimony is sought to be used in an attempt to demonstrate the truth of the underlying facts rather than solely to show state of mind, the evidence must be excluded. Buckeye Powder Co. v. E.I. du Pont de Nemours Powder Co., 248 U.S. 55 (S.Ct. 1918). Therefore, this Court properly refused to admit Mr. Booker's testimony.

The Defendant next argues that this Court erred in failing to grant the Defendant's Post Sentence Motion for a New Trial where the verdict was allegedly so against the weight of the evidence as to shock one's sense of justice. The Defendant was convicted of Possession of a Controlled Substance (cocaine) on August 16, 2008 and August 27, 2008; Possession with Intent to Deliver a Controlled Substance on August 16, 2008 and August 27, 2008; and Criminal Use of a Communication Facility.

"[I]n order to prevail on a charge of possession of a controlled substance with intent to deliver, the Commonwealth must prove, beyond a reasonable doubt, that the accused posses a controlled substance and that the accused had the intent to deliver the controlled substance." Comm. v. Taylor, 33 A.3d 1283 (Pa. Super. 2011). There was testimony at trial that on both August 16, 2008 and August 27, 2008 the Commonwealth of Pennsylvania through the New Castle Police Department and the Drug Enforcement Agency conducted a controlled purchased via a confidential informant. During each of these purchases, the confidential informant was strip searched and his vehicle was searched both before and after the purchase. The confidential informant was provided with money, and he met with the Defendant. On August 16, 2008, the ~~Defendant~~ confidential informant purchased what was later determined to be crack cocaine from the Defendant at a parking lot located across the street from the

Defendant's residence. Agent Hammerman and Corporal Lagnese each testified to viewing and identifying the Defendant. Immediately after the purchase, the confidential informant met with law enforcement and turned over approximately one ounce of crack cocaine that the Defendant sold to him.

On August 27, 2008, the Confidential Informant participated in another controlled purchase at another location, at a Mr. Ernie Bester's house. First, the Confidential Informant and the Defendant have a phone conversation that was recorded and played for the jury. The voices on the recording were identified as the Confidential Informant and the Defendant. During this call, they set up a sale of an eighth of a kilogram of crack cocaine. Before the purchase, the Confidential Informant and his vehicle were each searched. The Confidential Informant was provided with money and met with the Defendant. Sergeant Salem who was performing surveillance on that date, identified the Defendant three times with the Confidential Informant. Thereafter, the Confidential Informant met with law enforcement and turned over approximately one kilogram of crack cocaine that the Defendant sold to him.

Based on the above evidence, and under the totality of the circumstances, this Court is of the opinion that the record does contain sufficient evidence to support the convictions of the charges of Possession of a Controlled Substance and Possession with Intent to Deliver a Controlled Substance on both August 16, 2008 and August 27, 2008.

The Defendant was also convicted of Criminal Use of a Communication Facility pursuant to 18 Pa.C.S.A. § 7512. "A person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the

commission or the attempt thereof of any crime which constitutes a felony under this title[.]" The term "communication facility" includes a telephone. There was sufficient evidence at trial to support this conviction. Agent Hammerman and the Confidential Informant both testified to hearing conversations via a telephone between the Confidential Informant and the Defendant to facilitate the controlled purchases. Additionally, the recording of one of these phone calls was played for the jury. The voices on the call were identified as the Confidential Informant and the Defendant.

A verdict may only be overturned when it is so contrary to the evidence as to shock one's sense of justice. A verdict is said to shock one's sense of justice "when the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and cause him to almost fall from the bench[.]" Comm. v. Foley, 38 A3d 882, 891 (Pa. Super. 2012) (citations and internal quotation marks omitted). This Court finds that the evidence presented at trial and discussed above was comprehensive and credible enough to support the verdict. As such, sufficient evidence was presented to support a conviction of this charge.

The Defendant next argues that this Court erred in failing to grant the Defendant's Post-Sentence Motion for a New Trial where the verdict was against the weight of the evidence because of the inconsistencies in the testimony of the agents, police officers and confidential informant regarding identification and location. However, after reviewing the transcripts, this Court disagrees. The inconsistencies in the testimony of the law enforcement officers pertained to the ownership of the parking lot where the controlled purchases took place. Each officer identified the same parking lot on a map, but the officers merely were not sure who owned the lot. This

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Court views such inconsistencies as insignificant. Again, this Court is satisfied in the evidence provided during trial to support the Defendant's convictions.

Lastly, the Defendant argued that this Court erred in failing to grant the Defendant's Post Sentence Motion where the Commonwealth allegedly failed to disclose Brady information. This issue was addressed *supra*. Additionally, there was insufficient testimony relation to an alleged Brady violation to grant the Defendant's Post-Sentence Motion.

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