NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. KEVIN THOMAS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 483 WDA 2012

Appeal from the Judgment of Sentence October 25, 2011
In the Court of Common Pleas of Westmoreland County
Criminal Division at No(s): CP-65-CR-0001787-2010

BEFORE: FORD ELLIOTT, P.J.E., BOWES, & DONOHUE, JJ.

MEMORANDUM BY BOWES, J.: Filed: February 19, 2013

Kevin Thomas appeals from the judgment of sentence of two to four years imprisonment that was imposed after he was convicted by a jury of possession of a controlled substance with intent to deliver ("PWID"), possession of a controlled substance, and defiant trespass. We affirm.

New Kensington Police Officer Dion Wagner testified that at approximately 1:00 a.m. on May 4, 2010, he was on-duty and responded to a call regarding an incident of domestic violence in Apartment 102 of 1123 4th Avenue, New Kensington. Terry Fulgham and Appellant were present at the apartment. "Ms. Fulgham was visibly upset. She said that [Appellant] had came home. He was intoxicated. That they began arguing and he grabbed her by her arms and she wanted him to leave the residence." N.T.

Jury Trial, 6/22-24/11, at 42. Ms. Fulgham reported to the officer that she rented the apartment and that Appellant's name was not on the lease.

Officer Wagner told Appellant that he had to leave and asked him if he had a place to stay. Appellant responded affirmatively, and Officer Wagner told Appellant that "he would be arrested if he returned." ***Id***. After Appellant walked away, Officer Wagner returned to his patrol car and circled the block to ensure that Appellant had not returned. About forty-five minutes later, Officer Wagner received a second call reporting that Appellant was knocking on the door to Ms. Fulgham's apartment. By the time the officer arrived, Appellant had left the area, but Ms. Fulgham confirmed that Appellant had attempted to gain entry to her apartment.

At approximately 2:30 a.m., Officer Wagner received a third report of "domestic with a woman screaming for help" at the same address. ***Id***. at 46. When Officer Wagner arrived at Ms. Fulgham's residence, she answered the door, and Appellant was standing behind her. Ms. Fulgham told Officer Wagner that she "didn't know how [Appellant] got into the residence. She didn't want him there and she wanted him to leave." ***Id***. At that time, Appellant was placed under arrest for defiant trespass and searched. Officer Wagner discovered in Appellant's pocket "a pill bottle. Inside that pill bottle was 24 individually wrapped pieces of suspected crack cocaine." ***Id***. at 49. Appellant had nothing on his person that could be used to consume crack cocaine. As he was being led away, Appellant turned to Ms. Fulgham and stated that he would kill her when he was released from prison.

The substance inside the bottle tested positively as crack cocaine, and the amount of crack cocaine seized was 5.6 grams. Westmoreland County Detective Tony Marcocci, who worked for the vice/narcotics unit in the district attorney's office for approximately twenty-six years, was qualified as an expert in the field of narcotics investigations and illegal drug sales.

Detective Marcocci indicated that crack cocaine is processed to remove any impurities and is the purest form of cocaine. It is imbibed by smoking and is immediately absorbed into the bloodstream, which creates an instantaneous and intense reaction. The price for a gram of crack is between ninety to one hundred dollars. Detective Marcocci indicated that during his various drug interdictions, he discovered crack cocaine users had either small amounts of cocaine or paraphernalia for smoking crack cocaine, but he did not "find crack users who carry quantities of crack cocaine on them without the paraphernalia for use[.]" ***Id***. at 104.

Based on the facts that Appellant possessed twenty-four individually bagged packets of crack cocaine, the cocaine's weight, and Appellant's lack of means by which to consume the drug, Detective Marcocci opined that Appellant possessed the 5.6 grams with intent to deliver. He observed that each of the twenty-four packets found on Appellant was worth about twenty dollars on the street. Since Appellant only had $55.00 in cash on him when he was arrested, Detective Marcocci concluded that he was a street level dealer. In response to Detective Marcocci's opinion, Appellant presented his

own expert witness who offered the countervailing position that Appellant possessed the crack cocaine for personal use.

Based on this evidence, Appellant was convicted of PWID, possession of a controlled substance, and defiant trespass, but acquitted of terroristic threats. This appeal followed imposition of judgment of sentence. Appellant raises these contentions on appeal:

> I. Whether the Commonwealth's evidence supported Appellant's conviction for possession with the intent to deliver; namely, whether the possession of 24 individually wrapped rocks of cocaine, without and (sic) other indicia of selling is sufficient to find the Appellant guilty?
>
> II. Whether the verdict of guilty for the drug offense of possession with the intent to deliver was against the weight of the evidence?

Appellant's brief at vii.

In assessing Appellant's first position on appeal, we delineate our well-established standard of review in connection with a challenge to the sufficiency of the evidence:

> The standard we apply in reviewing the sufficiency of evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact[-]finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the 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. The Commonwealth may sustain its burden of

> proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. 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. Helsel, 53 A.3d 906, 917-18 (Pa.Super. 2012) (quoting ***Commonwealth v. Bricker***, 41 A.3d 872, 877 (Pa.Super. 2012)).

In the present case, Appellant complains that there was inadequate proof that he possessed the crack in order to sell it. He points to the Commonwealth's failure to produce evidence that he had drug dealing paraphernalia, to the fact that he was not seen selling drugs, and to the small amount of cash in his possession at the time of his arrest. Appellant's brief at 13. However, we need look only to what the Commonwealth did prove. It produced the opinion of an expert witness who concluded, based on facts of record, that Appellant possessed the drugs in question with intent to deliver. This testimony was sufficient to sustain Appellant's conviction. ***Commonwealth v. Correa***, 620 A.2d 497, 504 (Pa.Super. 1993) (sufficient evidence to sustain PWID conviction where defendant was "in possession of eighteen twenty-dollar packets of cocaine, and the expert testified that such a cache of cocaine was possessed for delivery, not for personal use"). In the ***Correa*** case, there was no indication that the defendant possessed a large amount of cash or drug dealing paraphernalia nor did police observe a drug transaction. Hence, ***Correa*** disposes of Appellant's sufficiency claim herein.

Appellant's second issue is framed as a challenge to the weight of the evidence. However, his argument actually pertains to the trial court's refusal to read a charge submitted by Appellant. "The proposed charge was that the small amount of a controlled substance supports the conclusion that in the absence of evidence of intent to deliver that there is no intent to deliver." Appellant's brief at 17. After Appellant asked for this charge in chambers, the court concluded that it would cover that concept with the general jury instructions on the question of intent to deliver, but noted Appellant's objection for the record.

Initially, we recount that, "In reviewing a challenge to a jury instruction the entire charge is considered, not merely discrete portions thereof. The trial court is free to use its own expressions as long as the concepts at issue are clearly and accurately presented to the jury." ***Commonwealth v. Eichinger***, 915 A.2d 1122, 1138 (Pa. 2007). In this case, the Commonwealth's expert witness had admitted that 5.6 grams of cocaine could be considered a small amount, and Appellant presented his evidence that the weight and value of the drugs seized established that he possessed the crack cocaine for personal use. The trial court proffered the following instruction regarding this issue:

> In determining whether it has been proven that the defendant had the intent to deliver the substance cocaine, and not merely retained it for personal use, you should consider all the evidence, including the evidence as to quantity and quality of the cocaine, the monetary value, the defendant's circumstances, and the circumstances of the possession.

N.T. Jury Trial, 6/22-24/11, at 239-240. This charge accurately outlined the pertinent law and encompassed the concept that custody of a small amount of drugs supports the finding that the drugs were possessed for personal use, which was the principle that Appellant wanted the court to convey to the jury. Hence, we find no error in the jury instructions.

Judgment of sentence affirmed.