

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: J.S., A MINOR

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 695 WDA 2012

Appeal from the Dispositional Order of February 7, 2012,
in the Court of Common Pleas of Allegheny County,
Criminal Division at No. JID 50144C/ Case No. T-168472 1738-05

BEFORE: BOWES, LAZARUS and COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

Filed: March 19, 2013

This case is an appeal from the dispositional order entered after Appellant was adjudicated delinquent on charges of delivery of a controlled substance, possession with intent to deliver a controlled substance ("PWID") and possession of a controlled substance. Appellant contends the lower court erred in not granting his pretrial motion to disclose the identity of a confidential informant ("CI") and in not granting Appellant a new trial based on the weight of the evidence. We affirm the dispositional order.

The record reveals the following facts. Police were involved in a multi-month investigation targeting Taiwan Reed¹ for suspected drug dealing. Using a CI to telephone Reed, police arranged for an undercover drug purchase. The plan was for the officer to buy a brick (*i.e.*, 50 stamp bags)

* Retired Senior Judge assigned to the Superior Court.

¹ This individual's name is spelled various ways in the record. We are using the spelling from the trial transcript.

of heroin. During the phone call, Reed told the CI to go to Barry's Bar located on Broadway in Pitcairn.

Police Officer Andrea Vergara and the CI traveled in a van driven by Vergara to Barry's Bar. They arrived at roughly 3:05 p.m. and parked in front of the bar. They then called Reed. Reed told the CI that Reed "would be right out." N.T., 02/07/12, at 9. At 3:32 p.m., an individual came alongside the van, having approached from the rear thereof. The individual entered the back of the van and apparently sat in a rear seat. Vergara turned to the individual and, being familiar with Reed based on the preexisting investigation, saw that the individual in the back seat was not Reed.

Vergara would eventually describe the individual as a young black male, a juvenile in Vergara's estimation. According to Vergara, the male had a hood over his head, little hair braids under the hood, a little scar on his forehead, and big lips. Vergara had not seen the male before this incident.

The male who had entered the van asked Vergara if she had the money; Vergara asked to see the drugs. After the male displayed a brick of heroin, Vergara counted her money in front of him and then gave him cash in return for the heroin. The sale lasted roughly 45 seconds to one minute. The male then asked Vergara to drive him from the location. She complied, leaving him out of the van roughly one-half block from the bar.

Positioned across a street from Barry's Bar, Police Officer David Zacchia had been surveilling Vergara's van. Zacchia watched the male exit the van. The male walked to the side, and then around the back, of Barry's Bar. At that point, Zacchia drove to the rear of the bar and saw the male walking with Reed. Zacchia recognized Reed based on the ongoing investigation that preceded this incident. The male was counting money and he gave the money to Reed. As they continued to walk, Reed and the male eventually passed close to Zacchia. The testimony indicates Zacchia was able to see the male's face at that point. Before the day of this incident, Zacchia had not ever seen that male.

Zacchia also noticed that, parked in front of a nearby residence—475 Second Street—was a vehicle in which Reed had been seen driving or riding on prior occasions. Police did not arrest Reed or the male accompanying him.

Following the aforesaid events, Zacchia and Vergara enlisted the help of local police who, in turn, indicated Appellant may have been the male who sold the heroin to Vergara. Roughly two weeks after the sale, Zacchia and Vergara obtained a picture of Appellant from his probation officer. Both officers determined that Appellant was the male they had seen during this incident. At some point, they also determined Appellant lived at 475 Second Street, the residence in front of which Reed's vehicle was parked at the time of the drug sale. That residence was approximately two blocks from Barry's Bar.

Appellant was later arrested. Before trial, he moved to disclose the identity of the CI. The court denied Appellant's request. Appellant proceeded to trial at which the aforementioned facts were adduced. During trial, both Zacchia and Vergara identified Appellant as the black male they had seen on the date of this incident.

Additionally, the following evidence was admitted at trial. The parties stipulated that Appellant was not absent from school on the day of the instant drug sale. According to Appellant's probation officer, Appellant's school day regularly concluded at 2:30 p.m. Appellant's mother testified Appellant arrived home on the day in question at 3:25 p.m. or 3:30 p.m. She indicated she recalled that particular day because it was the anniversary of her other son's death. She also testified that Reed was at her home of the day of the drug sale. She further indicated that Appellant never had a scar and never had hair braids. Appellant's probation officer did not recall if Appellant had a scar or wore braids.

The Commonwealth introduced testimony that Appellant was subject to electronic home monitoring ("EHM") on the day of the incident. According to EHM personnel and/or records, Appellant apparently arrived home from school on most days between 3:00 p.m. and 3:20 p.m.

The court adjudicated Appellant delinquent and issued its dispositional order. Thereafter, Appellant moved for a new trial on the grounds that the

adjudication was against the weight of the evidence. The court denied the motion. Appellant lodged this appeal.

In his first claim, Appellant argues the court erred in denying his pretrial motion to disclose the identity of the CI. This claim warrants no relief.

To overcome the Commonwealth's qualified privilege against disclosing a CI's identity, a defendant must establish that the requested information is material to the defense and that the request is reasonable. ***Commonwealth v. Roebuck***, 681 A.2d 1279, 1283 (Pa. 1996); Pa.R.Crim.P. 573(B)(2)(a)(i). If the defendant satisfies the prerequisites of materiality and reasonableness, then the court must balance the public interest in protecting the flow of investigative information against the right to prepare a defense. ***Commonwealth v. Carter***, 233 A.2d 284, 287 (Pa. 1967). This balancing requires the court to evaluate the particular circumstances of each case. ***Id.*** In doing so, the court is to consider the crime(s) charged, the possible defenses, the potential significance of the CI's testimony, and whatever other factors are relevant to the case at hand. ***Id.*** Consistent with the foregoing principles, the court then decides, in its discretion, whether to order disclosure of a CI's identity. ***Roebuck***, 681 A.2d at 1283-84.

To persuade us that the trial court erred when it denied Appellant's pretrial motion to disclose the CI's identity, Appellant relies exclusively on

trial testimony. The facts adduced at trial do not inform us whether the trial court, in its pretrial consideration of facts, abused its discretion when denying Appellant's request. Accordingly, Appellant's claim fails.

Appellant next argues the trial court abused its discretion in denying his weight motion because Appellant was not identified at trial in any reliable way. He notes that only one officer, Vergara, witnessed the actual drug sale, that the sale was quick, and that Vergara testified she saw a scar on Appellant's head while the trial court itself indicated it saw no scar.² Appellant also contends the court's comment that scars come and go is inconsistent with the common understanding of the term "scar."

Moreover, Appellant argues the identification testimony by Vergara and Zacchia were unreliable because neither one had previously seen Appellant and because it was some weeks after the sale that the officers obtained Appellant's photograph. Appellant maintains that viewing the photograph was itself an unduly suggestive step in the identification process.

² It appears the court did make this remark. In a statement filed under Pa.R.A.P. 1923(b), the parties agreed to a number of facts and items not appearing in the trial transcript because the recording device malfunctioned. The information to which the parties agreed included the fact that the trial court remarked in the aforesaid fashion when announcing its decision. The court also expressed its belief that scars come and go. Additionally, the court voiced its finding that the officers were credible, that they saw Appellant during the incidents, that Vergara may have just been mistaken about Appellant having braids, and that the EHM evidence had little bearing on the court's adjudication.

Appellant also points out the apparent conflict between Vergara's claim that she saw braids in Appellant's hair and his mother's claim that he never wore braids. Furthermore, Appellant contends the evidence relating to his school schedule and his mother's testimony about his time of arrival at home showed it was implausible for him to have engaged in the drug transaction. In sum, Appellant maintains the evidence relating to identification was so infirm that the trial court should have granted a new trial. For the following reasons, his claim lacks merit.

We analyze weight-related appeals in this way:

The weight given to trial evidence is a choice for the factfinder. If the factfinder returns a guilty verdict, and if a criminal defendant then files a motion for a new trial on the basis that the verdict was against the weight of the evidence, a trial court is not to grant relief unless the verdict is so contrary to the evidence as to shock one's sense of justice.

When a trial court denies a weight-of-the-evidence motion, and when an appellant then appeals that ruling to this Court, our review is limited. It is important to understand we do not reach the underlying question of whether the verdict was, in fact, against the weight of the evidence. We do not decide how we would have ruled on the motion and then simply replace our own judgment for that of the trial court. Instead, this Court determines whether the trial court abused its discretion in reaching whatever decision it made on the motion, whether or not that decision is the one we might have made in the first instance.

Moreover, when evaluating a trial court's ruling, we keep in mind that an abuse of discretion is not merely an error in judgment. Rather, it involves bias, partiality, prejudice, ill-will, manifest unreasonableness or a misapplication of the law. By contrast, a

proper exercise of discretion conforms to the law and is based on the facts of record.

Commonwealth v. West, 937 A.2d 516, 521 (Pa. Super. 2007) (internal citations omitted).

Appellant has cited some arguable weaknesses in the Commonwealth's identification testimony. However, it was for the factfinder to evaluate the credibility of the officers and the reliability of their testimony. Along these lines, we note that the presence of Reed's car outside Appellant's home near the time of the drug sale tended to buttress Zacchia's testimony that he saw Reed and Appellant together and Vergara's testimony that it was Appellant who appeared in the van to complete the drug sale that had been arranged a short time earlier with Reed.

Discrepancies and/or conflicts regarding Appellant's appearance (*e.g.*, his hair and any scar or lack thereof), questions about the lapse of time between the incident and the photographic identification, and concerns about the time of Appellant's return from school were likewise all matters for the factfinder to resolve. Ultimately, it was the factfinder's duty and province to weigh the relative strengths and weaknesses in the evidence and to decide what and whom the factfinder believed.

In an opinion issued when denying the weight motion, the trial court discussed the evidence and reiterated its finding that the officers were credible. Nothing in the opinion reveals bias, ill will, manifest injustice, misapplication of law, partiality, or prejudice. Similarly, Appellant has not

convinced us the court reasoned in an abusive fashion when denying the weight claim.

To whatever extent common understanding might differ from the court's remark that scars come and go, any such difference does not convince us the trial court abused its discretion when deciding Appellant's motion for a new trial. Vergara indicated the scar was little and she did not claim it was of such a size or prominence as to make that aspect of her testimony and/or Appellant's identification significant on this appeal.

In short, having not demonstrated that the trial court's ruling was an abuse of discretion, Appellant cannot obtain relief on his weight-related argument.

Based on our foregoing discussion, Appellant is not entitled to relief. Therefore, we affirm the dispositional order.

Order affirmed.

Judge Bowes concurs in the result.