

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JAMES R. HEARD

Appellant

No. 972 WDA 2012

Appeal from the Judgment of Sentence February 14, 2012
In the Court of Common Pleas of Cambria County
Criminal Division at No(s): CP-11-CR-0001624-2010

BEFORE: GANTMAN, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY GANTMAN, J.: FILED: June 3, 2013

Appellant, James R. Heard, appeals from the judgment of sentence entered in the Cambria County Court of Common Pleas, following his jury trial convictions for possession of a controlled substance, possession of a controlled substance with intent to deliver, and criminal use of a communication facility.¹ We affirm.

The relevant facts and procedural history of this appeal are as follows. Police utilized a confidential informant ("CI") to conduct a controlled purchase of heroin from Appellant on June 29, 2009. On September 13, 2010, the Commonwealth filed a criminal information charging Appellant

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

*Former Justice specially assigned to the Superior Court.

with PWID, possession of a controlled substance, and criminal use of a communication facility. On November 1, 2011, the Commonwealth filed notice of intent to seek a youth/school zone sentencing enhancement, pursuant to 204 Pa.Code § 303.9(c).

Following trial, a jury found Appellant guilty of all charges. On February 14, 2012, the court sentenced Appellant to an aggregate term of forty-eight (48) to ninety-six (96) months' imprisonment, followed by a consecutive term of five (5) years' probation.² Appellant timely filed post-sentence motions on February 22, 2012, challenging the weight and sufficiency of the evidence and the applicability of Section 303.9(c). Appellant also raised multiple claims of ineffective assistance of trial counsel. On April 2, 2012, Appellant filed supplemental post-sentence motions. The court conducted a hearing on April 3, 2012. On May 30, 2012, the court denied Appellant's weight, sufficiency, and sentencing challenges. The court deferred consideration of the ineffectiveness of counsel claims, instructing Appellant to raise them on collateral review.

Appellant timely filed a notice of appeal on June 19, 2012. On June 20, 2012, the court ordered Appellant to file a concise statement of errors

² Also on February 14, 2012, the court permitted trial counsel to withdraw and appointed current counsel to represent Appellant for purposes of post-sentence motions and direct appeal.

complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed a Rule 1925(b) statement on July 6, 2012.

Appellant raises twelve issues for our review:

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING DETECTIVE KEVIN PRICE TO TESTIFY IN A PREJUDICIAL NARRATIVE MANNER DESPITE THE FACT THAT THE DETECTIVE HAD NO DIRECT INVOLVEMENT IN THE CASE?

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING DETECTIVE THOMAS KEIRN TO IMPROPERLY NARRATE A VIDEO SURVEILLANCE VIDEO?

WHETHER [APPELLANT'S] SIXTH AMENDMENT CONFRONTATION RIGHTS WERE VIOLATED WHEN FORENSIC SCIENTIST THOMAS M. FRIEBEN DID NOT TESTIFY AT TRIAL TO HIS FINDINGS IN A LABORATORY TESTING REPORT?

WHETHER THE VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE DUE TO THE OFFICERS' "FALSE TESTIMONY" AS [TO] THE DESCRIPTION AND LICENSE PLATE OF THE VEHICLE ALLEGEDLY INVOLVED IN THE DRUG TRANSACTION?

WHETHER THE VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE DUE TO DETECTIVE KEIRN'S "FALSE TESTIMONY" THAT HE VIEWED THE CONFIDENTIAL INFORMANT THROUGHOUT THE ENTIRE DRUG TRANSACTION?

WHETHER THE VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE DUE TO DETECTIVE MAKOSY'S "FALSE TESTIMONY" THAT HE HAD A CLEAR LINE OF SIGHT DURING THE ALLEGED DRUG TRANSACTION?

WHETHER THE VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE DUE TO THE INFORMANT'S "COERCED" STATEMENT?

WHETHER THE IDENTIFICATION OF [APPELLANT] RELATIVE TO A JNET PHOTO UTILIZED BY THE POLICE WAS UNDULY SUGGESTIVE?

WHETHER THE VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE DUE TO A QUESTIONABLE PHONE NUMBER...WHICH WAS ALLEGEDLY CALLED BY THE CONFIDENTIAL INFORMANT, WHERE [APPELLANT] AVERS THE PHONE NUMBER IS OWNED BY THE FBI?

WHETHER THE VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE BECAUSE THE "OFFICIAL FUNDS" ALLEGEDLY UTILIZED BY THE CONFIDENTIAL INFORMANT WERE NOT RETRIEVED BY THE COMMONWEALTH?

WHETHER THE TRIAL COURT ERRED IN APPLYING THE YOUTH/SCHOOL ZONE ENHANCEMENT LAW?

WHETHER TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE COURSE OF THE TRIAL?

(Appellant's Brief at 3).

In his first issue, Appellant contends Detective Kevin Price, head of the Cambria County Drug Task Force, testified regarding task force protocols and the use of informants to conduct controlled purchases of narcotics. Appellant emphasizes Detective Price had no direct involvement in the instant case; rather, Detective Thomas Keirn acted as the lead investigator and arranged for the CI to conduct the controlled purchase from Appellant. In light of Detective Price's lack of involvement, Appellant argues the court should not have allowed Detective Price to provide extensive testimony regarding task force protocols and controlled purchases. Appellant

concludes the court abused its discretion in overruling his objections and admitting Detective Price's testimony.³ We disagree.

"Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion." **Commonwealth v. Drumheller**, 570 Pa. 117, 135, 808 A.2d 893, 904 (2002), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003) (quoting **Commonwealth v. Stallworth**, 566 Pa. 349, 363, 781 A.2d 110, 117 (2001)).

Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact.

Drumheller, supra at 135, 808 A.2d at 904 (quoting **Stallworth, supra** at 363, 781 A.2d at 117-18).

³ Additionally, Appellant argues Detective Price provided improper opinion testimony about the reliability of the CI. Appellant further argues the court erroneously permitted Detective Price to testify about surveillance video of the controlled purchase and to identify Appellant from a still photograph taken from the surveillance video. Appellant, however, failed to include these specific arguments in his Rule 1925(b) statement. (**See** Rule 1925(b) Statement, filed 7/6/12, at 1-2.) Thus, the claims are waived. **See Commonwealth v. Schutzues**, 54 A.3d 86 (Pa.Super. 2012) (explaining appellant waived claim by failing to raise it in Rule 1925(b) statement). Regarding the detective's testimony about the surveillance video and subsequent identification, Appellant failed to object to this testimony at trial. (**See** N.T. Trial, 12/6/11 (Morning Session), at 47-48.) Consequently, the claim is also waived on this basis. **See Commonwealth v. Whitaker**, 878 A.2d 914 (Pa.Super. 2005), *appeal denied*, 586 Pa. 738, 891 A.2d 732 (2005) (reiterating defendant must make timely and specific objection to introduction of challenged evidence at trial to preserve claim for review).

Instantly, the Commonwealth presented Detective Price, the head of the Cambria County Drug Task Force, to testify about the use of confidential informants and the task force's protocols for conducting controlled purchases of narcotics from suspected drug dealers. Prior to Detective Price's testimony, Appellant objected, claiming the proposed testimony was irrelevant. Appellant maintained that Detective Keirn was the lead investigator for Appellant's case; thus, testimony from Detective Price would mislead the jury.

In response, the Commonwealth asserted that Detective Price was in charge of all task force members, including Detective Keirn. The Commonwealth emphasized that Detective Price was actively involved in Appellant's case from the start of the investigation; moreover, Detective Price had personal knowledge of the CI used in Appellant's case. Under these circumstances, the Commonwealth concluded Detective Price was the best witness available to testify about the task force's use of confidential informants and controlled purchases.

After receiving argument, the court overruled Appellant's objection. The court determined Detective Price's testimony was "useful to the factfinder in understanding the context" for the criminal investigation into Appellant's drug dealing activities. (**See** Trial Court Opinion, filed August 17, 2012, at 5.) We agree this evidence was relevant, because Detective Price's testimony tended to make the facts at issue more probable. **See**

Drumheller, supra. In light of the applicable standard of review and relevant case law, the court properly admitted the testimony. ***Id.***

In his second issue, Appellant asserts the CI wore a hidden surveillance camera during the controlled purchase, and the Commonwealth presented the resulting video footage at trial. Appellant complains the court permitted Detective Keirn to narrate the video footage, identifying the locations and actions depicted in the video while the Commonwealth played it for the jury. Appellant maintains the video “provided an independent vehicle for the jury to assess the events taking place that incriminated [Appellant].” (Appellant’s Brief at 10). Consequently, Appellant argues Detective Keirn’s narration usurped the jury’s function of determining what the video actually depicted. Appellant concludes the court abused its discretion in overruling his objections to Detective Keirn’s narrative testimony. We disagree.

Pennsylvania Rule of Evidence 602⁴ provided in relevant part as follows:

Rule 602. Lack of personal knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove

⁴ On January 17, 2013, after Appellant’s trial, the legislature rescinded this version of Rule 602. The current version of Rule 602 went into effect on March 18, 2013.

personal knowledge may, but need not, consist of the witness' own testimony.

* * *

Pa.R.E. 602.

Instantly, the Commonwealth called Detective Keirn to testify about his surveillance of the controlled purchase. Detective Keirn indicated that he drove the CI to the pre-determined location for the meeting with Appellant. Upon arriving at the location, Detective Keirn activated the hidden surveillance camera on the CI's person. With the camera activated, the CI exited the detective's vehicle and walked toward a lot where Appellant had parked his vehicle. As the CI moved closer to Appellant's vehicle, Detective Keirn moved from his original location to get a better view of the impending transaction. At that point, Detective Keirn temporarily lost sight of the CI. Upon arriving at his new vantage point, Detective Keirn viewed the CI enter Appellant's vehicle through the front passenger-side door. The CI remained inside the vehicle for less than two minutes. After the CI exited Appellant's vehicle, Detective Keirn returned to the location where he had dropped off the CI. The CI rendezvoused with the detective, entering the detective's vehicle and handing over ten bags of heroin that he had purchased.

Following Detective Keirn's testimony, the Commonwealth sought permission to play the video that the CI had recorded with the hidden surveillance camera. The Commonwealth asked to play the tape twice. The first showing would be uninterrupted; the second showing would include

narration from Detective Keirn. Appellant objected, claiming the CI operated the camera and the footage was taken from the CI's perspective; therefore, Detective Keirn could not adequately describe the events depicted in the video.

The court determined that any narration from Detective Keirn must be limited as follows:

THE COURT: Now, when [Detective Keirn] loses sight of [the CI], I think he can't testify anymore, like a description of what the camera is showing at that time. I think [defense counsel] has...a point. So Detective Keirn can testify as to what he saw like [the CI] walking past the Market, past the complex, and then maybe walking back, but not when he loses sight of him. Only what he saw.

[COMMONWEALTH]: If I may, I will not have Detective Keirn stop the tape or testify or make any comments once the CI is around the corner. But his testimony did reflect that he did pick up surveillance again when he got in the vehicle. So the time period from when [the CI] walks past Advanced Office Systems until he gets in the car, because Detective Keirn testified he saw him get into the car and back.

THE COURT: Right.

* * *

(**See** N.T. Trial, 12/6/11 (Afternoon Portion), at 57.)

Here, Detective Keirn's testimony established that he observed the CI throughout the relevant period before and after the controlled purchase. Thus, the court properly permitted Detective Keirn to testify during the presentation of the video, because the detective's testimony concerned

events the detective had witnessed first-hand and had already described during his earlier testimony. **See** Pa.R.E. 602. **See also Commonwealth v. Steward**, 762 A.2d 721 (Pa.Super. 2000), *appeal denied*, 566 Pa. 662, 782 A.2d 545 (2001) (holding eyewitness testimony obviates need to produce videotape made simultaneously; videotape evidence does not rise to level of “best evidence” when eyewitness testifies from personal knowledge). Based upon the foregoing, Appellant is not entitled to relief on his second issue.

In his third issue, Appellant acknowledges he entered into a stipulation regarding the contents of a laboratory report, which confirmed that the controlled substance at issue was heroin. Nevertheless, Appellant complains he should have been given some chance to cross-examine the forensic scientist who prepared the laboratory report. Absent an opportunity to challenge the stipulated facts, Appellant concludes the court violated his Sixth Amendment right to confront the witness against him. We disagree.

“Even in trials by jury there are certain constitutional rights which an accused can waive; among these [is] the right to meet the witnesses face to face....” **Commonwealth v. Petrillo**, 340 Pa. 33, 44, 16 A.2d 50, 56-57 (1940) (internal quotation marks omitted). **See also Tyler v. King**, 496 A.2d 16, 24 (Pa.Super. 1985) (stating: “The right to confront and cross-examine does not require that the parties in every case cross-examine each adverse witness, but that they have the opportunity to do so. This right

may therefore be waived, even in a criminal case"). Further, "A stipulation is a declaration that the fact agreed upon is proven [, and a] valid stipulation must be enforced according to its terms." ***Commonwealth v. Mitchell***, 588 Pa. 19, 69, 902 A.2d 430, 460 (2006), *cert. denied*, 549 U.S. 1169, 127 S.Ct. 1126, 166 L.Ed.2d 897 (2007).

Instantly, Appellant stipulated to the facts set forth in the laboratory report. (**See** N.T. Trial, 12/7/11 (Afternoon Portion), at 40.) In the report, the forensic scientist identified the substance inside the bags obtained by the CI as heroin. Because Appellant stipulated to the facts set forth in the laboratory report, he cannot now complain he was unable to cross-examine the forensic scientist. **See *Mitchell, supra*; *Petrillo, supra***. Therefore, Appellant is not entitled to relief on his third claim.

In his fourth, fifth, sixth, seventh, ninth, and tenth issues, Appellant avers multiple Commonwealth witnesses presented false testimony. Specifically, Appellant complains that a police witness' description of the drug dealer's vehicle and license plate number did not match Appellant's own vehicle. Appellant claims Detectives Keirn and Makosy testified that they could view the CI during the entire controlled purchase, even though the record belied such testimony. Appellant also contends that the Commonwealth presented unreliable, coerced testimony from the CI, the Commonwealth failed to prove the CI had actually called Appellant's cellular phone to arrange a meeting, and the Commonwealth failed to recover any of

the “buy money” used during the controlled purchase. Under these circumstances, Appellant concludes the Commonwealth presented insufficient evidence to support his convictions, and the convictions are against the weight of the evidence.⁵ We disagree.

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

The standard we apply in reviewing the sufficiency of the 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 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.

⁵ Appellant’s brief does not expressly challenge the weight of the evidence. Nevertheless, Appellant’s claims regarding the credibility of the witnesses constitute challenges to the weight of the evidence. **See Commonwealth v. Gibbs**, 981 A.2d 274 (Pa.Super. 2009), *appeal denied*, 607 Pa. 690, 3 A.3d 670 (2010) (stating argument regarding credibility of witnesses goes to weight of evidence rather than sufficiency). Because Appellant properly preserved these claims in the post-sentence motions, we will address them.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa.Super. 2011), *appeal denied*, 613 Pa. 642, 32 A.3d 1275 (2011) (quoting ***Commonwealth v. Jones***, 874 A.2d 108, 120-21 (Pa.Super. 2005)).

The following principles apply to our review of a weight of the evidence claim:

The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the...verdict if it is so contrary to the evidence as to shock one's sense of justice.

Commonwealth v. Small, 559 Pa. 423, [435,] 741 A.2d 666, 672-73 (1999). Moreover, 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. Champney, 574 Pa. 435, 444, 832 A.2d 403, 408 (2003), *cert. denied*, 542 U.S. 939, 124 S.Ct. 2906, 159 L.Ed.2d 816 (2004) (most internal citations omitted).

Section 780-113 of the Controlled Substance, Drug, Device and Cosmetic Act provides:

§ 780-113. Prohibited acts; penalties

(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

* * *

(16) Knowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, unless the substance was obtained directly from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by this act.

* * *

(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)(16), (30).

To establish the offense of PWID, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance with the intent to deliver it. ***Jones, supra*** at 121.

The trier of fact may infer that the defendant intended to deliver a controlled substance from an examination of the facts and circumstances surrounding the case. Factors to consider in determining whether the drugs were possessed with the intent to deliver include the particular method of packaging, the form of the drug, and the behavior of the defendant.

Id. (quoting ***Commonwealth v. Kirkland***, 831 A.2d 607, 611 (Pa.Super. 2003), *appeal denied*, 577 Pa. 712, 847 A.2d 1280 (2004)). Thus, PWID can be inferred from the quantity of drugs possessed and circumstances

such as a lack of paraphernalia for personal consumption. **Jones, supra.** Moreover, “all of the facts and circumstances surrounding the possession are relevant and the elements of the crime may be established by circumstantial evidence.” **Commonwealth v. Little**, 879 A.2d 293, 297 (Pa.Super. 2005), *appeal denied*, 586 Pa. 724, 890 A.2d 1057 (2005).

The Pennsylvania Crimes Code defines criminal use of a communication facility as follow:

§ 7512. Criminal use of communication facility

(a) Offense defined.—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 or under the act of April 14, 1972 (P.L. 233, No. 64), [35 P.S. § 780-101 *et seq.*] known as The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.

* * *

(c) Definition.—As used in this section, the term “communication facility” means a public or private instrumentality used or useful in the transmission of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part, including, but not limited to, telephone, wire, radio, electromagnetic, photoelectronic or photo-optical systems or the mail.

18 Pa.C.S.A. § 7512(a), (c).

Instantly, Detective Keirn first encountered the CI in 2008, when the detective arrested the CI for drug offenses. After the CI had completed his sentence for the drug charges and a rehabilitation program, the CI

approached Detective Keirn and indicated his willingness to work for the county drug task force. In 2009, the CI commenced work as a confidential informant. At that time, the CI identified Appellant as an individual who was trafficking heroin in Cambria County.

On June 29, 2009, the CI met with Detective Keirn. At the start of the meeting, police thoroughly searched the CI to confirm that he did not have any contraband on his person. Following the search, the CI used a cell phone to call Appellant and arrange to purchase ten (10) bags of heroin for \$150.00. Appellant agreed to meet the CI at a parking lot in Geistown Borough. After the CI arranged the meeting, Detective Keirn gave the CI \$150.00 in pre-recorded buy money. Detective Keirn also outfitted the CI with a hidden surveillance camera.

At approximately 6:00 p.m., Detective Keirn drove the CI to the pre-determined location for the controlled purchase. By that time, four surveillance officers in two vehicles were already in place at the scene. Upon arriving at the parking lot, Detective Keirn activated the hidden surveillance camera on the CI's person. The CI exited the detective's vehicle, walked toward Appellant's parked vehicle, and entered the vehicle through the front passenger-side door. The CI remained inside the vehicle for less than two minutes. Inside the vehicle, the CI exchanged the pre-recorded buy money for the heroin. After the exchange, the CI exited the vehicle, rendezvoused with Detective Keirn, and handed over the heroin that

he had purchased from Appellant. At trial, the CI unequivocally identified Appellant as the person that sold him the heroin.

Viewed in the light most favorable to the Commonwealth as verdict winner, sufficient evidence supported the verdict. ***See Hansley, supra***. To the extent Appellant also argues witnesses provided “false” testimony, the trial court concluded the jury’s verdict was not contrary to the weight of the evidence. (***See*** Trial Court Opinion at 7.) Based upon the foregoing, we see no abuse of discretion in the court’s decision to deny relief on Appellant’s weight claim. ***See Champney, supra***. Therefore, Appellant is not entitled to relief for his fourth, fifth, sixth, seventh, ninth, and tenth issues.

In his eighth issue, Appellant contends Detective Keirn obtained the license plate number of the vehicle involved in the controlled purchase, which was registered to Appellant. Appellant asserts Detective Keirn subsequently utilized the Pennsylvania Justice Network (“JNET”) database to view Appellant’s driver’s license and photograph. Appellant claims Detective Keirn printed the photograph from JNET and showed it to the surveillance officers and the CI, who identified Appellant as the seller involved in the controlled purchase. Appellant argues this procedure amounted to an unduly suggestive “show-up” identification. Appellant further argues the court erred in admitting the photograph into evidence, because the jury could have mistaken the photograph for a mug shot. Appellant concludes the Commonwealth utilized an impermissible identification procedure, and he

suffered undue prejudice from the admission of testimony regarding the identifications and the JNET photograph. Appellant's argument is waived.

"Pennsylvania Rule of Criminal Procedure 581 addresses the right of a criminal defendant to move to suppress evidence alleged to have been obtained in violation of his or her rights, and sets forth the procedure attendant to the disposition of a suppression motion." **Commonwealth v. Baumhammers**, 599 Pa. 1, 29, 960 A.2d 59, 76 (2008), *cert. denied*, 558 U.S. 821, 130 S.Ct. 104, 175 L.Ed.2d 31 (2009).

Rule 581(D) requires that a suppression motion state with specificity and particularity the evidence sought to be suppressed. Rule 581(B) provides: If timely motion [for suppression of evidence] is not made hereunder, the issue of suppression of such evidence shall be deemed to be waived.

[Our Supreme] Court has consistently affirmed the principle that a defendant waives the ground of suppressibility as a basis for opposition to the Commonwealth's introduction of evidence when he or she fails to file a suppression motion pursuant to our rules of criminal procedure.

Id. at 29, 960 A.2d at 76 (internal quotation marks omitted)

Instantly, Appellant did not file a pretrial motion to suppress evidence of the purportedly suggestive identifications. To the extent Appellant now complains about the admission of evidence related to the identifications, Appellant should have preserved the claim in a suppression motion. **See** Pa.R.Crim.P. 581. Therefore, the claim is waived. **See Baumhammers, supra.** Moreover, Appellant failed to object at trial when the

Commonwealth entered the JNET photo into evidence and questioned Detective Keirn about the circumstances surrounding his procurement of the photo and the subsequent identifications. (**See** N.T. Trial, 12/6/11 (Afternoon Portion), at 52-54.) Consequently, Appellant's challenge to the admission of the photo and corresponding testimony is also waived on this basis. **See Whitaker, supra.**

In his eleventh issue, Appellant acknowledges that Detective Price provided a supplemental report at sentencing, explaining the applicability of Section 303.9(c). Nevertheless, Appellant complains the Commonwealth knowingly arranged the controlled purchase to occur in an area within a school zone. Moreover, Appellant argues school was not in session on the date of the controlled purchase. Under these circumstances, Appellant concludes the court erred in applying Section 303.9(c) to enhance the sentence. Appellant's claim constitutes a challenge to the discretionary aspects of sentencing. **See Commonwealth v. Wilson**, 829 A.2d 1194 (Pa.Super. 2003) (explaining complaint about application of school zone enhancement challenges discretionary aspects of sentencing).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. **Commonwealth v. Sierra**, 752 A.2d 910 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:

[W]e conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, **see**

Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, **see** Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Evans, 901 A.2d 528, 533 (Pa.Super. 2006), *appeal denied*, 589 Pa. 727, 909 A.2d 303 (2006) (internal citations omitted).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. **Commonwealth v. Mouzon**, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). The concise statement must indicate "where the sentence falls in relation to the sentencing guidelines and what particular provision of the code it violates." **Commonwealth v. Kiesel**, 854 A.2d 530, 532 (Pa.Super. 2004) (quoting **Commonwealth v. Goggins**, 748 A.2d 721, 727 (Pa.Super. 2000), *appeal denied*, 563 Pa. 672, 759 A.2d 920 (2000)). If an appellant fails to comply with Rule 2119(f) and the Commonwealth objects, the issue is waived. **Kiesel, supra**.

Instantly, Appellant failed to include a Rule 2119(f) statement in his brief, and the Commonwealth objected to the omission. As such, Appellant's claim is waived. **See id.**

In his twelfth issue, Appellant avers trial counsel was ineffective for failing to file a motion to suppress the pretrial identifications, failing to attack the credibility of the CI at trial, failing to contest the Section 303.9(c) sentencing enhancement, and failing to verify that the Commonwealth had complied with the Wiretap Act in videotaping the controlled purchase. Further, Appellant alleges trial counsel was ineffective for entering into the stipulation regarding the contents of the forensic scientist's laboratory report. Appellant insists he properly raised these ineffectiveness of counsel claims in his post-sentence motions, but the court deferred the claims until collateral review. Appellant concludes the court abused its discretion, because it did not immediately consider the ineffectiveness claims. We disagree.

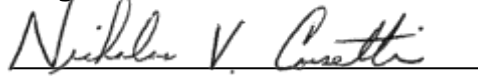
Generally, ineffective assistance of counsel claims should be deferred until proceedings under the Post Conviction Relief Act ("PCRA") at 42 Pa.C.S.A. §§ 9541-9546. **See generally Commonwealth v. Grant**, 572 Pa. 48, 813 A.2d 726 (2002). Likewise, this Court will not entertain ineffective assistance of counsel claims on direct appeal unless the defendant makes a knowing, intelligent, and voluntary waiver of PCRA review. **Commonwealth v. Barnett**, 25 A.3d 371 (Pa.Super. 2011) (*en banc*).

Instantly, Appellant's issues deal with trial counsel's alleged ineffectiveness. Appellant, however, did not waive his right to PCRA review.

See id. Thus, we decline to address those claims on direct appeal. Instead, Appellant must raise his ineffectiveness of counsel claims in a timely PCRA petition. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: June 3, 2013