

2011 PA Super 125

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ABDUL-MUSSAWIR JAMES,	:	
	:	
Appellant	:	No. 3188 EDA 2008

Appeal from the Judgment of Sentence November 1, 2010,
Court of Common Pleas, Philadelphia County,
Criminal Division at No. CP-51-CR-0000995-2008

BEFORE: DONOHUE, ALLEN and POPOVICH*, JJ.

OPINION BY DONOHUE, J.:

Filed: June 17, 2011

Appellant, Abdul-Mussawir James ("James"), appeals from the judgment of sentence entered by the Court of Common Pleas of Philadelphia County for his conviction for possession of a controlled substance, 35 P.S. § 780-113(a)(16).¹ For the reasons that follow, we vacate the judgment of sentence with respect to James' conviction for violation of section 780-113(a)(16).

In a prior Memorandum decision in this appeal, we summarized the relevant factual and procedural background of this case as follows:

James was arrested and charged with the aforementioned crimes based on police observation of a single sale of Oxycodone by James to an unidentified white male. On April 28, 2008, James filed a motion to suppress the physical evidence, arguing that he was stopped without reasonable

¹ James does not appeal his conviction for delivery of a controlled substance, 35 P.S. § 780-113(a)(30).

*Judge Popovich did not participate in the consideration or decision of this case.

suspicion that criminal activity was afoot and was arrested without probable cause that a crime was committed. A hearing was held on the motion on August 11, 2008. Agent John Brennan ('Agent Brennan') testified as a narcotics expert regarding his observations of what he believed to be a drug transaction between James and the unidentified white male. He stated that he was conducting surveillance in the 900 block of North 65th Street based on numerous complaints of drug activity in the area. He observed the unidentified white male walk up and down the street 'looking around constantly,' and then sit down on the steps in front of 925 North 65th Street. N.T., 8/11/08, at 7.

Agent Brennan then saw James leave a conversation with two individuals at the 6400 block of Jefferson Street, walk directly over to the unidentified white male, pull out an amber colored pill bottle, pour some of its contents into the male's hand, and place the pill bottle back in his pocket. The male then gave James something that James also put into his pocket, although Agent Brennan testified he could not see what was given to James. Agent Brennan stated that based on his expertise and experience, he believed a drug transaction had just occurred and radioed backup officers with a description of James. Police stopped James, went into his pant pockets, and removed \$16.00 and the amber pill bottle, which was found to contain 13 Oxycodone pills.

The trial court indicated that it found Agent Brennan's testimony to be credible, and based on his testimony, denied the suppression motion. A bench trial immediately followed, wherein Agent Brennan's prior testimony was incorporated into the record. He was briefly recalled to testify, at which time he indicated that the pill bottle bore James' name and indicated that the prescription had been filled on the day of this incident, June 4, 2007.

James testified that he had a prescription for Oxycodone because he had recently been hit by a

car and was experiencing back and arm pain. He stated that the unidentified white male was his neighbor, Joey, and that he merely said hello to Joey as James exited the building. He denied selling or providing Joey with any drugs. He testified that he was on the corner talking to friends when a police officer 'attacked' him and he was arrested. *Id.* at 46. James alleged that the police officer told him that unless he could provide them with a 'big fish,' James would be charged with selling drugs. *Id.* at 55.

The trial court indicated that it found James' version of events to be incredible. He was convicted of possession of a controlled substance and PWID, and sentenced to 3-6 years of incarceration for each crime, to run concurrently. This timely appeal followed.

Commonwealth v. James, 3188 EDA 2008 (unpublished Memorandum, July 29, 2010), at 1-3.

On appeal, counsel for James filed a motion to withdraw and a brief pursuant to ***Anders v. California***, 386 U.S. 738 (1967), in which he averred that after a conscientious examination of the record, the appeal was wholly frivolous. This Court, in a Memorandum decision filed on July 29, 2010, disagreed, concluding that there were at least two arguably meritorious issues for review. Accordingly, pursuant to Pa.R.A.P. 1925(c)(4), we remanded this case to the trial court for the filing of a supplemental Pa.R.A.P. 1925(b) statement and further proceedings in accordance therewith. On remand, James filed a supplemental Rule 1925(b)

statement, and in a supplemental written opinion pursuant to Rule 1925(a), the trial court has addressed the issues raised by James.

On appeal, James now raises the following two issues for our consideration:

1. Was not the evidence insufficient to support the verdict of guilty of possession of a controlled substance as [James] testified that he had a valid prescription for the Oxycodone found in his possession, and there was no evidence that the prescription was fraudulent, unlawfully obtained, or otherwise invalid.
2. Did not the trial court err by imposing two separate sentences for possession of a controlled substance and possession with intent to deliver, as those two crimes merge for sentencing purposes, and therefore the sentences are illegal.

Appellant's Brief at 4.

In addressing James' first issue on appeal, our standard of review for a sufficiency claim is as follows:

We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.

The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our

judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Mobley, 14 A.3d 887, 889-90 (Pa. Super. 2011) (quoting **Commonwealth v. Mollett**, 5 A.3d 291, 313 (Pa. Super. 2010)).

Section 780-113(a)(16) of Pennsylvania's Controlled Substances, Drug, Device and Cosmetic Act ("CSDDCA") provides as follows:

- (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.

35 P.S. § 780-113(a)(16).

Violation of this provision requires the Commonwealth to prove three elements: (1) possession of a controlled substance, (2) intent to possess a controlled substance, and (3) non-authorization because of a lack of registration, licensure, or a valid prescription. **Commonwealth v. South**, 597 A.2d 137, 140 (Pa. Super. 1991). With respect to the third element, however, this Court has recognized that requiring the Commonwealth to

prove non-authorization in every possession case would be an impossible burden:

We are inclined to agree with the Commonwealth that the CSDDCA would be virtually unenforceable if the Commonwealth were obliged to disprove, in every case, every potential type of authorization to possess controlled substances which the CSDDCA recognizes. With respect to 'practitioners' alone, the Commonwealth would be required to offer proof of non-authorization from as many as eleven different licensing boards of agencies. If drug manufacturers, salesmen, carriers, and others who possess controlled substances in the regular course of business, as well as persons holding valid prescriptions were included among persons authorized to possess, manufacture, or deliver controlled substances, enforcement of the CSDDCA would become virtually impossible.

Commonwealth v. Sojourner, 408 A.2d 1108, 1113 (Pa. Super. 1979) (*en banc*).

The majority in ***Sojourner*** also recognized, however, that basic principles of constitutional law require the Commonwealth to prove every element of a criminal offense beyond a reasonable doubt. ***Id.*** (citing ***In re Winship***, 397 U.S. 358 (1970) and ***Mullaney v. Wilbur***, 421 U.S. 684 (1975)). Accordingly, in ***Sojourner*** this Court ruled that in possession cases the accused has a burden of production on the issue of non-authorization – pursuant to which he must “offer some credible evidence of the particular kind of authorization upon which he is relying for his defense... .” ***Id.*** In an attempt to clarify the defendant’s burden of production, we quoted from

Justice Lewis Powell's dissenting opinion in *Patterson v. New York*, 432 U.S. 197 (1977) as follows:

Furthermore, as we indicated in *Mullaney* ..., even as to those factors upon which the prosecution must bear the burden of persuasion, the State retains an important procedural device to avoid jury confusion and prevent the prosecution from being unduly hampered. The State normally may shift to the defendant the burden of production, that is, the burden of going forward **with sufficient evidence 'to justify (a reasonable) doubt upon the issue.'** ... If the defendant's evidence does not cross this threshold, the issue (whether it be) malice, extreme emotional disturbance, self-defense, or whatever will not be submitted to the jury.

Sojourner, 408 A.2d at 1113-14 (emphasis added) (quoting *Patterson*, 432 U.S. at 230-31 (Powell, J., dissenting)).

In sum, with respect to prosecutions for violations of section 780-113(a)(16), a rebuttable presumption of non-authorization exists, and the Commonwealth's duty to prove non-authorization beyond a reasonable doubt arises if (and only if) the defendant first presents sufficient credible evidence to raise a reasonable doubt as to non-authorization. ***Cf. Commonwealth v. Crockford***, 660 A.2d 1326, 1332 (Pa. Super. 1995). In the present case, the trial court found that James did not meet his burden of production on the issue of non-authorization, principally because he found James' testimony that he had a valid prescription for the Oxycodone to be entirely lacking in credibility. Trial Court Opinion, 1/10/11, at 3-4. In this regard, the trial court also noted that James failed to produce any hospital

records relating to his accident, did not call the prescribing therapist to testify, and did not introduce the pill bottle into evidence. *Id.* at 4. Finally, the trial court indicated “it is certainly plausible that a cautious drug dealer might forge a pill bottle label in an effort to lessen his likelihood of arrest on the street, or submit a fraudulent prescription to a pharmacy.” *Id.*

Based upon our review of the record on appeal, we conclude that James did produce sufficient evidence to meet his burden of production.² We agree with the trial court that James’ own testimony did not qualify to meet this burden, since the trial court, as the finder of fact, found his testimony to lack credibility. As the trial court properly observed, if every defendant could shift the burden of proof to the Commonwealth on the issue of authorization merely by taking the stand and testifying that he or she had a valid prescription, then the “virtually impossible” burden on the Commonwealth recognized in *Sojourner* to prove non-authorization in every possession case would return. *Sojourner*, 408 A.2d at 1113. As we made clear in *Sojourner*, the defendant’s burden of production unquestionably requires the production of *credible* evidence. *Id.*

² We agree with the trial court’s lamentation that there are very few appellate decisions applying the *Sojourner* burden-shifting procedure, and that as a result there is little guidance to permit trial courts to determine the quality and quantity of evidence that a defendant must produce to meet his burden of persuasion. In fact, while our research has identified a number of cases from this Court that acknowledged the *Sojourner* burden-shifting procedure, in none of these cases did the defendant produce any evidence in an attempt to satisfy the burden of persuasion. *See, e.g., South*, 597 A.2d at 140; *Commonwealth v. Graeff*, 442 A.2d 1153, 1158 (Pa. Super. 1982); *Commonwealth v. Herman*, 431 A.2d 1016, 1021 (Pa. Super. 1981); *Commonwealth v. Parrott*, 429 A.2d 731, 732 (Pa. Super. 1981); *Commonwealth v. Daniels*, 422 A.2d 196, 199 n.2 (Pa. Super. 1980); *Commonwealth v. Waters*, 419 A.2d 612, (Pa. Super. 1980).

In the present case, however, James offered additional evidence of authorization from a source that the trial court found to be credible. Specifically, a witness called by the Commonwealth, Agent John Brennan, one of the arresting officers, testified as follows on cross-examination by James' counsel:

Q. And, Agent Brennan, did you get a look at the amber pill bottle that was recovered?

A. Yes.

Q. Was there a label on that pill bottle?

A. Yes. To the best of my recollection there was.

Q. And do you recall what the label on the pill bottle stated?

A. I at least remember that it had the – Mr. James' name on it. And I believe there was other information like the date that the prescription was filled and other items. The name of the pharmacy I believe was on it.

Q. Agent, do you recall if you recorded any of that information down in any of your paperwork?

A. I'm sure I did.

Q. And do you recall what paperwork specifically, if any, you would have written that in?

A. It would have gone on the property receipt.

Q. Okay. Would looking at the property receipt refresh your recollection as to what was written on that?

A. Yes, ma'am.

* * *

Q. For the record, I'm showing Agent Brennan the property receipt ending in 80, which the amber pill bottle was placed on.

A. Yes. It's property receipt number 2722780. And the name is Abdul James. And the description of evidence, which is item number 1, is one pill bottle, amber in color, with name Abdul James containing 13 round white pills scored 512 Oxycodone with a prescription dated 6/4/07. Filled 4/20. And then it has some other items just the case number and that number.

Q. And how many pills were recovered in the amber pill bottle?

A. There were thirteen inside the pill bottle.

Q. And, Agent Brennan, did you recover any other pills from the defendant anywhere else on him?

A. No.

N.T., 8/11/08, at 38-40.

In his testimony, Agent Brennan gave no indication that the prescription on the amber pill bottle was fraudulent, unlawfully obtained, or otherwise invalid. To the contrary, Agent Brennan implied that he considered the prescription to be valid.

Q. [D]id my client offer any explanation about why he had the prescription?

A. I don't recall if he did or not.

Q. But it's possible he did offer [sic] an explanation?

- A. Yes. **They were his.** The prescription bottle was in his name.

Id. at 45 (emphasis added).

In our view, Agent Brennan's testimony constituted credible evidence that James had a valid prescription for the Oxycodone the police found in his possession, and created a reasonable doubt as to non-authorization under section 780-113(a)(16). As a result, the burden of proof on the issue shifted to the Commonwealth to prove beyond a reasonable doubt that James did not have a valid prescription for the medication. Because the Commonwealth offered no evidence to meet its burden of proof on this issue, we conclude that there was not sufficient evidence in the record on appeal to support James' conviction for possession of a controlled substance.

In light of our disposition of his first issue on appeal, James' second issue, relating to an alleged illegal sentence for his conviction under section 780-113(a)(16), is moot. In this regard, we note that our decision herein has no effect on the trial court's previous sentence of three to six years of incarceration imposed as a result of James' conviction for violation of 35 P.S. § 780-113(a)(30).

Judgment of sentence vacated on the conviction for violation of 35 P.S. § 780-113(a)(16). Jurisdiction relinquished.