

**[J-79-2007]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

**CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ.**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 50 EAP 2006
	:	:
Appellant	:	Appeal from the Opinion and Order of the
	:	Superior Court dated October 18, 2005 at
	:	No. 25 EDA 2005 vacating the judgment
v.	:	of sentence entered by the Court of
	:	Common Pleas, Philadelphia County
	:	dated December 13, 2004 at No. 0406-
ROBERT RATSAMY,	:	0282
	:	:
Appellee	:	885 A.2d 1005 (Pa. Super. 2005)
	:	:
	:	SUBMITTED: June 25, 2007
	:	:
	:	:

**OPINION**

**JUSTICE FITZGERALD**

**DECIDED: November 20, 2007**

We granted allowance of appeal to determine whether the Superior Court failed to apply the proper substantive standard of review for a sufficiency of the evidence claim in a criminal matter. We conclude the Superior Court recognized yet misapplied the standard established by this Court. Accordingly, we vacate the order of the Superior Court and remand for reinstatement of the judgment of sentence.

The relevant facts are as follows. Police officers were conducting undercover surveillance of suspected drug trafficking activity, with a focus on an individual named Lamont Taylor. Officer Martinez observed appellee Robert Ratsamy and another individual, later identified as Rom Sang, approaching Taylor. Appellee lifted his T-shirt to

remove a handgun. Appellee placed the gun in his waistband and he and Sang went into a restaurant. Officer Martinez called for back-up. Several officers arrived on the scene and entered the restaurant. In the restaurant, Officer Martinez searched appellee and recovered the handgun with five rounds, a plastic bag containing a rock of crack cocaine weighing 6.02 grams, and \$349.00 in United States currency. Sang possessed some currency and a plastic bag containing 199 multi-colored new and unused Ziploc plastic packets.

Appellee was charged with conspiracy, drug possession charges, and weapons charges.<sup>1</sup> At the time of trial, Officer Andre Schafer, an expert in narcotics, testified that appellee possessed the drugs with the intent to deliver based upon the amount of cocaine in the form possessed by appellee, together with the new and unused plastic bags recovered from Sang. The trial court also found Officer Martinez's testimony to be credible. The officer observed appellee in the possession of a handgun. The trial court further found that appellee possessed "a significant amount of crack cocaine." Coupled with the plastic bags discovered on his compatriot, and the expert's opinion, the trial court found the evidence was sufficient to support the conclusion that appellee had the intent to deliver the crack cocaine. Appellee was convicted of possession of a controlled substance, possession with intent to deliver a controlled substance (PWID), and one count each of carrying a firearm: (1) without a license; and (2) on a public street. Appellee was sentenced to not less than three years nor more than six years state incarceration.

In his appeal to the Superior Court, appellee challenged the sufficiency of the Commonwealth's evidence to support a conviction for PWID. The Superior Court reversed the PWID conviction on sufficiency of the evidence grounds and remanded for re-sentencing on the remaining convictions. Commonwealth v. Ratsamy, 885 A.2d 1005 (Pa.

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<sup>1</sup> 18 Pa.C.S. § 903; 18 Pa.C.S. §§ 6106, 6108; 35 Pa.C.S. §§ 780-113(a)(16), (30), (32).

Super. 2005). This Court granted discretionary review to address the standard applicable to an appellate court's review of a challenge to the sufficiency of the evidence.

As this case involves a question of law, our scope of review is plenary. Commonwealth v. Nester, 709 A.2d 879, 881 (Pa. 1998). Our standard of review is de novo. Commonwealth v. Chester, 895 A.2d 520, 522 n.1 (Pa. 2006). "Scope of review" refers to 'the confines within which an appellate court must conduct its examination.'...In other words, it refers to the matters (or 'what') the appellate court is allowed to examine. In contrast, 'standard of review' refers to the manner in which (or 'how') that examination is conducted." Morrison v. Commonwealth, Dept. of Public Welfare, 646 A.2d 565, 570 (Pa. 1994). A standard of review is the "degree of deference given by the reviewing court to the decision under review." Martha S. Davis and Steven A. Childress, Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis, 60 Tul. L. Rev. 461, 465 (1986). In other words, it is the "power of the lens" through which the appellate court looks at the issue in a particular case. Robert L. Byer, Judge Aldisert's Contribution to Appellate Methodology: Emphasizing and Defining Standards of Review, 48 U. Pitt. L. Rev. 16, xvi (1987).

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (citation omitted) (emphasis supplied). Instead, it must determine simply whether the evidence believed by the fact-finder was sufficient to support the verdict. The Superior Court properly articulated the correct substantive standard enunciated by this Court for review of a sufficiency of the evidence claim: all of the evidence and any inferences drawn therefrom must be viewed in the light most favorable to the Commonwealth as the verdict winner. Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000). Indeed, the Superior Court quoted at length from its own opinion in

Commonwealth v. Lambert, 795 A.2d 1010, 1014-1015 (Pa. Super. 2002), which set forth the proper substantive standard.<sup>2</sup>

However, the Superior Court did not apply this standard in this case. Instead, the Superior Court impermissibly re-weighed the evidence presented. The Court opined, “other than the size of the ‘rock,’ there is really no evidence that [Ratsamy] possessed this piece of crack with the intent to deliver it to another.” Ratsamy, 885 A.2d at 1008. However, the trial court found that appellee was “in possession of a significant amount of crack cocaine.” The compatriot’s possession of a large quantity of unused ziplock bags was consistent with an intent to distribute. The expert testified that the circumstances surrounding appellee’s possession established that appellee intended to distribute the contraband. The trial court

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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. Ratsamy, 885 A.2d 1005, 1007 (Pa. Super. 2005) (quoting Lambert, internal citations and quotation marks omitted).

found the expert's opinion that appellee possessed the crack cocaine with an intent to deliver to be credible. Trial Court Op. at 5-6.

The Superior Court disregarded the expert's opinion that appellee possessed the crack cocaine with the intent to deliver. The Court stated "the Commonwealth's expert opinion represents a leap that is not corroborated by other independent evidence. It is also a leap that does not appear to be totally justified by logic. The piece of crack cocaine seized from [Ratsamy] weighed 6.2 grams, or less than one-quarter ounce, and less than the size of two 'eight-balls,' a quantity of drugs that is not an uncommon purchase from drug sellers. As such, it is hardly inconceivable that one who could afford to do so would buy crack cocaine in the quantity found here." Ratsamy, 885 A.2d at 1008. But whether or not it was "hardly inconceivable" that appellee could have possessed the crack for his own use is not the correct standard of review. The Superior Court cannot deem incredible that which the fact-finder deemed worthy of belief.

Moreover, expert testimony is important in drug cases where the other evidence may not conclusively establish that the drugs were intended for distribution. Commonwealth v. Kirkland, 831 A.2d 607, 612 (Pa. Super. 2003), appeal denied, 847 A.2d 1280 (Pa. 2004). Such testimony is admissible to aid in determining whether the facts surrounding the possession of controlled substances are consistent with intent to deliver. The amount of the controlled substance is not "crucial to establish an inference of possession with intent to deliver, if . . . other facts are present." Commonwealth v. Ariondo, 580 A.2d 341, 350-51 (Pa. Super. 1990). The Superior Court's own cases follow this reasoning. See, e.g., Commonwealth v. Brown, 904 A.2d 925, 931-32 (Pa. Super. 2006), appeal denied, 919 A.2d 954 (Pa. 2007) (the totality of the circumstances established sufficient evidence to support a conviction for possession with intent to deliver); Commonwealth v. Drummond, 775 A.2d 849, 853-54 (Pa. Super. 2001), appeal denied, 790 A.2d 1013 (Pa. 2001) (the Commonwealth may establish the essential elements of the crime wholly by circumstantial

evidence; the court looks to all facts and circumstances in each case surrounding the possession of the controlled substance).<sup>3</sup>

“When reviewing the sufficiency of the evidence, an appellate court must determine whether the evidence, and all reasonable inferences deducible from that, viewed in the light most favorable to the Commonwealth as verdict winner, are sufficient to establish all of the elements of the offense beyond a reasonable doubt.” Commonwealth v. Weiss, 776 A.2d 958, 963 (Pa. 2001), cert. denied, 535 U.S. 1101 (2002). It was incumbent upon the Superior Court to consider all of the evidence introduced at the time of trial, and apparently believed by the fact finder, including the expert’s testimony. “In applying this standard, [the reviewing court must] bear in mind that: the Commonwealth may sustain its burden by means of wholly circumstantial evidence; the entire trial record should be evaluated and all evidence received considered, whether or not the trial court’s ruling thereon were correct; and the trier of fact, while passing upon the credibility of witnesses and the weight of the proof, is free to believe all, part, or none of the evidence.” Commonwealth v. Watkins, 843 A.2d 1203, 1211 (Pa. 2003). The Superior Court here failed “to afford the prevailing party below the full effect of its having prevailed upon an issue in the trial court.” Commonwealth v. Meals, 912 A.2d 213, 224 n.14 (Pa. 2006).

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<sup>3</sup> See also Commonwealth v. Torres, 617 A.2d 812 (Pa. Super. 1992), appeal denied, 629 A.2d 1379 (Pa. 1993), where appellant was pulled over for speeding and arrested for driving under the influence. An inventory search of the automobile was conducted. During the search, 4.63 grams of cocaine, individually wrapped into seventeen packets, was discovered in appellant’s glove compartment. In addition, three unopened boxes of plastic sandwich bags were found. Two hundred and thirty six dollars were found on appellant’s person. A police officer testified as an expert witness at the trial and opined that appellant possessed the cocaine with intent to deliver. Viewing the evidence in the light most favorable to the Commonwealth as verdict winner, the Superior Court affirmed. Id. at 814.

We hold that, under the proper standard, the evidence was sufficient to sustain appellee's conviction of PWID. We emphasize that, if the quantity of the controlled substance is not dispositive as to the intent, the court may look to other factors.

Other factors to consider when determining whether a defendant intended to deliver a controlled substance include the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large sums of cash found in possession of the defendant. The final factor to be considered is expert testimony. "Expert opinion testimony is admissible concerning whether the facts surrounding the possession of controlled substances are consistent with an intent to deliver rather than with an intent to possess it for personal use."

Commonwealth v. Jackson, 645 A.2d 1366, 1368 (Pa. Super. 1994) (citations omitted). Relevant factors in this case were appellee's possession of the loaded handgun, his interaction with the suspect who was the subject of the narcotics surveillance, the absence of drug use paraphernalia, the location, the 199 unused zip-lock bags, and the quantity of US currency. "[P]ossession with intent to deliver can be inferred from the quantity of the drugs possessed and other surrounding circumstances, such as lack of paraphernalia for consumption." Commonwealth v. Jones, 874 A.2d 108, 121 (Pa. Super. 2005) (citation omitted).<sup>4</sup>

We conclude that the Superior Court misapplied the governing substantive standard of review, re-weighed the evidence, and disregarded evidence believed by the fact-finder, which was sufficient to support a conviction for PWID. When viewed under the

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<sup>4</sup> See also Commonwealth v. Bess, 789 A.2d 757, 761-62 (Pa. Super. 2002) (possession of significant sums of cash, \$158.00, absence of drug paraphernalia, and 2.2 grams of cocaine, supported conviction of PWID); Commonwealth v. Johnson, 782 A.2d 1040, 1040 (Pa. Super. 2001) (defendant observed in high drug area by an officer who knew he was on parole, possession of 1.8 grams of crack cocaine, \$86.00 in cash, a beeper, and expert testimony, absence of drug paraphernalia for smoking crack sufficient to establish PWID); Commonwealth v. Drummond, *supra* (six grams of cocaine were seized, with a street value of approximately \$ 790).

proper standard, the evidence clearly was sufficient to support the trial court's finding of PWID. The order of the Superior Court is therefore vacated and the matter remanded for reinstatement of the judgment of sentence.<sup>5</sup>

Order vacated; matter remanded.

Mr. Chief Justice Cappy and Messrs. Justice Castille, Saylor and Eakin join the opinion.

Mr. Justice Baer files a concurring opinion.

Madame Justice Baldwin files a dissenting opinion.

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<sup>5</sup> We note that Madame Justice Baldwin, in a dissenting opinion, would leave the merits of this case for another day. While acknowledging that there is no federal constitutional right to counsel beyond appeals as of right, and that this Court heretofore has not addressed the issue of whether an appellant has a state constitutional right to counsel on a petition for discretionary review, Madame Justice Baldwin would remand this case for a determination of whether appellee is entitled to counsel, which is tantamount to addressing an issue of first impression not raised before this Court.