IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. 97-10,671**
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	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
SHAWN JONES,	**:**	
Defendant	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Judgment of Sentence issued June 29, 1998. The relevant facts are as follows. On April 4, 1997 at approximately 7:30 p.m. the Williamsport Police conducted a buy/bust operation in targeting the 700 block of West Fourth Street.[1] A confidential informant was brought to City Hall. He was strip-searched, driven to Walnut Street just north of West Fourth Street and given $20 in pre-recorded funds.[2] Under the surveillance of the police, the confidential informant walked to a restaurant in the 700 block of West Fourth Street. The defendant, Shawn Jones, was standing in front of the restaurant wearing a dark blue coat with gold around the collar. The confidential informant approached the defendant and asked him if he knew where he would be able to buy some drugs. Initially, the defendant was leery of the confidential informant. He talked with him for several minutes and kept asking if confidential informant was a member of the police force or working for them. The

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[1]A buy/bust operation occurs when a confidential informant or an undercover police officer participates in a controlled purchase of drugs from an individual who is arrested shortly after the buy occurs.

[2]**The funds were pre-recorded by photocopying the serial numbers of the bill(s).**

confidential informant replied in the negative. The defendant then told the confidential informant to wait and he would be back in a few minutes.

The defendant entered the restaurant. A few minutes later the defendant and another individual came out of the restaurant. The defendant dropped something on the ground and said there it is. The other individual said, "It's right next to your foot." The confidential informant looked down and saw a tiny, blue, Ziplock baggie commonly used to carry crack cocaine near his foot. One of the individuals told the confidential informant to just pick it up and put the money there. The confidential informant retrieved the baggie and put the $20 bill where the baggie was. The confidential informant then walked away.

When he was about thirty (30) yards down West Fourth Street, the confidential informant gave the pre-determined signal to the police that a successful buy was completed. The police then picked up the confidential informant in an unmarked vehicle, and he turned over the Ziplock baggie and gave them a description of the individuals with whom he had dealt. The description of the individuals was broadcast on police radio and the defendant and other individual were arrested. The confidential informant identified them from the confines of the unmarked vehicle.

The contents of the baggie were field tested, which resulted a positive indication for cocaine.

The defendant was charged with conspiracy, delivery, possession with intent to deliver, possession of a controlled substance and possession of drug paraphernalia. A jury trial was held May 6-7, 1998. The jury found the defendant guilty of delivery of cocaine, possession

of cocaine, possession of drug paraphernalia and conspiracy.[3] On June 29, 1998, the Court sentenced the defendant to: undergo incarceration a t a State Correctional Institution for a minimum of three (3) years and a maximum of six (6) years on the delivery conviction; two (2) years consecutive probation for conspiracy; and a fine of $150 for possession of drug paraphernalia.[4] The Court applied the school enhancement to the sentencing guidelines on the delivery conviction.

On or about July 28, 1998, the defendant attempted to file a pro se Notice of Appeal. The Lycoming County Prothonotary, however, refused to accept it pursuant to Rule 9022(c), because the record reflected that the defendant was represented by an attorney, George Lepley, Esquire. On or about January 21, 1999, the defendant filed an Application for Leave to Appeal Nunc Pro Tunc. New counsel was appointed, and the defendant's appeal rights were reinstated.

In his statement of matters complained of on appeal the defendant raises two (2) issues: (1) the evidence was insufficient as a matter of law to sustain the convictions; and (2) the verdict was against the weight of the evidence.

When assessing a sufficiency claim, the Court must view the evidence and all reasonable inferences therefrom in the light most favorable to the verdict winner in determining whether the Commonwealth has established every element of the crimes beyond a reasonable doubt. Commonwealth v. Keaton, 556 Pa. 440, 729 A.2d 529, 536 (1999); Commonwealth v. Kling, 731 A.2d 145, 147 (Pa.Super. 1999). The defendant was convicted of delivery of a

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[3]By agreement of counsel, the possession with intent to deliver charge was not submitted to the jury.

[4]The possession charged merged with the delivery for sentencing purposes.

controlled substance, conspiracy and possession of drug paraphernalia. In order to sustain the delivery conviction, the Commonwealth had to prove beyond a reasonable doubt that the defendant delivered cocaine or was an accomplice of another individual who delivered a controlled substance. The term "deliver" includes the actual, constructive or attempted transfer from one person to another of a controlled substance. 35 P.S. §780-102; Pa.SSJI(Crim) 16.13(a)(30)(B); Commonwealth v. Morrow, 437 Pa.Super. 584, 650 A.2d 907, 912 (1994), appeal denied, 540 Pa. 648, 659 A.2d 986 (1995). An individual may be guilty of delivering even though he acted without compensation and as agent for another. See Commonwealth v. Metzger, 247 Pa.Super. 226, 372 A.2d 20 (1977). Here, the evidence was sufficient to show that the defendant either delivered the drugs to the confidential informant or was the accomplice to the individual who did so. The confidential informant testified that he approached the defendant and asked him if he knew where he could be able to buy some drugs. The defendant then told the confidential informant to wait and he would be back in a few minutes. When the defendant returned a few minutes later with another individual, the defendant dropped a baggie of cocaine at the confidential informant's feet. Either the defendant or the other individual told the confidential informant to pick up the baggie and put the money on the ground where the baggie was.[5] Credibility is within the sole province of the trier of fact. Commonwealth v. Ahearn, 543 Pa. 174, 670 A.2d 133, 136 (1996); Commonwealth v. Claypool, 508 Pa. 198, 495 A.2d 176 (1985). The jury obviously believed the confidential informant's testimony, which was sufficient to sustain the conviction for delivery.

[5]The confidential informant initially testified that the defendant told him to pick up the baggie and place the money on the ground; however, the confidential informant stated later in his testimony that the other individual may have made that statement.

The confidential informant's testimony also was sufficient to sustain the defendant's conviction for conspiracy. In order to establish a conspiracy, three (3) elements must be proven: (1) the defendant agreed with other persons that one or more of them would engage in conduct which constitutes the crime of delivery of a controlled substance; (2) the defendant and the other persons shared the intention to bring about the crime or make it easier to commit the crime; and (3) the defendant or other persons committed an overt act in furtherance of their conspiracy. Pa.SSJI(Crim)12.903A. The agreement and the parties' intention can be proven by either direct or circumstantial evidence. Here, the evidence proves that the defendant was not merely present at the scene of a crime, but was an active participant since the confidential informant testified that the defendant was the individual who dropped the baggie on the ground next to the confidential informant's feet. The evidence also shows the defendant and the other individual were acting in concert. When asked if he knew where the confidential informant could get drugs, the defendant went into the restaurant and returned with another individual. Both the defendant and the other individual participated in the drug transaction. The defendant dropped the baggie of cocaine on the ground and the other individual told the defendant where the drugs were and to put the money on the ground. This evidence is sufficient to prove beyond a reasonable doubt that the defendant and the other individual were involved in a conspiracy to deliver drugs.

In order to sustain the defendant's conviction for possession of drug paraphernalia, the Commonwealth had to prove beyond a reasonable doubt that the defendant possessed packaging material for a dime bag of cocaine and that this packaging material is an item of paraphernalia. Drug paraphernalia includes materials of any kind that are used, intended for use, or designed for use in packaging, repackaging, storing or containing a

controlled substance. Pa.SSJI(Crim) 16.13(a)(32). The testimony introduced at trial established that the defendant possessed the baggie used to package, store or contain the cocaine delivered to the confidential informant. Therefore, the evidence was sufficient to sustain the defendant's conviction for possession of drug paraphernalia.

The defendant also asserts that the verdict was against the weight of the evidence. In examining such a claim, "the test is not whether the court would have decided the case in the same way but whether the verdict is so contrary to the evidence as to make the award of a new trial imperative so that right may be given another opportunity to prevail." Commonwealth v. Whiteman, 336 Pa.Super. 120, 485 A.2d 459, 462 (1984). The Court cannot agree with the defendant's contention. The evidence in this case established that the defendant was involved in the transfer of drugs to the confidential informant. The defense merely attacked the credibility of the confidential informant whose testimony was bolstered by the observations of the police during surveillance. As previously stated, credibility is within the sole province of the trier of fact. Commonwealth v. Ahearn, 543 Pa. 174, 670 A.2d 133, 136 (1996); Commonwealth v. Claypool, 508 Pa. 198, 495 A.2d 176 (1985). Finally, there is nothing about the jury's verdict in this case which would shock the Court's sense of justice.

DATE: 11/15/99

By The Court,

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Kenneth D. Brown, J.

cc: District Attorney
J. Michael Wiley, Esquire