

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 97-11,482

V :

MICHAEL JOHN SELBY :

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 Order dated April 5, 1999 in which the Defendant was sentenced to undergo incarceration in a State Correctional Institution for a minimum of 12 months and a maximum of 36 months after a jury found him guilty of possession with the intent to deliver, possession of a controlled substance (cocaine), possession of a controlled substance (heroin) and possession of drug paraphernalia. The Defendant appealed his sentence on May 6, 1999. On May 27, 1999, the Court instructed the Defendant to submit a concise statement of matters complained of on appeal in accordance with Pa.R.A.P. 1925(b). The Defendant submitted his statement on June 4, 1999.

In his statement of matters complained of on appeal, the Defendant first asserts that the Court erred in denying his Suppression Motion and Motion for Habeas Corpus relief. The Opinion in support of this Court's Order denying the Defendant's motions accompanies the Order dated December 1, 1998.

The Defendant next argues that the evidence presented at trial was insufficient to establish beyond a reasonable doubt that the Defendant possessed a controlled substance, that he intended to deliver a controlled substance, and that he possessed drug

paraphernalia. The Defendant further argues that the Court erred in sustaining the Commonwealth's objection to the testimony of Officer Hugh E. McGee concerning statements made by the victims of an assault about the origin of the guns and the drugs. With regard to these arguments, the Court summarizes the facts presented at the trial as follows.

Stephen J. Sorage, a police officer with the Williamsport Bureau of Police testified that on July 31, 1997 at approximately 1:20 p.m., he responded to the area of 803 Cherry Street. He testified that there had been an incident with a man pointing a gun at someone at a different location, and that the suspect had been observed running into the home at that address. At some point after he arrived on the scene, the suspect surrendered to the officers and came out of the home. The officers immediately searched the suspect and took him into custody. When the suspect surrendered, he did not possess any of the firearms which the assault victims reported that he possessed. As Officer Sorage stood on the front porch of the residence with another officer, the Defendant, Michael Selby, approached them.

Selby told them that he leased the residence. Officer Sorage asked the Defendant for his permission to search the residence for the weapons that were believed to be in the residence. Sorage testified that initially, the Defendant was reluctant to allow the officers into the residence to search, "but he subsequently stated that we can go in and search if he could go in the residence." (N.T. 1/13/99, p.10). The officers permitted the Defendant into the first floor of the residence, accompanied by Assistant Chief Jett. Officer Sorage stated that he went to the second floor and searched for the weapons in a bedroom.

Officer Sorage testified that upon entering the bedroom, he observed an open closet door. He testified that “there was a safe on the floor of the closet. In front of the safe—well, to the left of the safe was a couple shoe boxes on the floor in front of the safe was a razor blade right at the front of the safe and then front of that was a small bag approximately about two to three inches long, about an inch and a half wide. On the front of that there was – there was a red apple.” (Id., p.11). Inside one of the shoe boxes were some small bags that were tied on the ends, a bag with an apple design, and small sections of straws that were cut into one inch lengths. Inside another shoe box were numerous sections of straws that had been cut into varying lengths, a couple of small (one inch) ziploc baggies, and a razor blade. (Id., p.13). Officer Sorage testified that based on his training and experience, these materials were used for the packaging and sale of controlled substances.

Officer Sorage testified that he immediately stopped searching and called for Officer Dincher who was searching another room. He advised Officer Dincher that they should discontinue the search and obtain a warrant for any drugs and any weapons in the house. Officer Dincher left the residence and obtained a search warrant. A subsequent search of the closet in the bedroom revealed a white Nautica jacket containing packaging materials and controlled substances, a bag containing small blue and clear bags, and Kauffmann receipts bearing the Defendant’s name. In the living room of the home, the officers found another bag containing what was believed to be an owe sheet, and a birth certificate in the name of Kareem Ford. Other alleged owe sheets were found in a notebook. In the kitchen, officers found bags believed to contain marijuana residue. The officers also found Inositol, a cutting agent used for controlled substances; more plastic

bags; a package of razor blades; and finger scales. On cross examination, Officer Sorage testified that "Butter," the person involved in the assault, was believed to have not only been on the first floor, but other floors of the residence.

Officer Dincher, also of the Williamsport Bureau of Police testified that the Defendant had two pagers on his person at the time of his arrest. Officer Dincher testified that "of the hundreds of cases that we've done, every drug dealer that we've arrested is normally possessing a minimum of at least one pager" (N.T. 1/14/99, p.11). Officer Dincher identified several items collected from the residence. Among the items were a snorting straw, additional owe sheets and a heroin baggie. In a pair of black shorts, officers found a sandwich bag containing 18 black ten dollar bags. Officer Dincher explained that the thumbnail sized bags are often packaged in this fashion to carry out on the street for distribution purposes.

Officer Dincher testified that the officers opened a safe, collected from the master bedroom with a sledge hammer and a crowbar. Inside, the officers found \$175.00 in cash, packaged in two cellophane baggies; a nine inch kitchen dinner plate containing some white powder residue; and packaging material. Also found in the safe were rent receipts bearing the Defendant's name, .38 caliber ammunition, and additional detailed owe sheets. Officer Dincher testified that the combination of the assortment of drugs and paraphernalia that were found in the residence led him to the conclusion that the items were possessed with the intent to deliver. Officer Ungard, of the Williamsport Bureau of Police testified that after recovering the safe it was discovered that when punching in the Defendant's date of birth as the combination of the safe, a green light appeared. This appeared to indicate that it was the correct combination for the safe.

On cross examination, Officer Dincher testified that a garbage bag that was found in the residence contained a photo identification of the person involved in the initial assault and some clothing believed to belong to the person involved in the assault. In the garbage bag was a bag with an apple marking of the same type that was found inside the safe. Officer Dincher also testified that one of the weapons found in the home that was believed to have belonged to the individual involved in the assault was the same caliber as the ammunition that was found inside the safe (Id., p.80). On re-direct Officer Dincher testified that the person involved in the initial assault was wearing boxers with a waist of 42-44. The pants that were found with the drugs and paraphernalia were size 36.

The Defendant testified that he had been in Philadelphia for a few days and returned to his residence that day around noon. (N.T. 1/20/99, p.9). He testified that there was not a safe in his residence when he left. He also testified that the items and clothing found in the residence which contained the drugs and paraphernalia did not belong to him. He testified that before he left for Philadelphia he had given the individual involved in the assault keys to his vehicle to replace the brakes. The key chain also contained keys to his house. He had not, however, given the individual permission to enter his house. The Defendant testified that two other people had access to his house while he was in Philadelphia.

The Defendant argues that the evidence presented at the trial was insufficient to establish beyond a reasonable doubt that the Defendant possessed controlled substances with the intent to deliver them, and that he possessed paraphernalia. Instantly, the Court would find that when viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, there was sufficient evidence to have proven beyond a reasonable

doubt that the Defendant possessed the controlled substances found at his residence. The Commonwealth provided evidence that the officers found controlled substances in various locations throughout the Defendant's residence, including in a safe that appeared to have the Defendant's date of birth as the combination. Along with the controlled substances in the safe were other items belonging to the Defendant, including the Defendant's utility bills and rent receipts. Controlled substances were also found in clothing that was hanging in the Defendant's closet. All of this evidence supports a finding that the Defendant possessed the controlled substances found in the residence.

The Court also finds that there was sufficient evidence for the jury to have found beyond a reasonable doubt that the Defendant possessed controlled substances with the intent to deliver them. The Commonwealth introduced evidence that the officers found a cutting agent used in preparing controlled substances in the Defendant's kitchen. Also in the kitchen were finger scales which are commonly used in weighing controlled substances before packaging. In other areas of the house, including in the safe, were papers believed to be owe sheets. The papers included names of individuals and dollar amounts by their names. All of this evidence supports a finding that the Defendant prepared and packaged controlled substances for the purpose of selling or delivering to others.

The Court further finds that there was sufficient evidence for the jury to have found beyond a reasonable doubt that the Defendant possessed drug paraphernalia. The Commonwealth introduced evidence that the officers found numerous baggies and straws used for packaging controlled substances. Further, officers found cutting agent, finger scales and razor blades which would have been used in the processing and preparation of

the controlled substances. All of this evidence supports a finding that the Defendant possessed drug paraphernalia.

The Defendant next argues that the Court erred in sustaining the Commonwealth's objection to the testimony of Officer Hugh E. McGee concerning statements made by the victims of the assault about the origin of the guns and drugs. The Commonwealth argued that the officer's testimony with regard to the statements made by the victims of the assault would be inadmissible hearsay. The Defense argued that the statements fall within the excited utterance exception to the hearsay rule. The Defense argued that the victim's "state of mind would have been such that she was in an agitated state, she was excited, and that therefore the statements which she would have made in that condition would tend to be truthful and therefore would" . . ."void the affect of the hearsay rule" (N.T. 1/19/99, p. 67). The Court found, however, that although the statement may have been relating to a startling event while the declarant was under the stress of the event, the Defense had not shown how the evidence was relevant to the proceeding. The statements made by the victims were that the individual that was involved in the initial assault had been using heroin, that he had pointed a gun, that he keeps two guns, and that he took them to the Defendant's residence after the assault. (Id., pp. 67-68). The Court would find that the evidence did not have a tendency to make the existence of a fact that was of consequence to the determination of the action more probable that it would be without the evidence. Instantly, there were no charges relating to the Defendant's possession of firearms. Additionally, considering the overwhelming amount of drugs and paraphernalia found in the residence, the Court failed to see how a statement that the assault suspect had been using heroin at the time of the assault was relevant to whether the Defendant possessed the

controlled substances in his home. The Commonwealth's objection was therefore sustained.

Dated_____

By The Court,

Nancy L. Butts, Judge

Michael Dinges, Esquire
Kyle Rude, Esquire
Honorable Nancy L. Butts
Judges
Law Clerk
Gary Weber, Esquire