IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. 98-11495**
	:	
vs.	**:**	
	:	
	:	
KEVIN SMITH,	**:**	
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 dated May 12, 1999. The relevant facts are as follows.

On March 16, 1999, a jury found the defendant guilty of possession with intent to deliver a controlled substance, possession of a controlled substance, and possession of drug paraphernalia.

The Court sentenced the defendant to a term of imprisonment of two to five (2-5) years on the possession with intent to deliver conviction.[1] The conviction for possession of cocaine merged with the possession with intent to deliver cocaine. Although the defendant also was convicted of possessing drug paraphernalia, the Court did not impose any further punishment on that count, because the items of paraphernalia were simply the baggies which contained the cocaine.

The Court notes it imposed a two (2) year mandatory minimum sentence on the possession with intent to deliver conviction pursuant to 18 Pa.C.S.A. §6317. This statute requires a minimum sentence of two (2) years when, as here, the individual who possessed a

[1]The defendant possessed forty-six (46) dime baggies which contained a total of 3.2 grams of crack cocaine.

controlled substance with the intent to deliver it did so within 250 feet of a recreation center or playground.

The defendant appealed his conviction and sentence and on or about July 29, 1999, filed a "Concise Statement of Matters Complained of on Appeal Nunc Pro Tunc." In his matters complained of on appeal, the defendant raises three issues, which the Court will address seriatim.

The first issue raised by the defendant is whether the evidence is sufficient to support the conviction. In reviewing the Court's notes of the trial, it is apparent the evidence is more than sufficient to support the verdict.

On July 10, 1998, Officer Thomas Ungard of the Williamsport Bureau of Police Vice and Narcotic Unit participated in a stop of the defendant and 5 or 6 other occupants in a motor vehicle as it entered the Kennedy King housing project. The Williamsport Police had felony arrest warrants for some of the occupants of the vehicle. All of the occupants were ordered out of the vehicle and secured. Officer Ungard did a "Terry Frisk" of the defendant and felt a bulge in his left pant pocket. N.T., March 15, 1999, at p. 21-22. The officer, highly experienced in narcotics investigations, believed he felt a quantity of dime bags of cocaine in the defendant's pocket. N.T., March 15, 1999, at p. 21. The officer immediately placed the defendant under arrest and seized the cocaine from the defendant's pocket. The officer also seized $45.00 from the defendant's right pant pocket. N.T., March 15, 1999 at p. 22. No drug paraphernalia suitable for using the cocaine was found on the defendant. N.T., March 15, 1999, at p. 22.

The cocaine found in the defendant's pant pocket consisted of 46 separately packed blue dime bags of crack cocaine inside a large clear baggie. The total weight of the

cocaine was 3.2 grams.[2] Officer Ungard testified that the street value of the 46 dime bags was approximately $460.00.

Officer Ungard testified that from his experience, the possession of 46 separate dime bags of cocaine would indicate a possession with intent to deliver cocaine. N.T., March 15, 1999, at p. 30. The officer stated he never encountered a cocaine addict who possessed this large a number of individual dime bags. Rather, the user buys a few bags at a time, uses what was purchased, and then tries to purchase more. N.T. March 15, 1999, at p. 32. In fact, the officer noted that 46 dime bags is "way over the limit for a crack addict or user to have in their possession." N.T., March 15, 1999, at pp.32-33.[3] Officer Ungard also opined that each dime bag was packaged for individual sale. N.T., March 15, 1999, at p.33. Officer Ungard further testified that the 46 dime bags found, coupled with the amount of money found ($45.00), also had some significance. If a drug dealer had half a "G bag" (50 dime bags of cocaine) to sell, then sold four (4) of the bags, the amount of money the dealer received would be consistent with amount found on the defendant when the 46 bags were seized. N.T., March 15, 1999, at p. 34.[4]

Officer Ungard's testimony was supported by other experienced narcotic officers who testified at trial. See testimony of Officer Leonard Dincher, N.T., March 15, 1999 at pp. 45-

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[2]The defendant stipulated at trial to the lab analysis identifying the involved substance as cocaine. N.T. March 15, pp. 26, 27.

[3]Interestingly, the defendant's own testimony supports Officer Ungard's statements. On cross-examination, the defendant testified he would spend $40 to $50 dollars at a time for cocaine; thus, he would only buy four to five (4-5) dime bags at a time. N.T., March 15, 1999, at p. 88.

[4]See also testimony of Vice Officer John McKenna that half a G pack, 50 dime bags, is commonly carried by a drug dealer and noting the amount of money found on the defendant was consistent with selling four (4) dime bags. N.T., March 15, at p. 56.

51; testimony of Officer John McKenna, N.T., March 15, 1999, at pp. 51-63.

The defendant testified in his own defense. He admitted he possessed the 46 dime bags of cocaine, packed together in a large cellophane bag. The defendant testified that on the day in question, he happened to find the large bag with the 46 dime bags of cocaine on the ground when he was cleaning up trash in his yard. N.T., March 15, 1999, at p.68. He further testified he put the cocaine in his pocket; he had been using crack cocaine for fifteen (15) years; and he kept the cocaine with the intention of using it. He denied he possessed the cocaine with the intent to deliver it to any third party. N.T., March 15, 1999, at pp.69-70. The defendant acknowledged that this was significant quantity of cocaine. N.T., March 15, 1999, at p.78.

The defense also called as a witness Delphine Harris, a friend of the defendant. Ms. Harris testified that the area where the defendant lives is "drug infested." N.T., March 15, 1999 at p. 93. Ms. Harris also testified she had been a crack user for twelve (12) years. She testified heavy crack cocaine users may possess the quantity of cocaine possessed by the defendant in this case. N.T., March 15, 1999, at p. 97.

After reviewing the evidence, the Court believes there is ample evidence to sustain the defendant's conviction for possession with intent to deliver cocaine. Every witness agreed that the defendant was in possession of a significant quantity of cocaine. It was within the province of the jury to accept or reject the opinion of the experienced police officers. It also was within the province of the jury to accept or reject the defendant's account of how he came into possession of hundreds of dollars worth of cocaine shortly before the police confronted him. Apparently, the jury chose to disbelieve the defendant's explanation.

The next issue raised by the defendant on appeal is whether the school/playground "enhancement" should have been applied by the Court if no delivery occurred

within the restricted zone. In looking at the Court's sentencing Order, it is clear the Court applied the two (2) year mandatory minimum sentence required by 18 Pa.C.S. §6317 "in that the offense was committed within two hundred and fifty (250) feet of a playground." See Order of Court dated May 12, 1999.[5]

The Court is somewhat at a disadvantage in considering this issue, because the defendant/appellant has not requested a transcript of the sentencing hearing. See Pa.R.App.P. 1911. Thus, the Court has no record to review. It is also unclear whether the defendant is attacking the factual finding that the crime of possession with intent to deliver occurred within 250 feet of a playground, or whether the defendant's argument is geared to the purely legal issue that §6317 should not apply because "no delivery occurred within the restricted zone." To the best of the Court's memory, there was neither an evidentiary hearing nor a challenge at the sentencing hearing concerning the distance to the playground. Therefore, the Court will assume the defendant's contention is whether §6317 requires a delivery of a controlled substance before the mandatory sentence is applied.

Section 6317 provides that the mandatory sentence is applicable to a person 18 years or older who is convicted of a violation of §13(a)(30) of the Drug Device and Cosmetic Act. Since the defendant was convicted of possession with intent to deliver a controlled substance, which is encompassed within §13(a)(30), the mandatory expressly applies to the offense for which the defendant was sentenced.[6]

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[5]The Court assumes that, in his matters complained of on appeal, the defendant mistakenly refers to this as a "sentencing enhancement", rather than a mandatory minimum sentence.

[6]See also Commonwealth v. Murphy, 405 Pa.Super. 452, 592 A.2d 750,754 (1999), (where the Court rejected a defendant's claim that the Commonwealth must prove that a defendant intended to be within one thousand feet of a school in discussing School Zone Enhancement).

The final issue raised by the defendant is whether the Court erred in denying his untimely motion to suppress evidence.[7] The motion was raised at or just after the jury was selected in this case. The issue was briefly discussed by the Court and counsel just before the beginning of trial. See N.T., March 15, 1999, at pp. 3-5.

Lycoming County has an extremely demanding and busy criminal court calendar. Typically, in a time frame of one week, the Court will select several juries on the first morning of a trial week and attempt to try several criminal cases in immediate succession. There is simply no time to spare in a typical jury trial week. Moreover, the Court is hesitant to select a jury only to have the jurors then wait while the Court allows the potentially lengthy litigation evidentiary motions. In the instant case, the Court would not allow the defendant to litigate an untimely motion to suppress evidence, since the case was literally ready for trial. The Court believes no abuse of discretion occurred in its decision, in light of the untimeliness of the motion and the inherent delay which would have occurred if we held a suppression, particularly as the jury had been selected.

DATE: _____ By The Court,

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Kenneth D. Brown, J.

[7]The Court notes defense counsel entered his appearance and waived the defendant's arraignment on October 2, 1998. The defendant's arraignment was scheduled for October 5, 1998. Therefore, for the motion to be timely, it should have been filed on or before November 3, 1998.