IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 98-11,678

VS :

DAVID CHRISTOPHER :

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

Defendant appeals this Court's Order dated August 30, 1999, wherein the Defendant was sentenced to undergo incarceration for a minimum of two (2) years and a maximum of four (4) years on the charge of delivery of a controlled substance. This sentence was imposed after he was found guilty following a jury trial held on March 24, 1999. The evidence presented at trial was as follows.

Officer Leonard Dincher, of the Williamsport Bureau of Police, Vice Narcotics Unit, testified that on February 4, 1998 at approximately 3:30 p.m., he was involved in an undercover operation involving the Defendant. On that date, he met with a confidential informant he had been working with. (N.T. 3/24/99, p. 12-13). Officer Dincher testified that he was with the informant as she made two calls to the Defendant on his cell phone. Officer Dincher dialed Defendant's number, then gave the phone to the informant. (Id., p. 77). He testified that after a short conversation with regard to playing some "eight ball pool," the informant was told to call back when they reached Williamsport. Once he and the informant reached the Coastal Mart on the 500 block of Hepburn Street, the informant called the Defendant again. The informant told the Defendant they were at the C-Mart, and the Defendant stated that he would be at their location in approximately twenty minutes. (Id., p.78). Shortly thereafter, the Defendant

arrived at the Coastal Mart. The Defendant got into the vehicle with Officer Dincher and the confidential informant, and they drove to an apartment complex on the 300 block of Bridge Street. The Defendant went into one of the apartments, but returned several minutes later empty-handed. (Id., p. 15). The Defendant stated that he would have what they were looking for, but it would take several more minutes.

The Defendant left, then returned to the vehicle and directed that they drive to the Shamrock Bar and Grill parking lot on West Edwin Street. Once there, Officer Dincher gave the Defendant $220.00 and he left. Fifteen to twenty minutes later, when he returned to the truck, the Defendant had small baggies of white power.(Id., p.16). Officer Dincher testified that he initially questioned the Defendant with regard to the weight of the substance, stating that he thought that it was "a little light". The Defendant assured him that "his boy" had weighed it, and that it was "the best fish scale in town." (Ibid.)

As they are leaving the area, the Defendant pulled a couple of toothbrushes out of a grocery bag, and proceeded to explain how to fold the cocaine into the creases of the grocery bag to conceal it from the police. The toothbrushes can then be placed on top to camouflage the drugs. As they approached the 300 block of Bridge Street, the Defendant handed the grocery bag to Officer Dincher and got out of the vehicle. (Id., p.17). The substance received tested positive for cocaine. Officer Dincher testified that he later learned that his suspicions with regard to the weight of the substance were correct. Instead of an "eight ball," – which would have totaled approximately 3.5 grams – he received only 1.3 grams. (Id., p.19).

The Defendant testified that the confidential informant who introduced him to Officer Dincher was Dodie Seagraves. Defendant had contact with her only when he was using drugs. (Id., p. 40). He testified that he had tried on many occasions to clean up. Defendant testified that on the date of the incident, he had been clean for approximately three to four days.[1] He testified that his efforts to clean up included calling friends who were recovering for advice, and calling friends he had used with—including Ms. Seagraves—to inform them that he did not want to use. (Id., p. 43). One of the occasions he had called Ms. Seagraves was only a few days before this incident.

The Defendant testified that Ms. Seagraves called on three occasions the day of the incident. He testified that with each call, she got increasingly persistent. The first two times he turned her down. The third time she called, he agreed to make the buy. (Id., p. 45). He made a few calls and finally made a contact for the purchase. He purchased an eight ball (three grams), but that "being an addict, I took half of it." (Id., p. 49). He hid the drugs in his mouth, and when he got into the vehicle with the confidential informant and Officer Dincher, he spit them out into the confidential informant's hand. Once he turned over the drugs, he received $20.00 from the confidential informant. (Id., p. 50-51).

Entrapment

On appeal, Defendant first alleges that the Court erred by not finding entrapment as a matter of law. The defense of entrapment is established when the defendant

[1] Cross-examination of the Defendant revealed that the Defendant's wife had contacted the Williamsport Bureau of Police on February 3, 1998, the day before the incident in this case. His wife had told the police that the Defendant was using drugs constantly in the house. (Id., p. 74). She had called the police

proves by a preponderance of the evidence that, for the purpose of obtaining evidence of the commission of an offense, a public law enforcement official or a person acting in cooperation with such an official:

> (1) mak[es] knowingly false representations designed to induce the belief that such conduct is not prohibited; or
>
> (2) employ[s] methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.
>
> 18 Pa.C.S.A. § 313.

The test for entrapment is an objective one. Commonwealth v. Weiskerger, 520 Pa. 305, 312, 554 A.2d 10, 14 (1989); Commonwealth v. Jones, 242 Pa.Super. 303, 311, 363 A.2d 1281, 1285 (1976). Therefore, if the finder of fact is persuaded that the conduct of the police was such that there is a substantial risk that such an offense will be committed by persons other than those who are ready to commit it, then they must find that there was entrapment, regardless of defendant's predisposition. See Weiskerger, supra.

Whether an entrapment has occurred is a question for the jury. To find entrapment *as a matter of law*, appellant must show that the evidence was so overwhelming that no reasonable jury could fail to find entrapment as a matter of law. Commonwealth v. Lebo, 405 Pa.Super. 316, 592 A.2d 353, 356 (1991), appeal denied, 530 Pa. 640, 607 A.2d 251. In the instant case, the Court would find that the evidence presented did not rise to such a level. The contacts to the Defendant by the confidential

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to inform them that if they raided the house, the drugs were his and not hers. On cross-examination he admitted that he may have been using on February 3, 1998.

informant as testified to by Officer Dincher did not manipulate, coerce, or create a substantial risk that an offense would be committed by one not inclined to commit it. Additionally, Defendant's argument that Ms. Seagraves had persisted even though she knew he had been trying to "stay clean" for three to four days prior to the date of the incident was contradicted by testimony that his girlfriend had contacted the authorities only the day before the incident to inform them that the Defendant was constantly using drugs in the home at that time. The Court therefore finds the Defendant's argument without merit.

Constitutionality of Commonwealth's Right to Jury Trial

The Defendant next argues that the Constitutional Amendment allowing the Commonwealth to override the Defendant's right to proceed non-jury is unconstitutional.[2] The Court finds the Defendant's argument without merit. *See* Commonwealth v. Tharp, 754 A.2d 1251 (Pa. 2000), (amendment to Pennsylvania Constitution granting Commonwealth the right to jury trial is constitutional).

Sufficiency of Evidence

The Defendant next argues that the evidence presented at trial was insufficient to prove his guilt, since he established by a preponderance of the evidence that he was entrapped. The Court cannot agree. "The test of the sufficiency of the evidence in a criminal case is whether, viewing the evidence admitted at trial in the light most favorable to the Commonwealth and drawing all reasonable inferences in the Commonwealth's favor, there is sufficient evidence to enable the trier of fact to find every element of the [crime] charged beyond a reasonable doubt." Commonwealth v.

[2] On March 22, 1999, the Defendant formally requested that he be permitted to proceed non-jury. On that date, the Assistant District Attorney invoked his right to a trial by jury.

Jones, 449 Pa. Super. 58, 672 A.2d 1353, 1354, (Pa. Super. 1996), citing, Commonwealth v. Carter, 329 Pa. Super. 490, 495-96, 478 A.2d 1286, 1288 (1984); Commonwealth v. Peduzzi, 338 Pa. Super. 551, 555, 488 A.2d 29, 31-32 (1985). In the instant case, when viewing the evidence in the light most favorable to the Commonwealth, the Court could not find evidence that the conduct of the police in this case created a substantial risk that the offense would be committed by a person other than one who was ready to commit it. As was stated previously, although the Defendant argued that he was trying to "stay clean" for a few days prior to the date of the incident, this was contradicted by the fact that his girlfriend had contacted the authorities only the day before the incident to inform them that the Defendant was constantly using drugs in the home at that time. The Court therefore finds the Defendant's argument without merit.

Ineffective Assistance of Counsel

The Defendant next argues that his counsel was ineffective for failing to request a missing witness instruction when the Commonwealth failed to call the confidential informant at trial. The standard to be applied to claims of ineffective assistance of counsel as follows:

> First, we must determine whether the underlying claim is of arguable merit. Commonwealth v. Evans, 489 Pa. 85, 413 A.2d 1025 (1980). If the claim is devoid of merit, our inquiry ceases for counsel will not be deemed ineffective for failing to pursue a meritless issue. Commonwealth v. Nelson, 514 Pa. 262, 523 A.2d 728 (1987). If, however, the claim possesses merit, we must then determine whether the course of action chosen by counsel had some reasonable basis designed to effectuate his client's interest. Commonwealth v. Hentosh, 520 Pa. 325, 554 A.2d 20 (1989). Finally, appellant must demonstrate how the ineffectiveness

> prejudiced him. Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987). Commonwealth v. Tressler, 526 Pa. 139, 142, 584 A.2d 930, 931-932 (1990). Thus, the mere allegation that trial counsel pursued a wrong course of action will not make out a finding of ineffectiveness. Commonwealth v. Savage, 529 Pa. 108, 112, 602 A.2d 309, 311 (1992).
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> Commonwealth v. Mason, 427 Pa.Super. 243, 628 A.2d 1141 (1993)

The Court finds that Defendant's claim has no merit, as the missing witness instruction would not have been warranted in this case. A missing witness instruction may be warranted where a witness is: (1) available to only one of the parties to a trial, and (2), and it appears this witness has special information material to the issue, and (3), the witnesses testimony would not be merely cumulative, then if that party does not present the testimony of the witness, the jury may draw an inference that such testimony, had it been presented, would have been unfavorable to that party. Commonwealth v. Echevarria, 394 Pa.Super 261, 575 A.2d 620 (1990), *citing* Commonwealth v. Manigault, 501 Pa. 506, 462 A.2d 239 (1983). In the instant case, the confidential informant was available to the Defense. The Defendant knew the confidential informant and referred to her by her first and last name at trial. The Defendant additionally testified with regard to his relationship with the confidential informant. The Court would therefore find that the informant was just as available to defendant as he was to the Commonwealth. When defendant fails to subpoena a witness who is known and available to him, even if that witness has special information material to the issue which would not be cumulative, he is not entitled to the "missing witness" charge. The Court therefore rejects this argument.

Sentencing Mandatory

Defendant next alleges that the Court erred in imposing the mandatory sentencing provision in 18 Pa.C.S.A. § 6317 in this case. Under section 6317, a person 18 years of age or older who is convicted of a violation of section 13(a)(14) or (30) of The Controlled Substance, Drug, Device and Cosmetic Act, shall, if the delivery or possession with intent to deliver of the controlled substance occurred within 1,000 feet of the real property on which is located a public, private or parochial school or a college or university or within 250 feet of the real property on which is located a recreation center or playground or on a school bus, be sentenced to a minimum sentence of at least two years of total confinement. In the instant case, it is not contested that the Defendant possessed a controlled substance with the intent to deliver. The Defendant argues, however, that he did not make the actual delivery in a school zone. The Defendant argued that the actual delivery of the controlled substance occurred not in the parking lot of the bar (which was in the school zone), rather, the Defendant waited until he was almost at his drop off point on Bridge Street (which was not in a school zone), to hand over the drugs in the vehicle. *See also N.T. 8/30/99, pp. 26-27.* The Court rejects this argument. Initially, the Court finds that there was evidence presented that the actual exchange occurred in the parking lot of the Shamrock Bar. The Defendant testified that he had the baggies of cocaine in his mouth as he got into the vehicle with Officer Dincher and the confidential informant. He testified that he spit the drugs out into the hand of the informant. Officer Dincher testified that he immediately commented that the amount seemed small. After being assured that it had been weighed, and was the best in town, they left the parking lot. Even if the physical

exchange—or actual delivery—did not occur in the parking lot of the bar, the Court would still find that the Defendant *possessed with the intent to deliver* in a school zone. The Defendant purchased the drugs in the school zone, he transported the drugs back to Officer Dincher's vehicle while in the school zone, and he showed the drugs purchased to Officer Dincher and the informant after getting into the car. The Court therefore rejects this argument.

Constitutionality of Sentencing Mandatory

Defendant last alleges that the sentencing mandatory provision in 18 Pa.C.S.A. § 6317 is unconstitutional, and should not, therefore, be applied. The Court does not agree. Initially, we note that legislative enactments by the General Assembly carry a strong presumption of constitutionality, Commonwealth v. Burnsworth, 543 Pa. 18, 669 A.2d 883, (1995), *citing* 1 Pa.C.S. § 1922; Curtis v. Kline, 542 Pa. 249 n. 3, 666 A.2d 265 n. 3 (1995); Commonwealth v. Blystone, 519 Pa. 450, 463, 549 A.2d 81, 87 (1988), aff'd, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), and any party challenging a statute's constitutionality bears a heavy burden to demonstrate that the legislation clearly, palpably and plainly violates the terms of the constitution. Burnsworth, supra, *citing* Commonwealth v. Bell, 537 Pa. 558, 569, 645 A.2d 211, 217 (1994), cert. denied, 513 U.S. 1153, 115 S.Ct. 1106, 130 L.Ed.2d 1072 (1995); Commonwealth v. Nicely, 536 Pa. 144, 150, 638 A.2d 213, 216 (1994).

Initially, the Court finds that the appropriate standard to utilize in evaluating the constitutionality of the sentencing statute at issue in this case is the "rational basis" test. The Court in Curtis v. Kline, 542 Pa. 249, 666 A.2d 265 (1995), set forth a two step approach for analysis under the rational basis test. First, we must determine whether

the challenged statute is designed to further a legitimate state interest or public value. Id. at 257-58, 666 A.2d at 269. If it is, we must then determine whether the statute is reasonably related to accomplishing the articulated state interest. Id. Essentially, we must address whether the statute has some relationship to the interest which the legislature seeks to promote and whether that relationship is reasonable.

The Court finds that the statute is designed to further a legitimate state interest or public value: limiting direct and indirect exposure of our children to drugs and drug activity. Additionally, the Court finds that the statute in the instant case is reasonably related to accomplishing that interest. The statute in the instant case was enacted to create a "drug-free zone" around schools, playgrounds, recreational centers and other areas where children are likely to be present. It is intended to send a clear signal to drug dealers that their presence would not be tolerated within a certain proximity of these areas, *See* Commonwealth v. Murphy, 405 Pa.Super 452, 592 A.2d 750 (1991), *citing* U.S. v. Crew, 916 F.2d 980 (5th Cir.1990). The statute is additionally applicable before and after school hours, when various extra-curricular activities occur. The Court therefore rejects Defendant's argument.

Dated:

By The Court,

Nancy L. Butts, Judge

xc: Nicole Spring, Esquire
Kenneth Osokow, Esquire
Honorable Nancy L. Butts
Law Clerk