IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 98-11,525

VS :

KEVIN ROBERT HOUSEKNECHT :

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

Defendant appeals this Court's Order dated August 17, 1999, wherein the Defendant was sentenced to undergo incarceration for a minimum of thirty (30) months and a maximum of seventy-two (72) months after the Court found him guilty of delivery of a controlled substance. The Defendant was further sentenced to minimum of two (2) years and a maximum of four (4) years on the charge of conspiracy. That sentence was suspended and the Defendant was placed under the supervision of the Pennsylvania Board of Probation and Parole for a period of ten (10) years.

WEIGHT OF THE EVIDENCE

The Defendant first alleges that the verdict was against the weight of the evidence. The test for determining whether the verdict is against the weight of the evidence, is 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 (1984). Instantly, the Court cannot conclude that the verdict was so contrary to the evidence that the award of a new trial is imperative so that justice may have another opportunity to prevail. The

Court's reasoning in support of this issue is in this Court's Opinion and Order dated April 30, 1999. The Opinion and Order was entered following the non-jury trial in this matter.

SUFFICIENCY OF THE EVIDENCE

The Defendant next alleges that there was insufficient evidence to find the Defendant guilty of the charges beyond a reasonable doubt. "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. 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). Instantly, the Court has concluded that there was sufficient evidence presented to establish the crimes charged beyond a reasonable doubt. The Court's reasoning in support of this issue is in this Court's Opinion and Order dated April 30, 1999.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Defendant next alleges several areas in which his trial counsel was ineffective. In order to make a claim for ineffective assistance of counsel, the Defendant must demonstrate that: (1) the underlying claim is of arguable merit; (2) counsel's performance was unreasonable; *and* (3) counsel's ineffectiveness prejudiced defendant. Commonwealth v. Beasley, 544 Pa. 554, 678 A.2d 773, 778, (1996).

Counsel's effectiveness is presumed, so the burden of establishing ineffectiveness rests squarely with the Defendant. Generalized ineffectiveness claims raised in a vacuum must be rejected. Appellant bears the burden of proving his allegation of ineffectiveness. Commonwealth v. Lilliock, 740 A.2d 237, (Pa.Super 1999) *citing* Commonwealth v. Baker, 531 Pa. 541, 561, 614 A.2d 663, 673 (1992). Instantly, the Court will address each allegation of ineffectiveness in the order they were raised.

Criminal records of the Commonwealth witnesses

Defendant argues that his counsel was ineffective for failing to request the prior criminal records of the Commonwealth's witnesses prior to trial. Defendant argues that the Commonwealth failed to comply with the Rules of Discovery by not providing the Defendant with the prior criminal records of its witnesses before trial. The Court rejects this argument, as the Defendant has not shown that the claim has arguable merit, or that he has been prejudiced by his counsel's inaction.

The Pennsylvania Supreme Court in Commonwealth v. Williams, 458 Pa. 319, 326 A.2d 300 (1974), held that criminal records of Commonwealth witnesses need not be disclosed by the Commonwealth. The Court noted "it is axiomatic both that the Commonwealth has no affirmative duty to disclose the past criminal record of a witness whose testimony it offers and that the credibility of a witness is a subject properly to be examined during cross examination." *See also* Commonwealth v. Colson, 507 Pa. 440, 490 A.2d 811 (1985), certiorari denied, 106 S.Ct. 2245, 476 U.S. 1140, 90 L.Ed.2d. 692. In the instant case, Defense counsel did, in fact, cross-examine the Commonwealth witnesses with regard to their criminal records during the non-jury trial. Charles Schriner, the confidential informant, disclosed that his prior record consisted of a theft,

receiving stolen property (N.T. 4/26/99, p. 41). The Defendant's co-conspirator, Walter Meyer, revealed that his cases were still pending before the court. The Court therefore finds no basis for a conclusion that trial counsel was ineffective.

Consideration given in exchange for cooperation

Defendant next argues that his counsel was ineffective for failing to request information from the Commonwealth with regard to any consideration given to the Commonwealth's witness in exchange for their cooperation. The Court rejects this argument, as the Defendant has not shown that the claim has arguable merit, or that he has been prejudiced by his counsel's inaction. Consideration given in exchange for cooperation is a proper subject for cross-examination in order to establish bias or motive for fabricating testimony. It is a method for impeachment. *See* Commonwealth v. Robinson, 507 Pa 522, 491 A.2d 107, (1985).

In the instant case, the two witnesses for the Commonwealth were, in fact, questioned with regard to consideration given in exchange for their cooperation. With regard to Charles Schriner, Defense counsel questioned:

> Q: Were you compensated in any for assisting the police officers on this drug buy?
>
> A: What do you mean by that?
>
> Q: Were you given money or you given help?
>
> A: I was given a couple dollars.
>
> Q: Were you given assistance in any other cases that you might have been in trouble:
>
> A: No, no.
>
> (N.T. 4/26/99, p.51)

With regard to Walter Meyer, the Commonwealth questioned Mr. Meyer on direct:

> Q: And do you have – has the Commonwealth, the district attorney's office, the police, promised you anything for your testimony other than the fact that it would be make [sic] known to the judge at your sentencing?
>
> A: No.
>
> (Id., p. 63)

Defense counsel further questioned Mr. Meyer with regard to his pending charges. The Court therefore finds that Defense counsel had the opportunity, and did in fact, question the Commonwealth witnesses with regard to consideration given for their cooperation. Additionally, the witnesses revealed that they were not given any promises in exchange for their cooperation. The Court therefore finds no basis for a conclusion that trial counsel was ineffective.

Bill of Particulars

Defendant next argues that his counsel was ineffective for failing to file a request for a bill of particulars. The Court rejects this argument, as the Defendant has not shown that the claim has arguable merit, or that he has been prejudiced by his counsel's inaction. The purpose of bill of particulars is to give notice to the accused of offenses charged in the indictment or information to allow him or her to prepare for trial and prevent surprise. Commonwealth v. Larsen, 452 Pa.Super. 508, 682 A.2d 783, (1996), reargument denied, appeal denied , 547 Pa. 752, 692 A.2d 564. In the instant case, the Defendant has not asserted what information he would have requested through the bill of particulars. Additionally, the Court is unable to determine what information the Defendant may have sought.

The information contains the date, location, and actors in the transaction. The affidavit of probable cause additionally provides that the Defendant was observed snorting a line of white powder from the kitchen table, that the Defendant weighed the cocaine given to the confidential informant, and that the Defendant gave the confidential informant change in the amount of $10.00. The Court finds that the Defendant had notice of the offenses charged, and finds no basis for a conclusion that trial counsel was ineffective.

Prerecorded Statements to Law Enforcement

Defendant next argues that his counsel was ineffective for failing to request a copy of the confidential informant's prerecorded statement to law enforcement. The Court rejects this argument, as the Defendant has not shown that the claim has arguable merit. In her discovery request, trial counsel requested all written or recorded statements and substantially verbatim oral statements made by eye-witnesses to the alleged crime. The Court therefore finds no basis for a conclusion that trial counsel was ineffective, and finds that this generalized claim of ineffectiveness must be rejected.

Preliminary Hearing Transcript

Defendant next argues that his counsel was ineffective for failing to obtain a transcript of the testimony of his preliminary hearing. The Court rejects this argument, as the Defendant has not shown that the claim has arguable merit, or that he has been prejudiced by his counsel's inaction. The Defendant does not assert, and the record fails to reveal, any instance where trial counsel's cross-examination was limited because she failed to obtain the notes of the testimony of the preliminary hearing. The Court therefore finds no basis for a conclusion that trial counsel was ineffective.

Discovery

Defendant next avers that his counsel was ineffective for not obtaining complete discovery from the District Attorney's Office prior to trial. The Court rejects this argument, as the Defendant has not shown that the claim has arguable merit, or that he has been prejudiced by his counsel's inaction. A review of the record indicates that Defense counsel made a request for discovery. Defense counsel does not specify any items that were not provided by the Commonwealth. The Court therefore finds no basis for a conclusion that trial counsel was ineffective.

Cross-examination

Defendant next argues that his counsel was ineffective in the way she cross-examined the confidential informant. Specifically, Defendant argues that his counsel was ineffective for asking the confidential informant whether he had ever made arrangements to purchase drugs from the Defendant on any other occasion other than on September 17, 1997. The Court rejects this argument, as the Defendant has not shown that he has been prejudiced by his counsel's questioning. The questioning was as follows:

> Q: Did you make any buys with Kevin?
>
> A: No, ma'am.
>
> Q: Did you ever make any arrangements with Kevin?
>
> A: We tried to but he wanted the money up front. . . .
>
> (Id., p. 52).

The Pennsylvania Supreme Court enunciated the standard for evaluating the prejudicial effect of error on a defendant's case in Commonwealth v. Story, 476 Pa. 391, 383 A.2d 155 (1978).

> This Court has stated that an error may be harmless where the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the error is so insignificant by comparison that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict. Commonwealth v. Davis, 452 Pa. 171, 178-79, 305 A.2d 715, 719 (1973); accord, Schneble v. Florida, 405 U.S. 427, 430, 92 S.Ct. 1056, 1059, 31 L.Ed.2d 340 (1972). Under this approach, a reviewing court first determines whether the untainted evidence, considered independently of the tainted evidence, overwhelmingly establishes the defendant's guilt. If " 'honest, fair minded jurors might very well have brought in not guilty verdicts,' " an error cannot be harmless on the basis of overwhelming evidence. Commonwealth v. Davis, 452 Pa. at 181, 305 A.2d at 721, quoting Chapman v. California, 386 U.S. 18, 26, 87 S.Ct. 824, 829, 17 L.Ed.2d 705 (1967). Once the court determines that the evidence of guilt is overwhelming, it then decides if the error was so insignificant by comparison that it could not have contributed to the verdict.
>
> Id. at 412-13, 383 A.2d at 166 (footnote omitted).

See also Commonwealth v. Pierce, 345 Pa.Super. 324, 498 A.2d 423, (1985). Instantly, the Court finds that the Defendant's guilt was overwhelmingly established by the untainted evidence, and the error was so insignificant that it did not contribute to the verdict. In determining whether the Defendant delivered a controlled substance on September 17, 1997, the Court focused on the events that occurred between the parties on that date. The Court was not concerned with any prior or subsequent relationship

the Defendant may have had with the confidential informant. *See also this Court's Opinion and Order dated April 30, 1999.*

Defendant next argues that his counsel was ineffective in the manner in which she cross-examined Walter Meyer. Specifically, Defendant argues that she ineffectively questioned Meyer with regard to the presence of the Defendant's girlfriend at the time of the drug transaction. Defendant argues that his counsel failed to introduce prison records revealing that his girlfriend was incarcerated and not at the Meyer residence on the date of the transaction. The Court rejects this argument, as the Defendant has not shown that he has been prejudiced by his counsel's inaction. The Court finds the Defendant's guilt was overwhelmingly established by untainted evidence, and any error in failing to establish that the Defendant's girlfriend was not at the residence was so insignificant that it did not contribute to the verdict. *See also this Court's Opinion and Order dated April 30, 1999.*

CREDIBILITY OF CONFIDENTIAL INFORMANT

Defendant next argues that the Court erred in allowing Corporal Hunter to testify regarding his opinion concerning the credibility of the confidential informant. The testimony with regard to this issue was as follows:

> Q: And did his cooperation lead to arrest in other people?
>
> A: Yes. Sir, it did.
>
> Q: And approximately how many other people?
>
> A: Between 20 and 30.
>
> Q: And at any time did anything he tell you ever turn out to be false?

> Mrs. Bartolai: Objection. He's – the district attorney is asking the police officer whether Mr. Schriner –whether he needs—if Mr. Schriner lied or not. Mr. Schriner—strike that. I don't think it's proper for the district attorney to ask the officer whether Mr. Schriner is a credible person, whether he is truthful or not.
>
> (Id., p. 33)

The Court overruled the objection, indicating that the question called not for a personal opinion from the witness, but for an indication of whether any of the information he had received from Mr. Snyder had later been found to be false. The Court finds Defendant's argument with regard to this issue to be without merit.

MERGER

Defendant last argues that the charge of conspiracy should merge with the count of delivery. Defendant alleges that the Court's consecutive sentence imposed for the charges is illegal and contrary to law. Under Commonwealth v. Williams, 521 Pa. 556, 559 A.2d 25 (1989) crimes do not merge unless: (1) the crimes have the same elements, and (2) the facts of the case are such that the facts which establish one criminal charge also serve as the basis for the additional criminal charge. In the instant case, the Court finds that the facts of the case are not such that the facts establishing the delivery of the controlled substance also serve the basis for the conspiracy. The conspiracy conviction rests on the existence of an agreement between the Defendant

and Walter Meyer. Accordingly, merger would not apply, and Defendant's argument fails. *See* Commonwealth v. Servich, 412 Pa.Super 120, 602 A.2d 1338 (1992).

Dated: June 16, 2000

By The Court,

Nancy L. Butts, Judge

xc: Eric Linhardt, Esquire
Kenneth Osokow, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges