

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 98-11,897

VS :

ANTHONY KEELING :

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

Defendant appeals from the sentence imposed by this Court on December 28, 1999¹, after he was found guilty following a jury trial of delivery of a controlled substance, conspiracy, and related offenses. For the conviction of delivery of a controlled substance, the Defendant was sentenced to incarceration of a minimum of forty (40) months, and a maximum of eighty-four (84) months. For the conspiracy conviction, the Defendant was placed under the supervision of the Pennsylvania Board of Probation and Parole for a period of five (5) years, consecutive to the sentence for the delivery. The following is a summary of the evidence presented at the trial.

Agent Mark Andrasi, a special agent with the Drug Enforcement Administration in Harrisburg, testified that in July of 1998, he and approximately three other agents were sent to the Williamsport Area for a four week period to assist in making numerous undercover purchases of controlled substances. (N.T. 4/20/99, p.36) He testified that on July 8, 1998, he was involved in a controlled buy operation involving the Defendant. Agent Andrasi conducted surveillance of the residence at 735 West Fourth Street. His vehicle was equipped with a video camera that was used to tape the transaction. (Id., p.

¹ This Court granted the Defendant's Petition under the Post Conviction Relief Act, permitting him to file his direct appeal nunc pro tunc.

37) Agent Andrasi testified that, he observed the Defendant, accompanied by a female and another male, enter and exit the residence at 735 West Fourth Street on several occasions. Agent Andrasi also observed the confidential informant, Michael Sinatra, enter and exit the residence. (Id., p. 39) The video tape depicting his observations was played for the jury.

Michael Sinatra, the confidential informant, testified that on the date of the controlled buy, after being strip searched by Officer Ungard, he was given \$100.00 of pre-recorded funds. Agent Vilello transported Sinatra to a location near the residence at 735 West Fourth Street. Sinatra rode to the residence by bicycle. Sinatra met the Defendant outside of the apartment. The Defendant asked him if he was looking for something, and Sinatra replied that he was. Agent Vilello maintained surveillance of Sinatra during the course of the transaction until he went inside the residence at 735 West Fourth Street.²

Once inside Defendant's apartment, Sinatra negotiated a deal for one hundred dollars worth of cocaine. Sinatra testified that the Defendant "was kind enough to tell me I didn't have to spend all my money because I just had a baby and I put \$20.00 back in my pocket and proceeded to make a deal for \$80.00 worth of cocaine." (Id., p. 52) Sinatra testified that he handed the Defendant four twenty-dollar bills. He testified that the Defendant walked down the hallway toward the kitchen, and handed the money to his wife. The Defendant entered the kitchen where Sinatra saw an individual place dime bags into the Defendant's hand. Sinatra never saw the individual's face. The

² On cross-examination, Agent Vilello testified that also residing at 735 West Fourth Street, in the East apartment, was Terry Jackson. Ms. Jackson was arrested for dealing cocaine on July 22, 1998. (Id., p. 78)

Defendant gave Sinatra eight pink bags of crack cocaine. (*Id.*, p. 54) The Defendant then asked Sinatra for one of the bags in exchange for hooking him up with the deal.

When Sinatra returned to the van, he gave Officer Vilello seven pink bags of cocaine, and one twenty dollar bill. Vilello transported Sinatra back to city hall, where a second strip-search was conducted. No contraband or illegal substances were found on the Sinatra. The Defendant was arrested at a later date so that other investigations involving the informant and agents could continue.

Christopher Libus, a forensic scientist with the Pennsylvania State Police Crime Laboratory in Wyoming, PA, testified that he performed the chemical analysis on the contents of seven small, pink ziplock bags. He testified that the substance in the bags was crack cocaine, with the weight of forty-two hundredths of a gram. (*Id.*, p. 32)

INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, Defendant 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. Defendant bears the burden of proving his allegation of ineffectiveness. Commonwealth v. Lillock, 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.

Failure to Object to the Uncorroborated Testimony of the Confidential Informant

Defendant argues that his counsel was ineffective in failing to object to the uncorroborated testimony of the confidential informant used. The Court finds Defendant's claim has no merit. Initially, the Court finds that the testimony of the confidential informant was relevant and admissible. Any questions with regard to improper motivations would not affect the admissibility of the evidence, but would affect the weight and credibility of the evidence. Defense counsel had the opportunity, and in fact extensively cross-examined the informant with regard to his motivations for becoming an informant, and for testifying.

Further, the testimony of the confidential informant was corroborated by the testimony of the officers. Their testimony provided video surveillance placing the Defendant in the residence at the time of the transaction. They additionally testified that the informant was searched, and given \$100.00 for the transaction. The informant was under constant surveillance as he entered and exited the house, and returned with the packets of cocaine. All of this evidence corroborated the testimony of the confidential informant. For these reasons, the Court finds that Defendant's claim has no merit. Having found no arguable merit, the Court concludes trial counsel was not ineffective for failing to object to the uncorroborated testimony of the informant.

Failure to Object to The Arrest Warrant

Defendant next argues that his trial counsel was ineffective in failing to object to the arrest warrant. Defense counsel argues that the warrant was not supported by probable cause. The Court finds that Defendant's claim has no merit. In determining the presence of "probable cause" to arrest, the crucial test is whether the "facts and circumstances which are within the knowledge of the police at the time of the arrest, and of which they have reasonable trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that a suspect has committed or is committing a crime." Commonwealth v. Simmons, 295 Pa.Super. 72, 440 A.2d 1228 (1982), *citing* Commonwealth v. Powers, 484 Pa. 198, 398 A.2d 1013 (1979); Commonwealth v. Culmer, 463 Pa. 189, 195, 344 A.2d 487, 490 (1975); Commonwealth v. Jones, 457 Pa. 423, 83 A.2d 119, (1974); Commonwealth v. Garvin, 448 Pa. 258, 293 A.2d 33, (1972). The burden of showing probable cause is on the Commonwealth. Commonwealth v. Holton, 432 Pa. 11, 14-15, 247 A.2d 228, 230 (1968). The standard of probable cause, however, must be applied to the totality of the circumstances facing the police. Facts insufficient to justify an arrest if considered separately may in combination supply probable cause. Simmons, *supra*, *citing* Commonwealth v. Roscioli, 240 Pa.Super. 135, 361 A.2d 834, (1976). In Commonwealth v. Tolbert, 235 Pa.Super. 227, 341 A.2d 198 (1975).

Instantly, the Court finds that there were sufficient facts in the affidavit to establish that a crime had been committed and that the Defendant was the perpetrator. The affidavit establishes that the informant had been strip searched by officers, and given \$100.00 of pre-recorded funds. The informant was dropped off and sent to the

Defendant's residence. Officers remained in the area to pick up the informant after the transaction. The Informant returned from the Defendant's residence with \$20.00 and seven packs of crack cocaine. This evidence corroborates the testimony of the confidential informant who stated that once inside the residence, the Defendant, who he knew by his nickname of "Amin," gave him seven packs of cocaine in exchange for \$80.00. The Court therefore rejects Defendant's argument that his counsel was ineffective on this basis.

Failure to Cross Examine Expert Witness with regard to Testing Methods

Defendant next argues that his counsel was ineffective for failing to cross-examine the expert witness from the laboratory with regard to his methods for testing the controlled substances. Instantly, the Court fails to see how the cross-examination, or impeachment of the laboratory technician on his testing methods would have advanced Defendant's theory of the case in any way. Additionally, Defendant makes no assertions that he believes that the testing was incorrectly conducted. With no assertion of how any cross-examination into the testing methods may have influenced his case, the Court finds no merit or prejudice in this claim. The Court concludes Defense counsel was not ineffective on this basis.

Failure to Call Alibi Witness

The Defendant next alleges that his counsel was ineffective by failing to call alibi witnesses. Our Supreme Court has held that the failure to call a witness is not per se ineffective assistance of counsel. Commonwealth v. Smallwood, 497 Pa. 476, 442 A.2d

222 (1982). The decision whether to call a witness generally involves a matter of trial strategy. Commonwealth v. Davis, 381 Pa.Super. 483, 554 A.2d 104 (1989). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To establish a claim that counsel was ineffective for failing to investigate or call witnesses, the Defendant must establish five essential points of information. Defendant must show that: (1) witness existed; (2) witness was available; (3) counsel was informed of existence of witness or should have known of witness' existence; (4) witness was available and prepared to cooperate and would have testified on defendant's behalf; and (5) absence of testimony prejudiced defendant. Commonwealth v. Pursell, 555 Pa. 233, 724 A.2d 293 (1999)

In the instant case, it appears that Defense Counsel initially intended to call alibi witnesses who would testify that the Defendant was in Philadelphia, PA on the date of the offense. At trial, however, the Commonwealth introduced into evidence, and played for the jury, a video tape from the date of the transaction that depicts the Defendant, his wife, and another gentleman entering and exiting the apartment on more than one occasion. The video tape further depicts the confidential informant entering the apartment. Having seen the surveillance video, Defendant's counsel had to employ a different theory of the case. The Court is satisfied that Defense counsel's decision not to the alibi witnesses was a strategic decision.

Additionally, the Court finds the failure to obtain the testimony of the technician did not prejudice the Defendant. 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 from the two officers who maintained surveillance, the video, and the confidential informant. Defendant's counsel decision not to call the witnesses could not have contributed to the verdict.

Failure to Call Defendant as a Witness

Defendant next asserts that his counsel was ineffective for failing to call the Defendant as a witness. The Court finds this argument without merit. The Court

questioned Defendant with regard to his decision not to testify in this case. Upon questioning, Defendant stated affirmatively that he understood that he had a right to testify in his defense. Defendant stated that he spoke with his attorney with regard to whether he would testify, and he testified that he felt comfortable with his decision not to testify. Defendant further stated that it was his decision not to testify in the case. (N.T. 4/20/99, p. 90) The Court is satisfied from Defendant's representations at the trial that Defendant understood that he had the right to testify. The Court is further satisfied that it was Defendant's decision not to testify in his defense. The Court therefore finds this claim without merit, and rejects any claim of ineffectiveness on the basis that he did not call the Defendant as a witness.

ERROR TO EXCLUDE TESTIMONY WITH REGARD TO TERRY JACKSON

Defendant next argues that the Court erred in excluding the testimony with regard to Terry Jackson, who is alleged to have resided in the same apartment building as the Defendant. Through cross-examination Defense counsel revealed evidence with regard to the fact that Jackson was arrested on a separate occasion, approximately two weeks later, for dealing cocaine out of the same residence. (Id., p. 78) When Defense counsel attempted to cross-examine with regard to the details of the Jackson investigation, the Commonwealth objected to the relevance the evidence. Defense Counsel argued that he should be permitted to introduce the testimony to draw an inference that Jackson could have been the person who sold the controlled substances to the Defendant. The Court found that cross-examination with regard to the details of an investigation occurring weeks after this incident did not appear relevant in light of the

fact that there was no evidence linking Jackson to this offense. There was no evidence presented that Jackson was even at the residence at the time of this offense.

Connecting Jackson with this incident would call for complete speculation. The Court therefore precluded Defense counsel from getting into further details with regard to the Jackson case. The Court therefore rejects Defendant's argument that it abused its discretion in limiting Defense Counsel's cross-examination in this area.

SUFFICIENCY OF EVIDENCE

The Defendant last alleges that there was insufficient evidence to find him 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 concludes that there was sufficient evidence presented to establish that the Defendant conspired to, and delivered cocaine. The Commonwealth presented evidence that a confidential informant was strip searched, and taken to the area of the Defendant's residence. The informant was under surveillance as he entered and exited the Defendant's residence. The informant testified that he gave the Defendant \$80.00, which the Defendant handed to his wife, and then retrieved the cocaine from an

individual in another room. When the informant returned to the location of the officer, he had baggies of cocaine and change in the amount of \$20.00. The informant told the officers that the Defendant, who he knows as "Amin" sold him the cocaine. The Court rejects Defendant's argument.

Dated:

By The Court,

Nancy L. Butts, Judge

xc: Kenneth Osokow, Esquire, DA
Matthew Zeigler, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges