IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: NO. 00-10,495
	:
	:
vs.	:
	:
ANDRE GRAY,	:
Defendant	:

OPINION IN SUPPORT OF ORDER DATED MAY 3, 2001, IN COMPLIANCE WITH RULE 1925(A) OF THE RULES OF APPELLATE PROCEDURE

After a non-jury trial on January 8, 2001, Defendant was found guilty of possession of intent to deliver cocaine, possession with intent to deliver marijuana, possession of marijuana, possession of cocaine, and possession of drug paraphernalia. By Order dated May 3, 2001, Defendant was sentenced to undergo incarceration in a state correctional facility for a minimum of thirty (30) months and a maximum of five (5) years on each of the counts of possession with intent to deliver, both sentences to run concurrently. The possession counts were determined to merge for sentencing purposes with the counts on which Defendant was sentenced and with respect to the charge of possession drug paraphernalia, the Court entered a sentence of guilty without further penalty. Defendant filed post sentence motions on May 4, 2001 and argument thereon was heard June 11, 2001. The Court requested preparation of a transcript of the trial but prior to completion of that transcript, the 120 day period in which to rule on the motion expired and therefore the motion was denied by operation of law. In the instant appeal, filed September 14, 2001, Defendant raises nine (9) issues. Each issue will be addressed in turn.

First, Defendant contends the suppression Court erred in denying his suppression motion.

The suppression motion was denied by an Order entered August 18, 2000 by the Honorable Nancy L. Butts. After consultation with Judge Butts, the Court chooses to rely on the Opinion issued in support of that Order, filed August 18, 2000.

Next, Defendant contends the Court erred at trial by admitting certain testimony by Officer Houseknecht, specifically that upon apprehending the passenger of the vehicle driven by Defendant, the passenger said "the driver threw dope on his lap and ran." At trial, Defendant objected to this statement as hearsay but the Court admitted the statement as an excited utterance. To qualify as a "excited utterance", and thus as an exception to the hearsay rule, a statement must be: "... a spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected shocking occurrence, which that person had just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties." Commonwealth v Sanford, 580 A.2d 784 (Pa. Super. 1990) (quoting Commonwealth v Pronkoskie, 383 A.2d 858, 860, (Pa. 1978). In evaluating a statement alleged to be an "excited utterance", Courts have considered whether the declarant, in fact, witnessed the startling event, the time that elapsed between the event and the declaration, whether the statement was in narrative form, and whether the declarant spoke to others before making the statement. Id. In the instant case, the officer observed the vehicle run up over a curb and come to a rest at an angle with one (1) side up on the landscaping immediately adjacent to a building, witnessed the passenger get out and run away, chased the passenger until the passenger stumbled and fell, caught the passenger and asked him where the driver was, to which the passenger responded the driver "threw dope on my lap" and then got out of the vehicle and ran away. Thus, not only did the declarant, the passenger, witness the event, he actually participated in it (the sudden stop, attempted escape, and being caught by the police officer). The statement was made immediately after being caught by the police officer, was not in narrative form, and the declarant had no opportunity to, nor did he, speak with anyone before making the statement. The Court therefore believes it was correct in ruling the statement an excited utterance and thus admissible. Defendant's contention the statement cannot be admissible as an excited utterance

because it was made in response to a question is also without merit, as it is well settled that a statement may be admissible as an excited utterance even though it is made in response to a question. Commonwealth v Hess, 411 A.2d 830 (Pa. Super. 1979).

Next, Defendant contends the Court erred in allowing Officer Leonard Dincher to testify as an expert witness with respect to the element of intent to deliver the drugs, specifically contending his testimony is inadmissible because he is an officer in the same department as the arresting officers, and further, his opinion was based upon no identifiable or generally accepted standards and was not expressed to any degree of certainty. With respect to the fact that Officer Dincher is an officer in the same department as the arresting officers, while the Court agrees that any potential bias which results from this fact may be examined on cross-examination, such does not affect the admissibility of his testimony. (See Commonwealth v Mehalic , 555 A.2d 173 (Pa. Super. 1989) (potentially corrupt witnesses may testify for the prosecution, and the defense may unearth, through effective cross-examination, any bias, motive or self-interest). With respect to Defendant's contention the officer's opinion was based on no identifiable or generally accepted standards, the Court notes Officer Dincher testified that he based his opinion (that Defendant indeed intended to deliver the drugs) on the method of packaging (seven (7) small bags of marijuana inside a larger bag), the quantity in each bag (approximately one (1) gram, a common method of sales), the fact that there were two (2) different kinds of drugs, and the fact that Defendant had on his person $925.00 in cash in small bills, a pager and two (2) slips of paper with phone numbers on them, as well as two (2) empty napkins. He also considered the fact that Defendant had no pipe, rolling papers, or other paraphernalia used for consumption of either of those drugs. He thus did base his opinion on identifiable standards. Further, a review of the case law shows that these factors are generally accepted to support officers' expert opinions regarding intent to deliver. With respect to the contention that Officer Dincher did not express his opinion to any degree of certainty, a review of Officer Dincher's testimony indicates that he did not waiver in his opinion, that he was unequivocal. He has thus expressed the opinion to the requisite degree of certainty. See Commonwealth v Campbell, 614 A.2d 692 (Pa. Super. 1992) (The officer's unequivocal conclusion, based on his experience, supported his opinion with the requisite degree of certainty).

Next, Defendant contends the evidence was insufficient to establish the element of intent to deliver, considering the small amount of drugs on Defendant's person and the alleged unreliability of the expert opinion. As noted above, the Court does not consider the opinion to be unreliable and finds such sufficient to establish the element of intent.

Next, Defendant contends the Court erred in denying his motion to dismiss for violation of Rule 704 of the Pennsylvania Rules of Criminal Procedure. In support of the ruling, the Court will rely on its Opinion issued on the matter, filed May 6, 2001.

Next, Defendant contends the Court erred when it granted the Commonwealth's request for a continuance of the sentencing on March 14, 2001. The Commonwealth had requested a continuance as the witness necessary to support the Commonwealth's request for a school zone enhancement was not present. Since the sentence could be rescheduled within the requisite ninety (90) days and since the oversight appeared to have been contributed to by the maternity leave of the assistant district attorney handling the matter, the continuance was granted. Upon review of this decision, the Court can find no error or abuse of discretion.

Next, Defendant contends the Court erred by applying the school zone mandatory minimum sentence of Title 18, Section 6317, which provides for a mandatory minimum of twenty-four (24) months incarceration. Defendant contends the Williamsport District Service Center, the building involved in this matter, is not a school as contemplated by the statute. Section 6317 provides, in pertinent part:

> ... 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....

18 Pa. C.S. Section 6317 (a). Evidence presented by the Commonwealth at the time of sentencing indicated that the Williamsport District Service Center provides administrative offices for the school district but also houses the alternative education program, which is attended from 8:00 a.m. until 2:00 p.m. Monday through Friday by sixth through twelfth grade students with behavioral or other issues

which make it inappropriate for them to be educated in the regular school buildings. Further, that evidence indicated that approximately 40 students attend the program at any given time. The Court determined, and at this time believes appropriately so, that the District Service Center qualifies as a school within the meaning of the statute. See Commonwealth v Campbell, 758 A.2d 1231 (Pa. Super. 2000) (School buses, schools, recreation centers and playgrounds are not merely related to school property or the public domain, but, rather, share a relation to children).

Next, Defendant contends the Court erred by considering the school zone enhancement of the sentencing guidelines. For the reason given in support of the Court's application of the mandatory minimum, the Court does not agree.

Finally, Defendant contends the Court abused its discretion when imposing sentence. With the school zone enhancement, the standard range of incarceration is 21 to 52 months. The mandatory minimum under Section 6317 is 24 months. The Court sentenced Defendant to 30 months minimum incarceration, running the two (2) counts of possession with intent to deliver concurrently. The Court finds no abuse of discretion in sentencing Defendant within the standard range.

By The Court,

Dated: October 10, 2001

Dudley N. Anderson, Judge

cc: DA
PD
Gary Weber, Esq.
Hon. Dudley N. Anderson