

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH, : NO. 00-11,502
Plaintiff :
 :
vs. :
 :
GERALD BARTLETT, :
Defendant :

OPINION IN SUPPORT OF ORDER DATED
NOVEMBER 15, 2001 IN
COMPLIANCE WITH RULE 1925(A) OF
THE RULES OF APPELLATE PROCEDURE

After a jury trial on September 10 and 11, 2001, Defendant was found guilty of two counts of delivery of a controlled substance, two counts of possession with intent to deliver a controlled substance, and two counts of possession of a controlled substance. On November 15, 2001, Defendant was sentenced to two consecutive periods of incarceration of two to four years. Defendant then filed the instant Notice of Appeal on December 12, 2001.

In his appeal, Defendant raises three claims of trial court error and twelve claims of ineffective assistance of counsel.

First, Defendant contends the Court erred in allowing an Afro-American juror to be dismissed. It appears the juror, Number 4, was peremptorily challenged by the Commonwealth and defense counsel thereafter raised a Batson challenge, contending that an inference of discriminatory intent could be drawn from the absence of questioning of that juror. The Commonwealth offered the reason for the strike as the juror’s positive response to the question: Have you or anyone close to you ever been arrested or charged with a crime? When defense counsel suggested there should be follow-

up questions posed to Juror Number 4, the Court¹ indicated she would not put the juror “on the spot” by asking further questions.

Once a defendant makes out a prima facie case of purposeful discrimination,² the burden shifts to the Commonwealth to come forward with a race-neutral explanation. Batson v Kentucky, 476 U.S. 79 (1986). The explanation need not rise to the level justifying exercise of a challenge for cause, however. Id. In the instant case, the Court believes the explanation offered satisfies the requirements of Batson and that a discriminatory purpose has not been proven. The Court therefore did not err in allowing the juror to be dismissed.

Second, Defendant contends the Court erred in denying his Suppression Motion. The Motion to which Defendant refers was filed to No. 00-11,501. Under that number, Defendant was charged with possession with intent to deliver a controlled substance and delivery of drug paraphernalia, in connection with an incident separate and apart from the two incidents involved in the instant appeal. Both informations were consolidated for trial but at the close of the Commonwealth’s case, the charges filed to No. 00-11,501 were dismissed. To the extent the suppression issue remains viable, the Commonwealth having introduced evidence to support the charges, the Court chooses to rely on the Opinion and Order issued in this matter by the Honorable Nancy L. Butts on April 17, 2001.

Third, Defendant contends the Court erred in consolidating the cases for trial. Pa.R.Crim.P. Rule 582 provides that offenses charged in separate indictments or informations may be tried together if the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so there is no danger of confusion. In the instant matter, the information filed to No. 00-11,502 charged Defendant with crimes arising out of two separate drug transactions taking place on September 8, 2000 and September 9, 2000, respectively. The transaction on September 8th involved a sale by Defendant of cocaine to an undercover officer. The transaction on September 9th involved a sale by Defendant of cocaine to a confidential informant,

¹ Jury selection was presided over by the Honorable Nancy L. Butts.

² A prima facie case of a prosecutor’s discriminatory exercise of peremptory challenges can be demonstrated by showing the defendant is a member of a cognizable racial group and the prosecutor exercised peremptory challenges to remove from the venire members of the defendant’s race. Batson v Kentucky, 476 U.S. 79 (1986).

under surveillance by undercover officers. The information filed to No. 00-11,501 is based on the recovery of cocaine from Defendant's residence upon his arrest for the previous two sales. The Court found no danger of confusion by the jury, the transactions and the recovery of drugs in Defendant's residence being easily separable. Further, evidence of the sales would be admissible in a separate trial for possession of the cocaine in Defendant's residence, specifically as evidence of intent to deliver. See Commonwealth v Camperson, 612 A.2d 482 (Pa. Super. 1992) (one of the strongest and most compelling pieces of evidence of intent to deliver is evidence that a defendant had in fact been delivering just immediately prior to the time when drugs were found in his home). With respect to the two delivery charges, Defendant testified that the delivery to the confidential informant was never made and that the delivery to the undercover officer was actually a delivery he made at the request of a confidential informant used to arrange the sale, indicating the confidential informant gave him the drugs to sell to the undercover officer, implying that they were not his drugs that were being sold. Evidence of the drugs being recovered in his home several days later is therefore relevant. See Commonwealth v Thomas, 717 A.2d 468 (Pa. 1998) (evidence of a defendant's other bad acts is admissible to prove absence of mistake or accident, motive or intent). The Court therefore finds no error in having consolidated the cases for trial.

With respect to Defendant's claims of ineffective assistance of counsel, the Court first notes the three elements of a valid claim of ineffective assistance: whether the underlying claim is of arguable merit, if so, whether counsel had any reasonable basis for the questionable action or omission which was designed to effectuate his client's interest, and if not, whether the defendant has shown that counsel's improper course of conduct worked to his prejudice, that is, had an adverse effect upon the outcome of a proceeding. Commonwealth v Coleman, 664 A.2d 1381 (Pa. Super. 1995). Further, in making an assertion of ineffectiveness, a defendant must allege sufficient facts upon which the Court can conclude that trial counsel may have been ineffective. Id. The Court will not consider a claim of ineffectiveness in a vacuum.

The Court considers the following allegations of ineffectiveness to be "claims in a vacuum" as Defendant has failed to allege sufficient facts upon which to base a decision: 1) trial counsel failed to

get the discovery material, 2) failed to prepare the defendant prior to his testifying, 3) failed to object when the prosecution interjected personal beliefs, 4) failed to call the defendant at the suppression hearing, 5) failed to object to the police officer's assumption that there had been a drug transaction, 6) failed to allow Defendant to participate in jury selection, 7) agreed to stipulate to the lab report, and 8) failed to investigate the prior record of the confidential informant. The remaining claims will be analyzed to determine whether any of the claims has arguable merit.

Defendant claims trial counsel was ineffective in failing to object to references to charges which were dismissed. It is assumed Defendant is speaking of the charges filed to No. 00-11,501, which were dismissed at the close of the Commonwealth's case. Reference to the allegations underlying those charges, Defendant's alleged possession of cocaine in his residence on September 13, 2000, was made following dismissal of the charges. Defendant's trial counsel did object to such reference, N.T. September 10, 2001 at p. 207. The objection was overruled. As noted above, with respect to the issue of consolidation, evidence of the possession of cocaine in Defendant's residence was relevant to the charges filed to the other information. This claim therefore has no merit.

Defendant alleges trial counsel was ineffective in stipulating to certain testimony, rather than insisting the transcript of the testimony be read back to the jury, when the jury asked a question about certain testimony. A review of the transcript indicates that during jury deliberation, the jury asked a question regarding testimony of three of the witnesses with respect to the confidential informant's entry into a bar where Defendant was located. Rather than read the entire testimony of all three witnesses, the Court suggested to counsel that perhaps a stipulation regarding that testimony could be agreed upon. Counsel so agreed. After reviewing the actual testimony of the three witnesses and the stipulation itself, the Court finds the stipulation to have been accurate and therefore trial counsel was not ineffective in agreeing to the stipulation.

Defendant alleges trial counsel was ineffective in failing to object to the consolidation of the cases for trial. As noted above, the consolidation was proper. Therefore, trial counsel was not ineffective in failing to object to such.

Defendant contends trial counsel was ineffective in failing to object to the dismissal of an Afro-

American juror. Trial counsel did object to the dismissal of the juror, however. No claim of ineffectiveness may therefore be raised.

As none of Defendant's alleged claims of ineffectiveness has merit, the Court believes the verdict was properly rendered and suggests the conviction and subsequent sentence should be affirmed.

Dated: May 17, 2002

By the Court,

Dudley N. Anderson, Judge

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