

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **No. 00-01,547**
:
: **vs.** :
:
:
:
HERBERT CAMPBELL, :
Defendant : **1925(a) Opinion**

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

This opinion is written in support of this Court's Judgment of Sentence dated February 28, 2001 and docketed March 2, 2001. The relevant facts are as follows. From approximately 3:00 p.m. on February 17, 2000 until the early morning hours of February 18, the defendant Herbert Campbell (hereinafter "Campbell") was with Raymond Richards (hereinafter "Richards") at 711 Locust Street, Williamsport, Pennsylvania. Richards and Campbell were cutting an eight (8) ball of cocaine and placing dime (\$10) quantities in plastic, heat-sealed straws. Around midnight on February 18, an individual known to Richards as Tone arrived at the residence along with another individual named Gus. Tone wanted to purchase cocaine. Unbeknownst to Campbell and Richards, Tone was a confidential informant working for Trooper Lancer Thomas of the Pennsylvania State Police.

Tone entered the residence, purchased approximately \$150.00 worth of cocaine and then he and Gus left. Tone then proceeded to meet with Trooper Thomas and

turn over the cocaine to him. Tone indicated he purchased the cocaine from Richards. Trooper Thomas contacted Officer Leonard Dincher of the Williamsport Police Bureau of Police, who was standing by at a District Justice office to obtain a search warrant.

Shortly after the sale to Tone, an individual came to the Locust Street residence and dropped off another eight (8) ball of cocaine to Campbell. Campbell showed the eight (8) ball to Richards. It was wrapped in a piece of plastic. Campbell then cut a \$20 piece of cocaine from the eight (8) ball and Mr. Richards provided it to a woman named Sherry. Campbell kept the remainder of the eight (8) ball of cocaine.

Meanwhile, Officer Dincher completed a search warrant application for 711 Locust Street. The application included the facts relating to the purchase by the informant as well as information that numerous people were going in and out of the residence "twenty (20) hour a day." A District Justice approved the application and issued a search warrant. Officer Dincher then notified a prearranged response team.

The response team consisted of nine to eleven (9-11) individuals from the Williamsport Bureau of Police and the Pennsylvania State Police. The response team converged on 711 Locust Street approximately thirty to forty-five (30-45) minutes after the controlled buy was completed by Tone. Some of the police knocked on the front door and identified themselves as police with a search warrant, while other officers remained at the rear of the residence and set off a "flash bang," a device that emitted a loud, booming noise to attract the individuals inside the residence to the rear of the building so it would be easier for the officers at the front door to gain entry. Someone looked out the first floor window and yelled "5-0", a slang expression to indicate the individuals at the front door

were police. In response, the police used a ram to gain entry through the front door.

When individuals inside the residence heard the boom, they fled to various locations. Sherry Dunlap, who was smoking cocaine with Robert Green in the second floor bedroom the police designated as Room 9, ran to another bedroom (room 8) to investigate the noise. As she did so, Campbell was running up the stairs to the second floor. Richards also ran up the stairs. Campbell passed him on the stairs and ran into an upstairs bedroom.

The first goal of the police was to secure the home and all the individuals therein, so they could safely search the home. Several adults were encountered on the first floor and handcuffed. It took the police approximately thirty seconds to one minute to obtain control of the first floor and ascend the steps to the second floor. Officer Dincher saw a small black man with a shirt with "5-0" written on it near the stairs. Dincher put individual, who was later identified as Richards, on the floor and handcuffed him.

In Room 9, Officer James Douglas found Campbell. Officer Douglas believed it took him forty-five (45) seconds to one (1) minute to reach room 9 after he entered the residence. At this time, Campbell was the only individual in the room. Room 9 had bare walls, a small dresser and a mattress which took up most of the room. Campbell was on the mattress. Within fifteen to thirty seconds other officers came into Room 9 and handcuffed Campbell.

Since Room 9 was lit and the other rooms were not, the other adults found on the second floor were handcuffed with their hands behind their back and taken Room 9. Officer Douglas maintained close watch over the individuals in this room. The police

obtained identification of all these individuals and they were released.¹

Once the residence was cleared, the police began to search it. Officer Donald Mayes was assigned to search Room 9. Officer Mayes found a small rock of cocaine wrapped in a piece of plastic sandwich bag underneath the mattress. It appeared someone purposely placed it there in an effort to hide it. The police also found matches, a lighter, cigarette filters, pieces of straw, a blue leather jacket, and a jewelry box which contained a metal crack pipe. Access cards in the name of Barbara Dunlap and a Motorola cell phone were found inside the jacket. It was later determined the jacket belonged to Richards.

Other items found in the residence were as follows:

(a) A razor blade and heat-sealed pieces of plastic drinking straws were found inside a plastic case on the kitchen table;

(b) Benefit checks in the name of Gary Bruton were found in the kitchen;

(c) Benefit checks, a food stamp statement and Domestic Relations Court Order with the name Barbara Dunlap were found in the kitchen;

(d) A straight shooter, which is an instrument commonly used to inhale cocaine, was found in the second floor hallway;

(e) A plate, knife, razor blade and portion of a cut straw were found under the mattress in the second floor bedroom designated Room 8;

¹The only individual arrested on February 18, was Raymond Richards, who was charged with delivery of cocaine to the informant.

(f) Three Hundred and Six dollars (\$306) in currency, some of which was the marked money from the sale of cocaine to the informant was found in Richards' wallet when he was arrested. Richards claimed Campbell gave him the money after he (Campbell) sold the cocaine to Tone, the informant.

On March 23, 2000, the police arrested Campbell and charged him possession with intent to deliver cocaine, possession of cocaine and possession of drug paraphernalia relating to the bag of cocaine found under the mattress in Room 9.

On January 10-11, 2001, a jury trial was held in this case. The parties stipulated that the baggie found in Room 9 contained 2.2 grams of rock cocaine. The jury found the defendant guilty of all the charges.

On February 28, 2001, the Court sentenced the defendant to pay a \$5,000 fine and undergo incarceration in a state correctional institution for eighteen (18) months to four (4) years for possession with intent to deliver cocaine and imposed a consecutive one (1) year probation for possession of drug paraphernalia. The sentencing Order was docketed March 2, 2001.

On April 2, 2001, the defendant filed a Notice of Appeal. The Court ordered the defendant to file a Concise Statement of Matters Complained of on Appeal. Trial counsel J. Michael Wiley's contract as a conflicts counsel terminated and new counsel, Eric Linhardt, was appointed. Mr. Linhardt could not file a statement of Matters Complained of on Appeal until he received the trial transcripts. The statement was filed on December 4, 2001.

Campbell first asserts that trial counsel was ineffective for failing to object to

Officer Dincher's testimony to the effect that 711 Locust Street was a crackhouse from which drug dealing was occurring 20 hours per day. Counsel is presumed effective and appellant has the burden of proving otherwise. Commonwealth v. Carson, 559 Pa. 460, 741 A.2d 686, 697 (1999). In order to prevail on an ineffectiveness claim, appellant must prove the following: (1) the claim is of arguable merit; (2) there was no rational or strategic basis for counsel's action or omission; and (3) prejudice, i.e., the outcome of the trial would have been different but for counsel's act or omission. Commonwealth v. Fletcher, 561 Pa. 266, 750 A.2d 261, 273 (2000); Commonwealth v. Miller, 560 Pa. 500, 746 A.2d 592 (2000); Commonwealth v. Kimball, 555 Pa. 299, 724 A.2d 326, 333 (1999).

Campbell argues that the implication of this testimony was that he was engaged in an ongoing drug trafficking business from 711 Locust Street. He further argues such testimony amounted to inadmissible evidence of other crimes, wrongs or acts under Rule 404 of the Pennsylvania Rules of Evidence. The Court cannot agree. First, the Court does not believe this evidence amounted to other crimes or wrongs under Rule 404. Evidence that individuals were going in and out of 711 Locust Street 20 hours a day was relevant to the background of this case in that it was part of the basis for the police to obtain a search warrant for the residence and it was relevant to show why so many police officers were present when the search warrant was executed. With the exception of testimony from Richards regarding the sale to the confidential informant and testimony from Sherry Dunlap that she purchased \$20 of cocaine from Campbell, no specific transactions were discussed. These two exceptions, however, were relevant and admissible to show the defendant's intent; specifically, his intent to deliver the cocaine

found in Room 9. Since the Court finds this evidence was relevant and admissible, counsel would not be ineffective for failing to object thereto.

Campbell next contends counsel was ineffective for failing to object to statements that children were found in the residence during the police raid on 711 Locust Street. He asserts that this testimony was irrelevant and prejudicial. Again, the Court cannot agree. There were several statements that children were in the house when the police executed the search warrant; however, all these references were innocuous. The police described the number of people found in the residence at the time of the search, including children. There was no testimony that anyone was selling to children or anything of that nature. Instead, the search warrant was executed at nighttime and, in describing who was present, the witnesses mentioned that there were a few children found in an upstairs bedroom of the house.

Campbell contends the Court erred in allowing the Commonwealth to call Officer Dincher as an expert witness in the field of narcotics trafficking. This contention is belied by the record. In the sidebar discussion regarding the scope of Officer Dincher's testimony, the Court ruled that Officer Dincher could not offer expert testimony that certain conduct was drug trafficking, but he could offer testimony to the effect that the packaging and quantity and other characteristics of the cocaine found in Room 9 were consistent with the intent to deliver it. N.T., January 10, 2001, at 45-52.

Campbell next claims trial counsel was ineffective for failing to request a mistrial, a cautionary instruction or that Officer Dincher's testimony be stricken when his testimony went beyond the scope of the Court's ruling and he opined 711 Locust Street

was a crack house. The Court does not believe Officer Dincher's testimony went beyond the bounds of the Court's ruling. The Court ruled that Officer Dincher could testify regarding his observations of what occurred or was occurring at 711 Locust Street. The ultimate conclusion that 711 Locust Street was a crack house was left for the jury to determine based on the evidence presented. N.T., January 10, 2001, at pp. 187-195. Since Officer Dincher's testimony did not exceed the Court's ruling, any request for a mistrial, a cautionary instruction or that the testimony be stricken would have been unsuccessful. Therefore, trial counsel was not ineffective for failing to request this relief.

Campbell alleges the Court erred in denying the defendant's motion in limine to preclude Sherry Dunlap from testifying. First, Campbell protests that the Commonwealth failed to disclose Ms. Dunlap's name and address as an eyewitness or provide a substantially verbatim oral statement of Ms. Dunlap in accordance with Rule 573(B)(2)(a)(i) and (ii). The Honorable Nancy L. Butts issued the rulings on Campbell's motions in limine. In her Order dated November 14, 2000, Judge Butts noted the defense was aware of this witness and her statement from the police reports provided to the defense by the Commonwealth. Therefore, the Commonwealth did not fail to disclose this witness. Even if November 2000 was the first time the defense knew the Commonwealth intended to call Ms. Dunlap as a witness, this case did not proceed to trial until January 10, 2001. Therefore, the defense had almost two (2) months to investigate and prepare to meet Ms. Dunlap's statements.

Campbell also avers Ms. Dunlap's testimony amounted to inadmissible evidence regarding other crimes, wrongs or acts under Rule 404. The Court cannot agree.

Ms. Dunlap's testimony that she purchased cocaine from Campbell prior to the arrival of the police was relevant to show Campbell possessed the cocaine found in Room 9 with the intent to deliver it. Since the transaction was within 24 hours of the search, the Court found that the probative value of this evidence exceeded any potential for prejudice.

Finally, since the defense was aware of this evidence by November 14, 2000 at the latest, the defense was given reasonable notice in advance of trial of the Commonwealth's intent to use it. N.T., January 10, 2001, pp. 149-155.

Campbell next charges that trial counsel was ineffective for failing to file a formal motion for discovery requesting pretrial disclosure of Ms. Dunlap's name, address and any statements she provided to law enforcement. This charge is meritless as a formal request for pretrial discovery was filed on Campbell's behalf on April 11, 2000.

In issues 7 and 8, Campbell contends trial counsel was ineffective in failing to object to Ms. Dunlap's testimony that she purchased cocaine from Campbell at approximately 12:30 a.m. and/or in failing to confront Ms. Dunlap with her prior inconsistent statement that she purchased the drugs sometime between noon and 5:00 p.m. on February 17, 2000. The Court has reviewed Ms. Dunlap's trial testimony and has not found any reference to the time that she purchased the cocaine from Campbell. Ms. Dunlap stated she was upstairs smoking cocaine for about ten minutes before the police arrived, however, she did not indicate she was smoking the cocaine purchased from Campbell. Instead, she testified she had been smoking crack on and off all day. She purchased two (2) straws of cocaine from Campbell, but also got cocaine from various other people. N.T., January 10, 2001, at pp. 128-133, 144.

Campbell asserts the Commonwealth failed to comply with mandatory discovery requirements of Rule 573 by neglecting to provide defense counsel with a copy of Trooper Lancer Thomas' incident report regarding the controlled buy. The Court does not know if defense counsel received a copy of Trooper Thomas' report. Therefore, it is difficult for the Court to address this assertion. Nevertheless, the Court will address this issue to the best of its ability.

Campbell claims the report contained the following evidence favorable to him: (1) Brian Postell, a.k.a. Justice, was believed to be dealing cocaine out of 711 and 709 Locust Streets; (2) the informant represented that the cocaine purchased on February 18, 2000 from 711 Locust Street was purchased from Richards; and (3) the informant named each of the other adults at 711 Locust Street at the time of the controlled buy and did not name Campbell. The Court questions whether this evidence would change the outcome of this trial for several reasons. First, although counsel could have made the argument that the cocaine found under the mattress in Room 9 belonged to Brian Postell if he had the report, Brian Postell was not present at 711 Locust Street when the delivery was made to the informant or when the police executed the search warrant. Second, Campbell was not charged with the delivery to the informant, Richards was. Evidence regarding this delivery was admitted only to determine if Campbell possessed the cocaine found in Room 9 with the intent to deliver it. Moreover, Defense counsel knew the informant claimed he/she purchased from Richards and counsel cross-examined Richards with this information as well as Richards' conviction relating to this transaction. While this evidence may have been more effective in tarnishing Richards' credibility if it was

introduced through the informant or a law enforcement witness, the jury was apprised of this information when it rendered its decision. Finally, although the informant named five adults who were present at the time of the controlled buy and did not name Campbell, there were nine or more adults present when the police executed the search warrant thirty to forty minutes thereafter, including Sherry Dunlap and Robert Green who also were not named by the informant. Therefore, it is likely there were others present when the controlled buy took place and either the informant did not know who they were or the informant did not see them because they were in another room or on the second floor.

Campbell next asserts that, assuming Trooper Thomas' report was provided to defense counsel prior to trial, counsel was ineffective for failing to elicit testimony from Trooper Thomas regarding the allegedly favorable evidence to the accused. Trooper Thomas was not called as a witness at trial by either side. In order to establish an ineffectiveness claim for failing to call a witness, the appellant must show the following: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness was so prejudicial as to deny appellant a fair trial. Commonwealth v. Holloway, 559 Pa. 258, 274-75, 739 A.2d 1039, 1048 (1999); Commonwealth v. Henry, 550 Pa. 346, 379, 706 A.2d 313, 329 (1997); Commonwealth v. Crawley, 541 Pa. 408, 415, 663 A.2d 676, 679-80 (1995). The Court does not know if Trooper Thomas was available during this trial. However, for the reasons stated above, the Court questions whether the outcome of the trial would have been different. Furthermore, the Court questions whether the testimony would be admissible

from Trooper Thomas as it appears the statements made by the informant could be subject to an objection based on hearsay.

The next three issues deal with the identity of the confidential informant and counsel's failure to call the informant to rebut Richards' testimony regarding the controlled buy. Campbell claims the Commonwealth was required to disclose the name and address of the informant and failed to do so. In the alternative, he asserts counsel was ineffective for failing to file a motion to disclose this information. The Court cannot agree. Disclosure of the identity of a confidential informant is not automatic. Normally, the informant is an eyewitness whose disclosure is discretionary with the Court under Rule 573(B)(2)(a)(i). In fact, there is no fixed rule with respect to disclosure of an informant's identity. Instead, the Court must balance the public interest in nondisclosure against the individual's right to prepare his defense. Commonwealth v. Bing, 551 Pa. 659, 713, A.2d 56, 58 (1998); Commonwealth v. Carter, 427 Pa. 53, 59, 233 A.2d 284, 287 (1967). The Court must consider all relevant factors including the crime charged, the possible defenses, and the possible significance of the informer's testimony. Id. Here, Campbell was not charged with the delivery to the informant. Rather, this evidence was introduced solely to determine Campbell's **intent** with respect to the cocaine found in Room 9. It is not clear whether the informant saw any drugs other than the fifteen or sixteen packets of cocaine he purchased. Therefore, the informant may or may not have been an eyewitness to Campbell's possession of the cocaine involved in this case. The Court acknowledges that the informant's testimony may have been helpful to the defense to challenge Richards' credibility; however, it was not the sole means of doing so. Trial counsel cross-examined

Richards regarding his conviction relating to the controlled buy and the fact that the informant indicated he purchased drugs from Richards, not Campbell. Furthermore, there were several other people present in the residence at the time of the transaction with the informant. Therefore, the defense could call witnesses other than the informant to rebut Richards' testimony.² In light of all these circumstances, the Court believes the balance weighs against disclosure of the informant's name and address. Therefore, the Commonwealth was not required to disclose this information nor was trial counsel ineffective for failing to file a motion to compel the disclosure of this information.

Campbell also contends counsel was ineffective for failing to call the informant as a witness to rebut Richards' testimony that Campbell sold the informant cocaine during the controlled buy. The Court cannot agree. As previously stated, to prevail on an ineffectiveness claim for a failure to call a witness, the appellant must prove that the witness was available, among other things. Since counsel did not know the identity of the informant and based on the above discussion it is unlikely the Court would have required the Commonwealth to disclose the informant's identity, the informant was not available. Furthermore, the Court believes a case against Brian Postell involving a delivery of controlled substances to this informant (No. 00-10,309) was not proded because the informant could not be located or was otherwise unavailable.

Campbell next avers the Court erred in denying his second motion in limine filed on November 14, 2000 relating to Richards' testimony. The Honorable Nancy L. Butts

²For example, Barbara Dunlap resided at 711 Locust Street and was identified in Trooper Thomas' report.

issued the rulings on Campbell's motions in limine. In her Order dated November 14, 2000, Judge Butts noted the defense was aware of this witness and his statement from the police reports provided to the defense by the Commonwealth. Therefore, the Commonwealth did not fail to disclose this witness. Even if November 2000 was the first time the defense knew the Commonwealth intended to call Richards as a witness, this case did not proceed to trial until January 10, 2001. Therefore, the defense had almost two (2) months to investigate and prepare to meet Richards' statements.

Campbell also alleges that Richards' testimony constituted inadmissible evidence of other crimes. The Court cannot agree. Richards' testimony was introduced to show Campbell's intent with respect to the cocaine found in Room 9. Since the transaction was within 24 hours of the search, the Court found that the probative value of this evidence exceeded any potential for prejudice. Finally, since the defense was aware of this evidence by November 14, 2000 at the latest, the defense was given reasonable notice in advance of trial of the Commonwealth's intent to use it. N.T., January 10, 2001, pp. 149-155.

Campbell next avers the Court erred in denying counsel's renewed objection to Richards' testimony at the time of trial. Since it was not erroneous to deny the motions in limine, the Court does not believe it was in error when it denied counsel's renewed objection. See also N.T., January 10, 2001, at pp. 149-155.

Campbell asserts counsel was ineffective in his cross-examination of Richards because counsel failed to confront Richards with the fact the Commonwealth dropped the felony delivery and possession with intent to deliver charges which carried a

maximum penalty of 10 years in jail and a \$100,000 fine in exchange for his cooperation and his plea to misdemeanor possession for which he received one year probation. Although counsel did not introduce evidence through cross-examination or otherwise that the charges against Richards' which were dismissed by the Commonwealth carried a maximum penalty of 10 years in jail and/or a \$100,000 fine, counsel did cross-examine Richards' with the fact he received a probationary sentence. The Court does not believe that additional cross-examination regarding the maximum penalties of the dismissed charges would change the result in this case. If such testimony had been elicited, it is likely the Commonwealth would have introduced evidence that, even though the maximum was 10 years in jail, the standard guideline range was three to twelve months for the dismissed charges and restorative sanctions to three months for the misdemeanor possession to which Richards' pled guilty.

Campbell next claims counsel was ineffective for failing to call the informant or elicit testimony from law enforcement officers that would have rebutted Richards' testimony that he did not deliver the controlled substances to the informant. The issue in this case is not who sold cocaine to the informant, but whether the cocaine found in Room 9 was possessed by Campbell with the intent to deliver it. As previously discussed, it is questionable whether the identity of the informant would have been disclosed. Also, the Court believes the informant was not available at the time of trial. Therefore, the Court does not believe counsel was ineffective for failing to call the informant as a witness.

Whether counsel should have elicited more information from law enforcement officers regarding Richards' involvement in the controlled buy is a more

difficult question. Although Richards was confronted during cross-examination with the fact that the informant claimed Richards was the individual who sold to him and the fact marked money from the controlled buy was found on his person when the police arrested him during the raid on 711 Locust Street, it may have been more persuasive if that information had been introduced through law enforcement officers. From the current record, however, the Court does not know if Trooper Thomas was available to testify as a witness for the defense. The Court also does not know counsel's reasons for failing to call such witnesses. The Court doubts that the addition of only this evidence would change the result in this case; however, the result may be different if it was introduced in conjunction with evidence from other individuals who were present in 711 Locust Street during the raid.

In issues 18 and 19, Campbell contends counsel was ineffective in failing to confront Officer Dincher with the fact he did not fingerprint the box containing paraphernalia found in Room 9 which Richards claimed belonged to Campbell and/or failing to ask that a fingerprint analysis be done of the paraphernalia found, including the box found in Room 9. Without holding an evidentiary hearing to determine counsel's reasons for his course of action and/or the results of a fingerprint analysis, this issue is difficult to address. The Court notes, however, that venturing into this line of questioning or requesting such analysis could be dangerous for Campbell. Questioning Officer Dincher regarding why he did not fingerprint the box could open the door to Richards' statements that the box was Campbell's. Personal items belonging to Richards were found in Room 9 such as the jacket, but no such items of Campbell's were found. Statements of Richards that the box found in Room 9 was Campbell's would further link Campbell to Room 9 and the cocaine

found therein. Furthermore, if a fingerprint analysis found Campbell's fingerprints on the box, it would bolster Richards' credibility. The only way this information would be helpful to the defense would be if fingerprints were found on the box and they were not Campbell's. The Court, however, does not know what the results of a fingerprint analysis would be.

Campbell next asserts counsel was ineffective for failing to request a missing witness instruction as a result of the Commonwealth's failure to call the informant as a witness in its case-in-chief. The missing witness adverse inference rule has been articulated as follows:

When a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not merely be cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference that it would have been unfavorable.

Commonwealth v. Manigault, 501 Pa. 506, 510-11, 462 a.2d 239, 241 (1983);

Commonwealth v. Evans, 664 A.2d 570, 573 (Pa.Super. 1995). The circumstances that preclude issuance of the missing witness instruction include the following, among others: (1) there is a satisfactory explanation as to why the party failed to call the witness; (2) the witness is not available or not within the control of the party against whom the negative inference is desired; and (3) the testimony of such a witness is comparatively unimportant, cumulative, or inferior to that already presented. Evans, supra. at 573-74. Although not contained in the record, the Court believes the informant was not available or within the control of the Commonwealth. The Court believes the Commonwealth attempted to subpoena the informant for trial in the Brian Postell case in the fall of 2000 and the informant did not appear, so the case was nol prosequi. Without an evidentiary hearing,

though, the Court cannot be certain whether the missing witness instruction would be precluded or not.

Campbell asserts trial counsel was ineffective for failing to call Arnell Weaver, a resident of 709 Locust Street, to testify that Campbell was with him at 709 Locust Street until approximately five minutes before the police raid on 711 Locust Street. As previously discussed, the appellant must show five elements to establish ineffectiveness for failure to call a witness. The Court cannot determine at this point whether appellant can meet any of these elements.³

In issue 22, Campbell argues counsel was ineffective for failing to call any of the ten other adults at 711 Locust Street during the police raid to rebut the testimony of Sherry Dunlap and Richards. As with the previous issue, the Court cannot determine whether appellant can meet the five elements necessary to establish this ineffectiveness claim. In fact, other than Barbara Dunlap and Robert Green whose names were mentioned during trial, the Court does not even know the names of these potential witnesses.

Finally, Campbell contends the Court erred in calculating his prior records score or, in the alternative, counsel was ineffective for failing to request a continuance, when Campbell asserted at sentencing that his drug delivery conviction from New Jersey had been overturned on appeal. At the time of sentencing, the Commonwealth provided a certified record of this conviction. The defense did not provide any documentation that this

³The Court notes, however, that the Commonwealth believed 709 Locust Street was also involved in the drug transactions in that people would go to 709 Locust Street, obtain drugs, return to 711 Locust Street and deliver it to other individuals. See N.T., January 10, 2000, at p. 153.

conviction had been overturned. Thus, the Court did not err in including this conviction when calculating the defendant's prior record score. At this time, the Court does not know why defense counsel did not ask for a continuance to confirm whether Campbell's conviction had been overturned on appeal. The Court notes, however, that the Commonwealth believed Campbell had other convictions to raise his prior record score from a four to a five. If counsel had requested such a continuance, it would have given the Commonwealth an additional time frame to obtain certified records for these other convictions and could have placed Campbell in a worse position than proceeding with sentencing on February 28, 2000.

DATE: _____

By The Court,

Kenneth D. Brown, J.

cc: Eric Linhardt, Esquire
Diane Turner, Esquire
Work file
Superior Court (original & 1)
Gary Weber, Esquire (Lycoming Reporter)