COMMONWEALTH OF PENNSYLVANIA Appellee v. DWAYNE A. ROBERTS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 30 MDA 2013

Appeal from the Judgment of Sentence Entered May 10, 2012
In the Court of Common Pleas of Bradford County
Criminal Division at No(s): CP-08-CR-0000770-2011

BEFORE: BENDER, P.J., PANELLA, J., and MUSMANNO, J.

CONCURRING AND DISSENTING MEMORANDUM BY BENDER, P.J.

FILED APRIL 16, 2014

I respectfully dissent because I believe the Majority applies the wrong standard of review in this case. Applying the correct standard of review, I would conclude that Appellant's conviction for criminal conspiracy was against the weight of the evidence and, therefore, that he is entitled to a new trial.

I am cognizant of the *general rule* that dictates our standard of review of claims that the verdict is against the weight of the evidence:

> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts

> would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

Commonwealth v. Widmer, 744 A.2d 745, 751-52 (Pa. 2000) (internal citations, footnote, and quotation marks omitted).

I also agree with the Majority's recitation of the elements of criminal conspiracy as applied to this case:

> [I]n order to sustain a conviction for criminal conspiracy the Commonwealth must establish that [Appellant]: "(1) entered an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent, and (3) an overt act was done in furtherance of the conspiracy." ***Commonwealth v. Johnson***, 719 A.2d 778, 784 (Pa. Super. 1998). The overt act need not be committed by the defendant, but rather, by any of the co-conspirators. ***See Commonwealth v. Finn***, 496 A.2d 1254, 1255 (Pa. Super. 1985).

Majority Memorandum, at 3 – 4.

The Majority concludes, after conducting its own summary of the facts, but without any discussion or analysis, that "[t]he trial court found that the verdict did not shock its sense of justice. We find no abuse of discretion with this conclusion." ***Id.*** at 5. Given the procedural history of this case that followed the trial court's imposition of sentence, it is clear that the Majority applies an incorrect standard of review.

In response to Appellant's post-sentence motion for a new trial, the trial court issued an order directing that counsel for both parties file briefs

addressing Appellant's weight of the evidence claim. However, the trial court did not conduct a hearing, and Appellant's post-sentence motion for a new trial was ultimately denied by operation of law pursuant to Pa.R.Crim.P. Rule 720 (B)(3)(a) ("If the judge fails to decide the motion within 120 days, or to grant an extension as provided in paragraph (B)(3)(b), the motion shall be deemed denied by operation of law."). Subsequently, Appellant filed a timely notice of appeal and complied with the trial court's order directing him to file a Pa.R.A.P. 1925(b) statement of errors complained of on appeal. Thus, Appellant preserved his weight of the evidence claim for appellate review. However, the trial court never filed a Rule 1925(a) opinion addressing the weight claim. Instead, the trial court issued a statement in lieu of a Rule 1925(a) opinion, which read: "The Honorable Jeffrey A. Smith entered the Order appealed from and has since retired. As such, no [Rule] 1925[(a)] opinion will be issued." Statement in lieu of a Rule 1925(a) Opinion, 6/24/13, at 1. Given this procedural history, we have no record of the trial court's reason(s) for denying Appellant's weight of the evidence claim.

It is well-established that "[t]he general rule in this Commonwealth is that a weight of the evidence claim is primarily addressed to the discretion of the judge who actually presided at trial." ***Armbruster v. Horowitz***, 813 A.2d 698, 702 (Pa. 2002). Thus, when reviewing a weight of the evidence claim, it is not typically the role of this Court "to consider the underlying question in the first instance." ***Id.*** at 703. "Accordingly, where the reasons

for the trial court's granting or denying a new trial appear in the record, this Court has held that only a palpable abuse of discretion will warrant upsetting that decision on appeal." ***Id.*** However, in ***Armbruster***, our Supreme Court considered "whether an appellate court is barred from reviewing such a claim where the judge who presided over the trial never ruled on the claim and is now permanently unavailable to do so." ***Id.*** The Supreme Court concluded that appellate courts are not barred from reviewing such a claim, creating "an exception to the general rule barring appellate review of weight claims in the first instance." ***Id.*** at 703-04.

This case falls squarely within the ***Armbruster*** exception. The trial court never memorialized its reasons for denying Appellant's weight of the evidence claim. Furthermore, remanding this case to ascertain the trial court's reasoning is not feasible given that the trial court judge has since retired. Accordingly, the Majority erroneously applies the general standard of review for weight of the evidence claims when it is quite clear that the ***Armbruster*** exception applies. As dictated by ***Armbruster***, the applicable standard of review in this instance is plenary. ***Id.*** at 705.

Applying the correct standard of review, I would conclude that Appellant's conspiracy conviction was against the weight of the evidence to a degree that shocks my sense of justice. Appellant was never observed interacting with the alleged purchaser, nor was he seen discussing or assisting in the sale with the principle conspirator, Bridgewater. The Commonwealth's primary witness never implicated Appellant, in any way,

beyond his presence at the scene of the alleged drug transaction. It is axiomatic that "[m]ere presence at the scene of a crime is not sufficient circumstance upon which guilt may be predicated." ***In re Amos***, 430 A.2d 688, 690 (Pa. 1981).

The Majority states that "[c]ontrolled substances, packaged in baggies and cash were recovered *from all occupants*[,]" which necessarily included Appellant. Majority Memorandum, at 5 (emphasis added). However, this statement directly contradicts the record. On the contrary, Officer Watkins testified that *all* of the seized drugs in this case were found on Ashly Hamilton, a fact that was never contested at trial. N.T., 3/21/12, at 45.

The Commonwealth contends, without any reference to the record, that Appellant was "a partner, lookout[,] and backup for Bridgewater." Commonwealth's Brief, at 2. By my estimation, the only evidence of that assertion presented at trial was again, Appellant's presence at the scene when the drug transaction allegedly occurred. No evidence or testimony tended to show Appellant's complicity in the transaction at all, much less that he acted as a lookout or a bodyguard for Bridgewater.

The Commonwealth also contends that the verdict was supported by the facts that Appellant falsely identified himself to police and had a large amount of cash in his possession (just over one thousand dollars). I disagree on both counts. Appellant's possession of a significant sum of legal tender was never linked to the alleged drug transaction. He was never observed exchanging anything for the money, nor did he possess any type of

contraband when searched. There was also no evidence concerning the form or location of the currency that would tend to support the inference that it had been recently used in an illegal transaction. Similarly, Appellant's falsely identifying himself to police was never tied to his participation in Bridgewater's drug deal. The evidentiary record fails to demonstrate how or why the false identification demonstrated Appellant's consciousness of guilt for *this crime* rather than any other crime, or for any other reason, for which Appellant may have wished to conceal his identity from police. This is particularly true since Appellant did not possess any contraband at the time of his arrest. I believe the inferences suggested by the Commonwealth regarding these two facts are too speculative in the circumstances of this case to have been afforded significant weight by the factfinder.[1]

The evidence of Appellant's guilt for the conspiracy charge was extremely weak and premised on speculation primarily arising out of his presence at the scene. "To prove a criminal conspiracy the evidence must rise above mere suspicion or possibility of guilty collusion." ***Commonwealth v. Burdell***, 110 A.2d 193, 197 (Pa. 1955). Even if Appellant knew that an illegal transaction was occurring, which may be the

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[1] ***See Ditz v. Marshall***, 393 A.2d 701, 703 (Pa. Super. 1978) ("The court is not required to consider the evidence in the light most favorable to the verdict winner when passing on the question of whether a verdict is against the weight of the evidence.")

only reasonable inference to be derived from the facts presented at his trial, such knowledge falls short of establishing that he entered into an agreement to commit or aid in the sale, that he shared the principle's criminal intent, or that he committed an overt act in furtherance of the conspiracy. ***See Commonwealth v. Swerdlow***, 636 A.2d 1173, 1177 (Pa. 1994) ("[M]ere association or mere presence at the scene of the crime is insufficient to prove a conspiracy unless the defendant had prior knowledge of his alleged co-conspirator's criminal intent. Similarly, the defendant's mere knowledge of the proposed crime is insufficient to convict him of conspiracy absent proof that he became an active participant in the criminal enterprise and that he had knowledge of the conspiratorial agreement.").

Thus, I would conclude that the verdict was against the weight of the evidence to an extent that shocks my sense of justice. Accordingly, I respectfully dissent.