NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
IRVIN HARPER,	:	
	:	
Appellant	:	No. 1088 EDA 2011

Appeal from the Judgment of Sentence entered on April 12, 2011
in the Court of Common Pleas of Philadelphia County,
Criminal Division, No. CP-51-CR-0013658-2010

BEFORE: GANTMAN, SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED JULY 03, 2013**

Irvin Harper ("Harper") appeals from the judgment of sentence imposed following his convictions of possession with intent to deliver a controlled substance and possession of a controlled substance. ***See*** 35 Pa.C.S.A. §§ 780-113(a)(30), (16). We affirm.

The trial court set forth the relevant underlying facts in its Opinion, which we adopt for the purpose of this appeal. ***See*** Trial Court Opinion, 10/9/12, at 1-4.

On appeal, Harper raises the following question for our review:

> 1. Is [Harper] entitled to an arrest of judgment with regard to his conviction for possession with intent to deliver since the Commonwealth failed to sustain its burden of proving, beyond a reasonable doubt, that [Harper] had an intent to deliver where the expert testimony presented by the Commonwealth was insufficient to establish this intent in that what the expert testified to was layman knowledge and was outside the

> limited scope of which he was accepted, at trial, to be an expert of?

Brief for Appellant at 3.

Harper contends that the evidence was insufficient to support his possession with intent to deliver conviction. ***Id.*** at 9. Harper asserts that the expert testimony presented by the Commonwealth was insufficient to support the element of intent because the expert's testimony amounted to nothing more than lay opinion testimony, and was therefore outside of the scope of his expertise. ***Id.*** at 9, 12-15. Harper argues that the expert's testimony was irrelevant to determining whether he had an intent to deliver crack cocaine. ***Id.*** at 14. Harper claims that without this testimony, the only evidence supporting his conviction was the absence of drug paraphernalia, which, alone, is not sufficient to sustain his conviction. ***Id.*** at 15.

Our standard of review is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether[,] viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in

> applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part, or none of the evidence.

Commonwealth v. Brown, 23 A.3d 544, 559-60 (Pa. Super. 2011) (citation omitted).

Here, the trial court set forth the relevant law and determined that the evidence was sufficient to sustain Harper's conviction. ***See*** Trial Court Opinion, 10/9/12, at 4-6; ***see also Commonwealth v. Ratsamy***, 934 A.2d 1233, 1237 (Pa. 2007) (stating that the reviewing court must consider all of the evidence when evaluating a sufficiency challenge, including an expert's testimony). We adopt the sound reasoning of the trial court for the purposes of this appeal. ***See*** Trial Court Opinion, 10/9/12, at 4-6.[1]

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 7/3/2013

[1] We note that Harper does not challenge the admissibility of the expert's testimony. ***See*** Reply Brief for Appellant at 2; ***see also*** Pa.R.E. 701. Further, Harper stipulated that the expert, Officer Walter Bartle, was an expert in narcotics, and Harper did not object to any of the expert's testimony at trial. ***See*** N.T., 3/1/11, at 24. Accordingly, any claim that the testimony was inadmissible is waived. ***See Commonwealth v. Berrios***, 434 A.2d 1173, 1178 (Pa. 1981) (holding that appellant's challenge to the admissibility of evidence at trial was waived where he did not timely object to the evidence).

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Criminal Appeals Unit
First Judicial District of PA

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0013658-2010
	:	
vs.	:	1088 EDA 2011
	:	
IRVIN HARPER	:	

OPINION

COVINGTON, J.

Procedural History

On May 5, 2011, following a bench trial, the defendant was found guilty of Possession with Intent to Deliver (35 Pa.C.S. §780-113 §A30) and Intentional Possession of a Controlled Substance (35 Pa.C.S. §780-113 §A16). On April 12, 2011, after a Presentence Investigation report was completed, the defendant was sentenced to eighteen (18) to thirty-six (36) months incarceration followed by three years reporting probation.

On April 15, 2011, the defendant filed a timely appeal, pro se. On January 24, 2012, defendant was appointed counsel for appeal. Defendant filed 1925(b) statement of errors with the Court on April 22, 2012.

Factual History

On September 25, 2010 at approximately 6:57 p.m., Police Officer James McGorry was on duty near 5800 Marian Street, Philadelphia. N. T. 3/1/2011, pp. 9-10. Officer McGorry was working with his partner, Officer Omlor, in a tactical unit for the area's frequent incidents of

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narcotics sales and drinking on the highway. *Id.* at 11. Officer McGorry observed Defendant walking down the street with an open container of alcohol in his hand. *Id.* at 12. Officers McGorry and Omlor exited their police vehicle, approached the Defendant, and asked Defendant to stop for investigation. *Id.* at 12. Defendant replied, "Why are you all fucking with me?" and immediately threw an approximately six (6) inch wide, clear ziplock bag from his right sleeve onto the ground. *Id.* Officer Omlor immediately placed Defendant in custody, while Officer McGorry recovered the clear ziplock bag. *Id.* For safety purposes, Officer McGorry looked around to secure the area when Officer Omlor placed the Defendant under arrest. *Id.* at 22-23. The clear sandwich bag contained twenty-nine (29) clear-tinted and two blue-tinted ziplock baggies, each baggie contained a white chunky substance that tested positive for crack cocaine. *Id.* at 12. Measured together, the crack cocaine weighed 1.984 grams. Defendant had no drug-use paraphernalia on his person when arrested. *Id.* at 14.

When Officer McGorry approached Defendant, no one else was in the immediate area, other than some people across the street, approximately fifty (50) feet away. N. T. 3/1/2012, p. 16. Defendant's aunt approached Officer McGorry after Defendant was placed in custody. *Id.* at 17. Defendant's aunt walked over from a few houses away, but was not present at the time Officer Omlor arrested Defendant, nor was she present at the time Officer McGorry recovered the ziplock bag. *Id.* at 21-22.

There was a stipulation that Officer Walter Bartle, of the Narcotic Strike Force with the Philadelphia Police Department, is an expert in the field of narcotics. N. T. 3/1/2012, pp. 23-24. Officer Bartle listened to the testimony in court from Officer McGorry, read the seizure analysis, and formulated an opinion based on the evidence. *Id.* at 24. Officer Bartle stated it is unheard of that a person would break down approximately two grams of crack into 31 bags for personal use.

Id. at 25. Officer Bartle opined a person intending to smoke two grams of crack for personal use would have to be a heavy user, and would not be caught without at least one pipe and some screens or other drug use paraphernalia. *Id.* at 26. Officer Bartle further opined a heavy user would buy crack in bulk as it is more economically feasible. *Id.* at 25. Officer Bartle testified that in his experience the use of a sandwich sized ziplock bag containing smaller baggies of crack, always for the purpose of distribution. *Id.* at 27. As such, it was Officer Bartle's opinion the 31 packets were for distribution in some way, shape, or form. *Id.* at 26.

Defendant's aunt, Kimberly Miller, testified she observed Officers McGorry and Omlar approach, search, and arrest Defendant. N. T. 3/1/2011, p. 30. Ms. Miller testified that while sitting on her porch, seven or eight houses away, she saw Defendant walk from around the corner. *Id.* at 31. Ms. Miller further testified Defendant never discarded anything. *Id.* at 32, 33. The Court found Ms. Miller's testimony be incredible. *Id.* at 44.

David Leff, witness for Defendant, is a self-employed forensic narcotics expert in the areas of drug trafficking, drug usage, and drug packaging. N. T. 3/1/2011, p. 35. Mr. Leff testified the evidence of the case was consistent with Defendant intending the drugs for personal use. *Id.* at 37. Mr. Leff opined two grams of crack could be used in one day by a heavy drug user, and although the thirty-one (31) bags of crack were at one point intended for distribution, there is no evidence the Defendant intended to distribute them. *Id.* at 38. Mr. Leff testified bulk quantities are not dispositive of intent to distribute, as a drug user needs a close relationship with a dealer to obtain bulk quantities of crack, but could also obtain several bags of crack at a still slightly reduced rate. *Id.* at 38. Mr. Leff pointed to the fact Defendant had no money on him and the the lack of drug selling paraphernalia (unused bags or scales) to neutralize the lack of drug

use paraphernalia. *Id.* at 39. Mr. Leff stated, "under the circumstances of this case, [the thirty-one nickel bags] could be consistent with personal use, and that's my opinion." *Id.* at 39-40.

Standard of Review

The standard of review for sufficiency of the evidence is "whether the evidence, viewed in the light most favorable to the Commonwealth as verdict winner, is adequate to enable a reasonable jury to find every element of the crime beyond a reasonable doubt." *Commonwealth v. Rega*, 933 A.2d 997 (Pa. 2007). Moreover, in applying the above test, the entire trial record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact, while passing upon the credibility of witnesses and the weight to be afforded the evidence produced, is free to believe all, part or none of the evidence introduced at trial. *Commonwealth v. Proetto*, 771 A.2d 823, 833 (Pa. Super. 2001). Under this standard, the Commonwealth's evidence was sufficient to sustain the convictions.

Discussion

Pursuant to Defendant's Statement of Errors, Defendant asserts he is entitled to an arrest of judgment with regards to his conviction for possession with intent to distribute since the expert testimony was insufficient for Commonwealth to prove beyond a reasonable doubt that Defendant had intent to distribute the drugs.

"To establish the offense of possession of a controlled substance with intent to deliver, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance with the intent to deliver it." *Commonwealth v. Kirkland*, 831 A.2d 607, 610 (Pa. Super. 2003). It is well established that all the facts and circumstances surrounding possession are relevant in making a determination of whether contraband was possessed with the

intent to deliver." *Commonwealth v. Ariondo*, 580 A.2d 341, 350 (Pa. Super. 1990) (quoting *Commonwealth v. Fisher*, 462 A.2d 1366, 1371 (Pa. Super. 1983)). "The trier of fact may infer that the defendant intended to deliver a controlled substance from an examination of the facts and circumstances surrounding the case. Factors to consider in determining whether the drugs were possessed with the intent to deliver include the particular method of packaging, the form of the drug, and the behavior of the defendant." *Kirkland, supra* at 611. "[P]ossession with intent to deliver can be inferred from the quantity of the drugs possessed and other surrounding circumstances, such as lack of paraphernalia for consumption." *Commonwealth v. Torres*, 617 A.2d 812, 814 (Pa. Super. 1992), appeal denied, 629 A.2d 1379 (1993). Expert opinion testimony is admissible concerning whether the facts surrounding the possession of controlled substances are consistent with intent to deliver rather than with intent for personal use. *Commonwealth v. Bagley*, 442 A.2d 287, 290 (Pa. Super. 1982).

It is clear from the facts of the case and testimony of the two expert witnesses that Defendant intended to use the bags of cocaine for distribution and not personal use. The packaging of the drugs Defendant discarded clearly implies his intention to distribute. The larger sandwich bag containing the smaller baggies is a common and familiar preparation for distributing drugs. Officer Bartle's experience with drug users and sellers led him to opine that the packaging of the drugs was consistent with intent to deliver. Officer Bartle's explanation of crack cocaine pricing led the Court to determine there was no reason a drug user would buy thirty-one (31) individual nickel bags of crack cocaine for personal use, given that a heavy user of crack cocaine would have the relationships to buy in bulk at a cheaper price.

Officer Bartle's expert testimony concluded the cocaine was intended for distribution, and made clear that a drug user would have been arrested with drug paraphernalia. Officer

Bartle's testimony was based on expert knowledge of crack cocaine addiction and the behavior of heavy crack cocaine users and sellers. Similar to *Commonwealth v. Robinson*, the Defendant had no drug use paraphernalia on him when arrested, despite having many individual bags of crack cocaine. 582 A.2d 14, 17 (Pa. Super. 1990). In *Robinson*, expert witness testimony that the defendant's thirty-eight (38) vials of crack cocaine stored in a plastic sandwich bag coupled with the defendant's lack of paraphernalia for immediate use was sufficient evidence to determine intent to deliver. In the instant case the surrounding circumstances combined with the quantity of narcotics prove Defendant intended the drugs for delivery, not personal use.

Conclusion

There was sufficient evidence for conviction and thus the conviction should be sustained.

BY THIS COURT:

Roxanne E. Covington
October 1, 2012