

COMMONWEALTH OF PENNSYLVANIA v. WILLIE WEAKFALL, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action No. 629 of 2004, Post-Conviction Relief Act

Conspiracy; Merger of sentences

1. If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.
2. In order to resolve whether there has been a single conspiracy or multiple ones, the court analyzes the following factors: the number of overt acts in common; the overlap of personnel; the time period during which the acts took place; the similarity in methods of operation; the location in which the acts took place; the extent to which the purported conspiracies share a common objective; and the degree to which interdependence is needed for the overall operation to succeed.
3. No one factor or combination of factors is dispositive in determining whether single or multiple conspiracies exist; it is a totality-of-the-circumstances analysis where all relevant factors must be considered.
4. The evidence presented at trial did not support the defendant's assertion that the two drug transactions, despite having certain elements in common, were part of a single, continuous, overarching conspiracy, or that the execution of one transaction was necessarily entwined with the other.
5. Where the evidence at trial was sufficient to prove the defendant was involved in two separate and distinct agreements to deliver cocaine, the imposition of a separate sentence for each conspiracy conviction was legal and appropriate.

Appearances:

Franklin County District Attorney's Office

Elliott B. Sulcove, Esq., *Counsel for Defendant*

OPINION

Herman, J., January 24, 2007

Background

The defendant was charged with two counts each of Delivery, Conspiracy to Deliver, and Criminal Use of a Communication Facility arising from two incidents which took place on November 20th and 21st of 2003. He was found guilty on all six counts after a jury trial on January 13, 2005. The court sentenced him on February 16, 2005 to 12-24 months for Delivery, 12-24 months for Conspiracy, 6-12 months for Delivery, 6-12 months for Conspiracy, 6-12 months for Criminal Use of a Communication Facility, and 6-12 months for Criminal Use of Communication Facility. The sentences for these last two counts were to be served concurrently. The total term of imprisonment was to be 42-84 months.¹

The defendant filed a petition for post-conviction collateral relief. The court appointed counsel, the Commonwealth answered the petition and an amended petition was filed on the defendant's behalf. The defendant alleges that the two consecutive sentences for each of the Conspiracy counts should have merged for sentencing purposes and he asks the court to vacate one of those sentences. His brings this claim pursuant to 42 Pa.C.S.A. §9543(a)(2)(vii) by which a defendant may be eligible for post-conviction collateral relief if a sentence has been imposed which is greater than the lawful maximum.² His claim must also be viewed as a challenge to the sufficiency of the evidence, i.e, the evidence was allegedly insufficient to sustain more than one conviction for Conspiracy. This is because his claim centers on the fact-based question of whether the drug deliveries were the product of one agreement or two agreements. Commonwealth v. Andrews, 768 A.2d 309 (Pa. 2001); Commonwealth v. Martinez, 777 A.2d 1121 (Pa.Super. 2001).

The court held a hearing, after which the transcripts of the sentencing hearing and the trial were completed. Counsel for the defendant and the Commonwealth then submitted timely written argument. The matter is ready for decision.

Evidence Presented at Trial

The Franklin County Drug Task Force was conducting an undercover drug investigation in November of 2003 using confidential informant Kandy Socks. On November 20th, police fitted Socks with a wire and she was given \$50 in cash to purchase drugs. She telephoned the defendant at his apartment at 5 Garber Street in Chambersburg to learn if he had drugs to sell. He told her to come to his apartment. She was driven there by members of the Task Force and left the police car. She went up to the defendant's apartment, he answered the door and let her inside. She told him she wanted crack cocaine, waited for a few moments until he returned with a small piece of the drug and she gave him the \$50. She complained to the defendant that the piece he gave her was too small but she nevertheless took it. She told him she might be back later and he replied "okay." She then returned to the police car parked in front of the building and gave the undercover officers the crack cocaine. The buy occurred at approximately 4:45 p.m. and took approximately 15 minutes. Socks's conversation with the defendant was captured on audiocassette and played for the jury.

The second controlled buy occurred on November 21st. Socks was again fitted with a wire and given \$50 in cash. Police drove her to 5 Garber Street. When she arrived at the defendant's apartment, he told her she would have to wait for a third person to arrive who had the drugs. Socks waited with the defendant for approximately 40-45 minutes until the third person arrived. She then gave the defendant the \$50, he obtained the crack cocaine from the third person and then gave it to her. The controlled buy took place at approximately 2:50 p.m. She returned to the police car and gave the drugs to the undercover officers. This transaction was recorded on a CD and played for the jury.

Discussion

Evidence is sufficient to support a guilty verdict when it establishes beyond a reasonable doubt each material element of the crime charged and its commission by the defendant. The court must view the evidence in the light most favorable to the Commonwealth as the verdict winner. The Commonwealth receives the benefit of all reasonable inferences which can be drawn from the evidence. Commonwealth v. Widmer, 744 A.2d 745 (Pa. 2000). We reviewed the evidence presented at trial with these principles in mind and now address the defendant's claim.

"Criminal conspiracy requires proof of intent to promote or facilitate a crime, agreement to commit or aid in the commission of an unlawful act, and an overt act in furtherance thereof." Andrews, supra at 311, citing 18 Pa.C.S.A. §903(a), (e). A person who conspires to commit multiple crimes may do so in one of two ways: (1) by entering into a single, overarching conspiracy to commit multiple crimes; or (2) by entering into separate conspiracies to commit each crime. The first situation is governed by 18 Pa.C.S.A. §903(c) which states: "If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship."

A single conspiracy under section 903(c) is defined as follows:

A single, continuing conspiracy is demonstrated where the evidence proved that the essential feature of the existing conspiracy was a common plan or scheme to achieve a common, single, comprehensive goal...A single, continuing conspiracy may contemplate a series of offenses, or be comprised of a series of steps in the formation of a larger, general conspiracy...Therefore,

where the evidence at trial is sufficient for the jury to infer that the essential features of the existing conspiracy were a common plan or scheme to achieve a common, single, comprehensive goal or end, then the conclusion that the conspiracy was a single, continuing conspiracy is justified.

Martinez, *supra* at 1125-1126, citing Commonwealth v. Troop, 571 A.2d 1084, 1089-1090 (Pa.Super. 1990).

For a defendant to be convicted of multiple counts of conspiracy, there must be separate agreements, or separate conspiratorial relationships, to support each conviction. In order to resolve whether there has been a single conspiracy or multiple ones, the courts have developed a multi-factor test which focuses on the following elements: the number of overt acts in common; the overlap of personnel; the time period during which the alleged acts took place; the similarity in methods of operations; the location in which the alleged acts took place; the extent to which the purported conspiracies share a common objective; and the degree to which interdependence is needed for the overall operation to succeed. No one factor or combination of factors is dispositive in determining whether single or multiple conspiracies exist. This is in essence a totality-of-the-circumstances analysis where all relevant factors must be considered. 18 Pa.C.S.A. §903(b); Commonwealth v. Koehler, 737 A.2d 225 (Pa. 1999), cert. denied, 531 U.S. 829 (2000); Commonwealth v. Herrick, 660 A.2d 51 (Pa.Super. 1995).

Our review of the evidence in the light most favorable to the Commonwealth as the verdict winner, as well all the pertinent cases, leads us to conclude that the evidence was sufficient to prove two separate conspiracies, making the imposition of two separate sentences for conspiracy appropriate and legal.

The defendant focuses on the following factors under the Koehler analysis to support his position that this case involves a single conspiracy to commit multiple crimes: the two controlled drug purchases involved the same persons -- himself and Kandy Socks; the transactions occurred within a 24-hour period; both buys were for a similar quantity of crack cocaine for a purchase price of \$50 each; and both transactions were arranged by phone and took place at the same residence. These similar and/or identical elements are not in dispute. However, the defendant also contends the conspiracies shared a common objective, specifically, the purchase of additional drugs from the defendant and that the two transactions were interdependent in the sense that each was necessary to the success of an overall criminal enterprise or operation. The record does not support the defendant's view of these factors.

The defendant cites to a portion of Socks's testimony where she clarifies the conversation between herself and the defendant on November 20th as captured on the audiocassette. After the drug buy was completed and Socks complained to the defendant about the small amount of crack he had given her, Socks told him "I might be back later," to which he responded "okay." (N.T. Jury Trial, January 13, 2005, pp. 24-25.) The defendant also points to Chambersburg Police Officer Darren North's testimony that the November 21st transaction "was essentially the same thing as the transaction that took place on the 20th." (N.T., p. 67.) In addition, the defendant testified he and Socks knew each other for two or three years before these transactions occurred, making their relationship of an on-going, continuous nature. He relies on these portions of the record, in addition to the other similarities noted above, to support his claim that there was but a single conspiracy between himself and Socks to conduct multiple drug transactions. Our analysis of the facts and operative case law does not bear this out, however. In essence, what the defendant overlooks is that multi-factor test set forth in Koehler and related cases is at heart a totality-of-the-circumstances analysis and that no one factor or combination of factors is necessarily dispositive.

The facts of this case are strikingly similar to those in Herrick, *supra*. A confidential informant went to the defendant's home and purchased cocaine from a third party in the defendant's presence. When the informant left, he received a call from the defendant and the third party asking if he wanted to buy more drugs. The informant went back to the defendant's home the next day and bought drugs in the same manner as before. Herrick was convicted of two separate conspiracies and given consecutive sentences for both convictions. The Superior Court, while acknowledging the similar circumstances of the two transactions -- same persons, same location, committed within one day of each other -- found there was insufficient evidence to support the claim that Herrick and the third party shared a common objective or that the transactions were part of a common plan or scheme, aside from the general purpose to make money illegally. "If, for instance, appellant and [the third party] told [the informant] to come back the next day to pick up some more drugs, we might agree there was but one conspiracy. Neither illegal transaction with [the informant], however, was necessarily intertwined with the other; both were independent phenomena...[T]he execution of one drug transaction was not necessary for the other to succeed." Id. at 55. In the instant case, although Socks indicated she might return to buy more drugs and the defendant assented, no particular date and time was agreed to. Instead, the matter remained open-ended and speculative.

In addition, the mere fact that Socks and the defendant had known each other for several years

before these transactions is insufficient to prove the two buys were part of a single, continuous, overarching conspiracy between them to buy and sell illegal drugs. In this respect, the Herrick court noted that the creation of a corrupt partnership or business venture is different from a conspiracy to commit a specific crime. A fact pattern similar to the one in Herrick and the instant case also appears in Martinez, supra, where the Superior Court affirmed the trial court's refusal to merge for sentencing purposes two convictions for conspiracy in connection with two drug transactions.

Commonwealth v. Troop, supra, is yet another example of a fact pattern very much like that in the case at bar. The defendant in that case and his four co-conspirators consumed cocaine and shortly thereafter agreed to and committed a robbery in order to obtain money to buy more drugs. They consumed the drugs and then approximately one day later, these five persons met again and planned another robbery in order to obtain more money for drugs. They carried out the robbery and again consumed the drugs which were purchased with the proceeds of the second robbery. Later on the same day as the second robbery, these same persons agreed to and committed a third robbery for the same purpose as before. The Superior Court disagreed with the trial court's ruling that there was one continuous conspiracy and found that the three episodes were separated in time and place and featured no single, pre-existing criminal plan which encompassed the three separate robberies. "Instead, the evidence suggested that the group formulated a separate criminal plan and committed a robbery each time the group needed money to buy more cocaine...[T]he idea and agreement to commit each robbery was formed only after the available cocaine had been used by the co-defendants." Id. at 1090. (Emphasis in original.) As with the instant case, there was insufficient evidence to prove that the crimes were intertwined in the sense that one was necessary for the other to succeed.

The evidence at trial was more than sufficient to prove the defendant was involved in two separate and distinct agreements to deliver cocaine. There was no single, pre-existing plan to commit multiple deliveries and the success of one delivery did not hinge on the success of the other. Under these circumstances, the court's imposition of a separate sentence for each conspiracy conviction was legal and the defendant's claim for relief under the Post-Conviction Relief Act must be denied.

ORDER OF COURT

Now this 24th day of January 2007, upon review and consideration of the defendant's Petition and Amended Petition for post-conviction collateral relief, the Commonwealth's Answer, the written arguments of counsel and the record, the court hereby denies the Petition.

¹The sentences imposed in count #4 for Delivery and count #6 for Conspiracy were in the mitigated range under the Pennsylvania Sentencing Guidelines. The sentences imposed in the other counts fell within the standard range.

²The defendant in his original pro se petition also alleged that counsel who represented him at trial and at sentencing was ineffective in connection with this merger issue. Based on written argument filed after the hearing and after consulting the transcripts and pertinent authority, however, the defendant's current counsel indicated the merger issue can be addressed outside the framework of an ineffectiveness-of-counsel claim and is more appropriately classified as a challenge to the legality of the sentence under §9543(a)(2)(vii).