IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	I.D. No. 0502000662
SANDRA PATTERSON,	)	
	)	
Defendant.	)	
	)	

Date Submitted: February 21, 2006
Date Decided: May 30, 2006

Upon Defendant's Motion for Judgment of Acquittal
DENIED

Gregory E. Smith, Esquire, Deputy Attorney General, Carvel State Office Building, Wilmington, Delaware, Counsel for the State of Delaware.

John S. Malik, Esquire, Wilmington, Delaware, Counsel for the Defendant.

SCOTT, J.

On January 27, 2006, the Defendant Sandra Patterson (hereafter "Patterson") was convicted by a jury of Delivery of a Non-Narcotic Schedule IV Controlled Substance, Promoting Prison Contraband, Conspiracy Third Degree, and Conspiracy Second Degree. After trial, Patterson filed a timely Motion for Judgment of Acquittal as to the charges of Delivery of a Non-Narcotic Schedule IV Controlled Substance and Conspiracy Second Degree. Having considered the evidence at trial, the arguments in the motion, and the State's response thereto, the Court concludes that the Motion for Judgment of Acquittal must be **DENIED**.

FACTUAL BACKGROUND

The charges in this case stem from an incident that occurred at the Delaware Correctional Center ("DCC"). Prior to May 9, 2004, Co-defendant Saad Soliman ("Soliman"), an inmate housed at the DCC, had approached another inmate, Bruce Duncan ("Duncan"), in his cell and had asked Duncan to serve as an intermediary between himself and Patterson. Patterson was employed as a nurse in the infirmary and had been romantically involved with Soliman. Soliman requested that Duncan, whose environmental crew job gave him access to the infirmary, retrieve Muslim oils from Patterson on three separate occasions. Soliman promised to pay

Duncan for these services. On May 9, 2004, Duncan was stopped by prison officials and detained for carrying a bag that contained prison contraband.

DISCUSSION

Under Superior Court Criminal Rule 29, upon motion by a defendant, the Court may order the entry of judgment of acquittal as to one or more of the offenses charged where the evidence is insufficient to sustain a conviction for such offense or offenses.[1] A motion for judgment of acquittal denies the sufficiency of the evidence and challenges the State's right to go to the jury.[2] When ruling upon a motion for acquittal, the trial judge must consider the evidence and all legitimately drawn inferences from the point of view most favorable to the State.[3] The applicable standard of review is whether a rational trier of fact could have found that guilt was established.[4] A motion for acquittal is only granted when the State failed to provide evidence sufficient to sustain a guilty verdict.[5]

A. Delivery of a Non-Narcotic Schedule IV Controlled Substance

Defendant Patterson concedes in her Motion for Judgment of Acquittal that Bipin Mody ("Mody"), a forensic chemist from the Office of the Medical Examiner, testified that Ambien was the prescription name for

[1] Super. Ct. Crim. R. 29(a).
[2] *State v. Biter*, 119 A.2d 894, 898 (Del. Super. Ct. 1955).
[3] *Vouras v. State*, 452 A.2d 1165, 1169 (Del. 1982).
[4] *State v. Owens*, 1993 Del. Super. LEXIS 97.
[5] *Vouras*, 452 A.2d at 1169.

Zolpidem, a Schedule IV controlled substance, as defined by 16 *Del. C.* §4720(b)(27). Nonetheless, Patterson asserts that, pursuant to 16 *Del. C.* §4752, the State was also required to allege and prove that Ambien was a "non-narcotic."

16 *Del. C.* §4752 provides:

> …[A]ny person who manufactures, delivers or possesses with intent to manufacture or deliver a controlled substance or a counterfeit controlled substance classified in Schedule I, II, III, IV or V which is not a narcotic drug is guilty of a class E felony and upon conviction shall be fined not less than $1,000 nor more than $10,000 and imprisoned not more than 5 years.

It is a well-settled principle of criminal law that the burden of proving every material element of the crime charged in the indictment rests upon the State.[6] The State relies upon *Barnett v. State*[7] to support its position that it was not required to prove that Ambien was a "non-narcotic" drug. *Barnett* cites to *White v. State*[8] which held that if a drug was identified by a name which was specifically designated as a narcotic by the Uniform Narcotic Drug Act, such as heroin or morphine, a conviction could be upheld as the trial court need only refer to the exact words of the statutory definition.[9]

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[6] *State v. Samuels*, 67 A. 164 (Del. Oyer & Term. 1904).
[7] 579 N.E.2d 84 (Ind. Ct. App. 1991).
[8] 316 N.E.2d 699, 701 (Ind. Ct. App. 1991).
[9] *Id*. at 702; *See also People v. Parent*, 543 P.2d 1241, 1242 (Colo. 1975)(holding that prosecution was not required to prove that marijuana was in fact a narcotic drug, in light of fact that marijuana was then statutorily classified as a narcotic and such classification satisfied threshold constitutional rationality).

However, if a substance was not specifically enumerated by the Uniform Narcotic Drug Act, the court found that the State could establish it as a legally defined narcotic drug by submitting some additional extrinsic evidence describing its chemical identity, characteristics, ingredients, or derivation so as to bring it within the Act's definition.[10] Similarly, in *Santine v. State*,[11] the court noted that the State need only prove the substance was heroin for there to be sufficient evidence for conviction under 16 *Del. C.* §4751, since heroin was defined as a narcotic schedule I controlled substance under 16 *Del. C.* §§ 4701(21) and 4714(10).[12]

The drug involved in the present case, Ambien, is a "non-narcotic," a term that is undefined by 16 *Del. C.* §4701. Thus, it was sufficient that the State only proved that the substance was a Schedule IV controlled substance. Unlike *Santine* and *White*, the State did not need to submit additional extrinsic evidence describing the chemical identity, characteristics, ingredients or derivation because it did not need to bring the drug within the Act's definition of a narcotic. Moreover, since 16 *Del. C.* §4751(b)[13] makes

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[10] *Id*. at 703.
[11] 1987 WL 4689 (Del. Supr.).
[12] *Id*. at *1.
[13] 16 *Del. C.* §4751 provides in relevant part:
(b) Except as authorized by this chapter, any person who manufactures, delivers or possesses with the intent to manufacture or deliver a controlled substance or a counterfeit controlled substance classified in Schedule III, IV or V which is a

delivery of a narcotic Schedule IV controlled substance more serious than delivery of a non-narcotic Schedule IV controlled substance,[14] the Court finds that "non-narcotic" is not an essential element of the crime. The effect of these sections is, not to make two distinct crimes, but to make two grades of the same crime. "Non-narcotic" is merely a descriptive term used to distinguish it from the higher grade of the same offense, delivery of a narcotic Schedule IV substance. Therefore, "non-narcotic" is not an essential element of the crime and the State does not have the burden of proving that element. Accordingly, Patterson's Motion for Judgment of Acquittal is denied with respect to the charge of Delivery of a Non-Narcotic Schedule IV Controlled Substance.

B. Conspiracy Second Degree

Patterson next asserts that judgment of acquittal must be granted as to the Conspiracy Second Degree charge because the object of the alleged conspiracy was the delivery of a non-narcotic Schedule IV controlled substance and the State failed to prove an essential element of that charge.

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narcotic drug is guilty of a class E felony and shall be fined not less than $3,000 nor more than $15,000.

[14] 16 *Del. C.* §4752 provides:

(a) Except as authorized by this chapter, any person who manufactures, delivers or possesses with intent to manufacture or deliver a controlled substance or a counterfeit controlled substance classified in Schedule I, II, III, IV or V which is not a narcotic drug is guilty of a class E felony and upon conviction shall be fined not less than $1,000 nor more than $10,000 and imprisoned not more than 5 years.

She further argues that judgment of acquittal must be granted because Duncan testified that he did not know that he was delivering Ambien. These claims, however, are unavailing.

As defined in *State v. Cole*,[15]

> A conspiracy is the combination of two or more persons to do either an unlawful act or a lawful act by criminal or unlawful means with unity of design and purpose. The gist of the offense is the unlawful combination between the parties. No formal agreement between the parties to the conspiracy charged is necessary. It is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and commit the offense charged. Conspiracy implies concert of design and not participation in every detail necessary to carry the general purpose or design into execution. Though the common design is the essence of the charge, it is not necessary to prove that the accused came together and actually agreed in terms to have that design and to pursue it by common means.[16]

A conspiracy may be shown by either direct or circumstantial evidence.[17] A jury's guilty verdict on a conspiracy charge and an acquittal on the underlying felony are not always legally inconsistent verdicts.[18] Under Delaware law, it is not necessary for a defendant to commit the overt act underlying the conspiracy charge.[19] It is sufficient that a co-conspirator commit the overt act.[20]

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[15] Gen. Sess. Del., 1 W.W. Harr. 279, 114 A. 201.
[16] *Id*. at 204.
[17] *State v. Wallace*, 214 A.2d 886, 890 (Del. Super. Ct. 1963).
[18] *See Robertson v. State*, 630 A.2d 1084, 1095 (Del. 1993); *Alston v. State*, 554 A.2d 304, 312 (Del. 1989).
[19] 11 *Del. C.* §512 provides:

On a motion for judgment of acquittal the evidence and reasonable inferences must be considered in the light most favorable to the State.[21] Looking at the evidence as a whole and the reasonable inferences in a light most favorable to the State, the Court finds that a trier of fact could find Patterson guilty of conspiracy beyond a reasonable doubt. Duncan specifically testified that he had agreed to act as an intermediary between Patterson and Soliman on three agreed upon transactions. He stated that on May 9, 2004, he knew that he was delivering a letter, Muslim oil, and plastic vials from Patterson to Soliman but did not know about the delivery of the pills. The letter in the bag warned Soliman not to take too much Ambien. Based upon Duncan's testimony and the letter written by Patterson it was reasonable for a jury to infer that there was a concert of design. Conspiracy implies concert of design and not participation in every detail necessary to carry the general purpose or design into execution.[22] The jury is the sole trier of fact responsible for determining witness credibility, resolving

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> A person is guilty of conspiracy in the second when, intending to promote or facilitate the commission of a felony, the person:
> (1) Agrees with another person or persons that they or 1 or more of them will engage in conduct constituting the felony or an attempt or solicitation to commit the felony; or
> (2) Agrees to aid another person or persons in the planning or commission of the felony or an attempt or solicitation to commit the felony; and *the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy*. (emphasis added).

[20] *See Stewart v. State*, 437 A.2d 153, 156 (Del. 1981); *Alston*, 554 A.2d at 312.
[21] *Vouras*, 452 A.2d at 1169 (quoting *Biter*, 119 A.2d at 898).
[22] *State v. Biter*, 119 A.2d 894, 897 (Del. Super. Ct. 1955).

conflicts in testimony and for drawing any inferences from the proven facts.[23] Therefore, Patterson's Motion for Judgment of Acquittal on the Conspiracy Second Degree charge is denied.

CONCLUSION

For all of the foregoing reasons, defendant Patterson's Motion for Judgment of Acquittal is hereby **DENIED.**

IT IS SO ORDERED.

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Judge Calvin L. Scott, Jr.

[23] *Pryor v. State*, 453 A.2d 98, 100 (Del. 1982)(the jury is the sole judge of a witness' credibility and is responsible for resolving conflicts in testimony); *State v. Matushefske*, 215 A.2d 443, 446 (Del. Super. Ct. 1965)(determination of true facts and the drawing of any inferences from the proven facts are matters solely within the jury's province)).