

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brian Phillips, :
 :
 Petitioner :
 :
 v. : No. 1241 C.D. 2011
 : Submitted: November 23, 2011
 Pennsylvania Board of Probation :
 and Parole, :
 Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: December 30, 2011

Brian Phillips petitions for review of the June 14, 2011, order of the Pennsylvania Board of Probation and Parole (Board), which affirmed the decision to recommit Phillips as a technical parole violator (TPV). We affirm.

Phillips was serving a sentence for rape and attempted homicide when he was released on parole in 2008. (C.R. at 19.) As a special condition of his parole, Phillips was required to receive sex offender treatment and obey the rules of the sex offender treatment program. (*Id.* at 21.) In addition, Phillips was not permitted to possess sexually explicit materials. (*Id.* at 26-29.)¹

¹ We note that the record does not contain a document setting forth this special condition of parole. (*See* C.R. at 20-24 (setting forth the special conditions of parole for Phillips).) However, Phillips' parole agent revealed at Phillips' parole revocation hearing that he placed this condition on Phillips on October 12, 2008. (C.R. at 85.)

Phillips received sex offender treatment from Forensic Treatment Services (FTS). However, Phillips failed to attend all of the required group and individual treatment sessions at FTS. As a result, on August 18, 2010, FTS had Phillips sign a “Therapeutic Contract,” agreeing that he “must attend all scheduled group and individual sessions.” (*Id.* at 99.) The contract stated, “I understand that there is Zero tolerance to any infractions to the guidelines listed above. If I fail to meet these guidelines I am facing discharge from treatment at [FTS].” (*Id.*)

Phillips continued to miss treatment sessions, and, on October 14, 2010, FTS discharged Phillips from its program. (*Id.* at 27.) Parole agents arrested Phillips at his apartment on October 19, 2010, for a technical violation of his parole. (*Id.*) While searching the apartment, the agents found eight pornographic movies, a pornographic magazine and various sex toys. (*Id.*) The Board charged Phillips with two violations of the conditions of his parole: (1) failure to comply with the rules of the sex offender treatment program; and (2) possession of sexually explicit materials. (*Id.* at 29.) The Board held a violation hearing on December 28, 2010. (*Id.* at 45.)

At the hearing, Vicky Moyer, an FTS therapist, testified on behalf of the Board that: (1) Phillips’ attendance at treatment sessions was sporadic, (*id.* at 55); (2) several of the absences were excused due to illness, but Phillips failed to attend the re-scheduled sessions, (*id.* at 55-56); (3) FTS had Phillips sign the zero-tolerance “Therapeutic Contract,” (*id.* at 56); (4) Phillips then missed sessions on September 15 (individual session – Phillips missed his bus), September 22 (excused for illness), September 29 (excused for illness) and October 5 (group session), (*id.* at 56-58, 62-

63); (5) the October 5 group session was originally scheduled for October 6, but a group member informed Phillips of the change, (*id.* at 63); (6) when Phillips was confronted about his October 5 absence at the October 13 group session, Phillips stated that he had to work late, but Phillips did not contact FTS all week to explain his absence, (*id.* at 58); and (7) FTS subsequently discharged Phillips from the program, (*id.* at 58).

Phillips' parole agent testified that: (1) on October 19, 2010, he and another agent found sexually explicit materials in a dresser drawer in Phillips' apartment that contained Phillips' clothes, (*id.* at 66-67, 69); and (2) the agent was aware that Phillips' brother was staying with him from time to time, but the agent was not aware that Phillips' sister stayed with him, too, (*id.* at 68).

Phillips testified about the health problems that caused him to miss some treatment sessions. With regard to his absence on October 5, Phillips denied that a group member informed him of the schedule change prior to the meeting; Phillips stated that he went to the regularly scheduled session on October 6, but FTS was closed. (*Id.* at 77-78, 83.) Phillips conceded that he should have called FTS to explain what happened, but he was sick. (*Id.* at 84.) With regard to his failure to attend the September 15 individual session, Phillips explained that he missed his bus and immediately informed FTS. (*Id.* at 78-79.) With respect to the sexually explicit materials, Phillips testified that he "never knew that stuff was there." (*Id.* at 80.) Phillips stated that it belonged to his sister, who stayed with him for a time and used the dresser in question for her clothes. (*Id.* at 80, 86.) Phillips conceded that it was his responsibility to know what people brought into his apartment. (*Id.* at 80.)

After considering the evidence, the Board recommitted Phillips as a TPV to serve his unexpired term. Phillips filed a request for administrative review, arguing that, except for one treatment session, Phillips' absences were excused for illness, and the Board failed to prove that Phillips actually possessed the sexually explicit materials found in his apartment. The Board affirmed based on the credible testimony of Vicky Moyer and the parole agent. Phillips now petitions this court for review.²

Phillips argues that, with respect to his absence from the October 5 group session, which resulted in his discharge from the FTS program, Vicky Moyer's testimony that a group member told Phillips about the schedule change was hearsay. This is incorrect. Vicky Moyer testified:

Q. His normal [group session] schedule, would have been the 6th and the 13th [of October], that would have been his scheduled day, is that what you're saying?

A. Yes. But group was moved to the 5th [of October] and Mr. Phillips was aware of that. In fact, another group member had contacted him that day and talked to him on the phone and he said that he would see him in group.

(*Id.* at 63.) Vicky Moyer did **not** testify regarding what the other group member **told** her, and counsel for Phillips did **not** ask Vicky Moyer whether her knowledge of the phone call was based on what the other group member told her or whether she was

² Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

present when the other group member made the phone call. Thus, we reject the first argument by Phillips.

Phillips next argues that the Board failed to prove that Phillips had constructive possession of the sexually explicit materials found in his apartment. We disagree.

Possession can be proven by showing actual possession or constructive possession. *Commonwealth v. Macolino*, 503 Pa. 201, 206, 469 A.2d 132, 134 (1983). Constructive possession has been defined as the ability to exercise a conscious dominion over the material, i.e., the power to control the material and the intent to exercise that control. *Id.* The intent to maintain a conscious dominion may be inferred from the totality of the circumstances, and circumstantial evidence may be considered. *Id.*

A review of numerous cases shows that the phrase “joint control and equal access” is the defining criteria for whether constructive possession exists. In every case examined since *Macolino* in 1983, a defendant who lived in the dwelling where the [materials] were found *and* who had access to the specific places in the dwelling where the [materials] were located was found to have constructively possessed them, *irrespective* of how many other people also had equal access to the [materials] or if the [materials] were hidden.

Manley v. Fitzgerald, 997 A.2d 1235, 1239-40 (Pa. Cmwlth. 2010) (footnote omitted) (emphasis in original).

Here, the Board did not find credible Phillips' testimony that the sexually explicit materials in the dresser drawer belonged to his sister. Indeed, Phillips' testimony that his sister used the dresser contradicts the parole agent's testimony that the dresser contained Phillips' clothes. Thus, Phillips had access to the dresser drawer and, inasmuch as it contained his clothes, Phillips would have had the intent to exercise control over its contents.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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v.	:	No. 1241 C.D. 2011
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Pennsylvania Board of Probation	:	
and Parole,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 30th day of December, 2011, the order of the Pennsylvania Board of Probation and Parole, dated June 14, 2011, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge