

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
KWAMAINE HAND,	:	
	:	
Appellant	:	No. 1090 EDA 2011

Appeal from the Judgment of Sentence entered on March 21, 2011  
in the Court of Common Pleas of Philadelphia County,  
Criminal Division, No. CP-51-CR-0006711-2010

BEFORE: MUSMANNO, WECHT and PLATT\*, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: March 11, 2013

Kwamaine Hand ("Hand") appeals from the judgment of sentence imposed after he was convicted of possession of a controlled substance and possession with the intent to deliver a controlled substance ("PWID"). **See** 35 P.S. § 780-113(a)(16), (a)(30). We affirm.

The trial court set forth the facts underlying this appeal as follows:

At trial, the Commonwealth presented the testimony of Philadelphia Police Officer Pat DiDomenico and Officer Paul Hays. Viewed in the light most favorable to the Commonwealth, the testimony presented [] established the following facts:

On February 25, 2010, at approximately 12:34 P.M., Officer DiDomenico was on duty at the 3900 block of Melon Street. Officer DiDomenico and his partner, Officer Hays, were in full uniform in a marked police vehicle when [Officer DiDomenico] observed a Pontiac Grand Prix[,] with a PA license plate tag of HLC7271[,] that was double[-]parked close to the top of the 3900 block with the engine still running. Officer DiDomenico was approximately 40 to 45 feet behind the vehicle when he observed [Hand] exit the driver['s] side [door]. [Hand

\*Retired Senior Judge assigned to the Superior Court.

then walked to] an open lot that was located behind a corner property on Union Street but faced the 3900 block of Melon [Street].

Officer DiDomenico was able to clearly see [Hand] discard with his hands four clear plastic bags containing smaller objects. Officer DiDomenico was approximately 20 to 25 feet away from [Hand] when he discarded the objects. [Hand] started to exit the lot when Officer DiDomenico stopped [him] for an investigation. Officer DiDomenico directed Officer Hays to where he saw [Hand] discard the plastic bags. Officer Hays walked to the back of the lot along the fence line and found the objects in less than two to three minutes. The objects were sitting on top of snow, rocks, and debris. Then, Officer Hays recovered the objects that Officer DiDomenico watched [Hand] discard.

The objects were four clear plastic sandwich bags. The four clear plastic bags [each] contained 40 smaller clear plastic Ziploc packets[; thus, there were] a total of 160 [small plastic packets]. The 160 packets were tested and all came back positive for crack cocaine base. [Hand] was arrested [and was subsequently charged with the above-mentioned narcotics offenses.] [Hand] was also issued two traffic citations .... The vehicle that [Hand had] exited was then [] stopped and towed.

At [Hand's non-jury] trial, there was a formal stipulation between counsel that if the narcotics expert was to testify[,] he would testify to a reasonable degree of expert certainty that the 160 packets were possessed with intention to deliver.

[Hand] testified on his own behalf that the running vehicle on [the] 3900 [block of] Melon Street belonged to his brother[, who, Hand alleged,] ... was never in the vehicle. [Hand] also testified that he [had entered] the open lot to reach the back of his aunt's house [in order to] yell for her to open the front door [of her residence]. However, [the trial c]ourt found [Hand's] testimony to be wholly incredible.

Trial Court Opinion, 6/29/12, at 2-3 (citations omitted).

At the close of Hand's trial, the trial court found Hand guilty of all counts. Subsequently, the trial court imposed a sentence of one to two

years in jail, followed by two years of probation. Hand timely filed a Notice of appeal.

On appeal, Hand raises the following issue for our review: "Did the trial court err in deciding that the evidence was sufficient to convict [Hand] [] of [PWID] and knowing and intentional possession of a controlled substance?" Brief for Appellant at 6 (capitalization omitted).

Our standard of review of a sufficiency of the evidence claim is well settled:

We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail. The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented.

*Commonwealth v. Mobley*, 14 A.3d 887, 889-90 (Pa. Super. 2011) (citation and paragraph break omitted).

Hand argues that the Commonwealth did not present sufficient evidence to sustain either of his convictions, since it failed to establish that he had constructive possession of the narcotics found by Officers DiDomenico and Hays.<sup>1</sup> Brief for Appellant at 14. Hand asserts that

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<sup>1</sup> Hand concedes that the narcotics were possessed with the intent to deliver; the only element at issue is whether Hand possessed the narcotics. **See** Brief for Appellant at 14.

although Officer DiDomenico testified to seeing Hand discard four clear plastic bags near the area where the officers found the narcotics, “Officer DiDomenico did not testify to any evidence that demonstrated [Hand’s] connection to the controlled substance found[.]” *Id.* at 15. Hand further points out that Officer Haye testified that the general area in which the officers had found the narcotics was a known high-crime area. *Id.* at 15, 16. Finally, Hand asserts that the circumstances surrounding his arrest tend to exculpate him. *Id.* at 15. Specifically, Hand contends that (1) “[w]hen Officer DiDomenico, who was in uniform, approached [Hand], [Hand] did not run or show any sign of perceived guilt[;]” (2) “[t]here was no testimony that narcotics were found in the vehicle [that Hand had] allegedly exited from[;]” and (3) “[t]here was no money found on [Hand, and t]here was no paraphernalia found that was consistent with either the use of the sale of drugs.” *Id.*

In its Opinion, the trial court adeptly set forth the applicable law and concisely discussed its reasons for concluding that the evidence supported each of Hand’s convictions. *See* Trial Court Opinion, 6/29/12, at 4-7.<sup>2</sup> Since the trial court’s sound reasoning is supported by the law and the certified record, we affirm on this basis. *See id.*; *see also Commonwealth v. Clark*, 746 A.2d 1128, 1136-37 (Pa. Super. 2000)

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<sup>2</sup> We note that the trial court provides an incorrect case citation on page 4 of its Opinion; the correct citation is as follows: *Commonwealth v. Cardona*, 463 A.2d 11, 15 (Pa. Super. 1983).

(where police officers had observed the appellant entering a vacant lot to obtain small objects for use in presumed drug sales and the appellant was the only person who had approached the lot during the police surveillance, holding that the evidence was sufficient to establish that the appellant constructively possessed narcotics hidden in the lot); **see also *Commonwealth v. Smith***, 392 A.2d 727, 729 (Pa. Super. 1978) (where the evidence was sufficient to prove that the appellant had possessed narcotics and a handgun that he concealed in a paper bag located at his feet, stating that “[t]he fact that the contraband was located on a public street accessible to other persons does not alter this conclusion” and “[a]lthough appellant attempted to separate himself from the contraband, his efforts were insufficient to avoid conviction.”).

Since we conclude that the totality of the evidence, taken in a light most favorable to the Commonwealth as the verdict winner, was sufficient to sustain Hand’s convictions of possession of a controlled substance and PWID, Hand’s sole claim on appeal fails.

Judgment of sentence affirmed.

FILED

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Appellate Appeals Unit  
First Judicial District of PA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF  
PENNSYLVANIA

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CP-51-CR-0006711-2010

v.

KWAMAINE HAND

OPINION

Coleman, R.

DATE:

**I. PROCEDURAL HISTORY**

After the bench trial on March 21, 2011, this Court found the Defendant/Appellant Kwamaime Hand guilty of Possession of a Controlled Substance with Intent to Deliver and Knowing and Intentional Possession of a Controlled Substance. On the same date, this Court sentenced Defendant to a period of one to two years incarceration. Defendant filed a timely appeal. On April 20, 2011, the trial counsel filed a Motion to Withdraw as counsel. On September 13, 2011, Mr. Doyle was appointed to represent the Defendant on appeal. On December 9, 2011, Defendant filed this appeal by and through his counsel, Mr. Doyle.

**II. ISSUE PRESENTED BY DEFENDANT**

In the Statement of Errors, filed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), Mr. Doyle alleges *verbatim* the following on appeal:

That, the evidence was insufficient to demonstrate that the Appellant possessed the drugs as required for a conviction of Possession with the Intent to Deliver pursuant to 35 §780-113(30) or for Simple Possession pursuant to 35 §780-113(16).

Defendant's Concise Statement of Errors Complained of on Appeal, p. 1 (December 9, 2011).

### III. FACTS

At trial, the Commonwealth presented the testimony of Philadelphia Police Officer Pat DiDomenico and Officer Paul Haye. Viewed in the light most favorable to the Commonwealth, the testimony presented and established the following facts:

On February 25, 2010, at approximately 12:34 P.M., Officer DiDomenico was on duty at the 3900 block of Melon Street. Notes of Testimony [hereinafter "N.T."], p. 9. Officer DiDomenico and his partner, Officer Haye, were in full uniform in a marked police vehicle when he observed a Pontiac Grand Prix with a PA license plate tag of HLC7271 that was doubled parked close to the top of the 3900 block with the engine still running. *Id.* Officer DiDomenico was approximately 40 to 45 feet behind the vehicle when he observed the Defendant exit the driver side. N.T., 10. The Defendant entered an open lot that was located behind a corner property on Union Street but faced the 3900 block of Melon. N.T., 10.

Officer DiDomenico was able to clearly see the Defendant discard with his hands four clear plastic bags containing smaller objects. *Id.* Officer DiDomenico was approximately 20 to 25 feet away from the Defendant when he discarded the objects. N.T., 28. The Defendant started to exit the lot when Officer DiDomenico stopped the Defendant for an investigation. N.T., 10. Officer DiDomenico directed Officer Haye to where he saw the Defendant discard the plastic bags. *Id.* Officer Haye walked to the back of the lot along the fence line and found the objects in less than two to three minutes. N.T., 62. The objects were sitting on top of snow, rocks, and debris. *Id.* Then, Officer Haye recovered the objects that Officer DiDomenico watched the Defendant discard. N.T., 10, 25.

The objects were four clear plastic sandwich bags. N.T., 11. The four clear plastic bags contained 40 smaller clear plastic Ziploc packets with a total of 160 bags. N.T., 11, 49. The 160 packets were tested and all came back positive for crack cocaine base. N.T., 68. The Defendant was arrested for a narcotics violation. *Id.* The Defendant was also issued two traffic citations; one for parked unattended vehicle while the engine was running and the other for driving with a suspended license. *Id.* The vehicle that the Defendant exited was then lived stopped and towed. N.T., 18.

At trial, there was a formal stipulation between counsel that if the narcotics expert was to testify he would testify to a reasonable degree of expert certainty that the 160 packets were possessed with intention to deliver. N.T., 69.

Defendant testified on his own behalf that the running vehicle on 3900 Melon Street belonged to his brother and that he was never in the vehicle. N.T., 93. He also testified that he went into the open lot to reach the back of his aunt's house so that he can yell for her to open the front door. N.T., 92. However, this Court found his testimony to be wholly incredible.

## **DISCUSSION**

### **1) The evidence produced at trial was sufficient to demonstrate Defendant's guilt beyond a reasonable doubt.**

#### **a. Standard of Review**

It is well established in Pennsylvania that when considering a challenge to the sufficiency of evidence adduced at trial, the court must decide whether this evidence, viewed in the light most favorable to the Commonwealth, together with all reasonable inferences therefrom, could enable the fact finder to find every element of the crimes charged to be established by the prosecution beyond a reasonable doubt. Commonwealth v. Little, 879 A.2d 293, 297 (Pa. Super. Ct. 2005), *appeal denied* 890 A.2d 1057 (Pa. 2005). In making this



assessment, a reviewing court may not weigh the evidence and substitute its own judgment for that of the fact finder, who is free to believe all, part, or none of the evidence presented.

Commonwealth v. Adams, 882 A.2d 496, 498-99 (Pa. Super. Ct. 2005). The Commonwealth may satisfy its burden of proof entirely by circumstantial evidence, and “if the record contains support for the verdict, it may not be disturbed.” *Id.* at 499, quoting Commonwealth v. Burns, 765 A.2d 1144, 1148 (Pa. Super. Ct. 2000), *appeal denied* 782 A.2d 542 (Pa. 2001). The facts and circumstances need not preclude every possibility of innocence – the fact finder may resolve any doubts concerning the defendant’s guilt, 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. Commonwealth v. Cassidy, 668 A.2d 1143, 1144 (Pa. Super. Ct. 1995).

**b. The evidence established that Defendant possessed the crack cocaine with intent to deliver.**

In order to convict Defendant with intent to deliver, the Commonwealth must prove beyond a reasonable doubt that that Defendant possessed a controlled substance, and that the defendant did so with the intent to transfer or deliver that controlled substance. 35 P.S. 780-113(a)(30); Commonwealth v. Cardona, 462 A.2d 11, 15 (Pa. Super. Ct. 1983). The intent to deliver can be inferred from examining all the facts and circumstances surrounding the case. Commonwealth v. Robinson, 582 A.2d 14, 17 (Pa. Super. Ct. 1990). “Factors to consider in determining whether the drugs were possessed with intent to deliver include the particular method of packaging, the form of the drug, and the behavior of the defendant.” Commonwealth v. Perez, 931 A.2d 703, 708 (Pa. Super. Ct. 2007) (citing Commonwealth v. Kirkland, 831 A.2d 607, 611 (Pa. Super. Ct. 2003)).

The Commonwealth has the option to establish actual or constructive possession of a controlled substance. Perez, 931 A.2d at 708. Actual possession is shown when a defendant had

the controlled substance on his person. Commonwealth v. Macolino, 469 A.2d 132, 134 (Pa. 1983). However, when drugs are not discovered on the defendant's person, the Commonwealth has the burden to show that the defendant constructively possessed the drugs. *Id.* A person is deemed to have constructive possession if he or she has the ability to exercise conscious dominion over the illegal substance. *Id.* Conscious dominion means the power to control the contraband and the intent to exercise that control, and intent to maintain a conscious dominion over the controlled substance may be inferred from the totality of the circumstances. *Id.* Further, circumstantial evidence may be used to establish defendant's possession of an illegal substance. *Id.* A decision by the trial court will be affirmed so long as there was a combination of evidence that links the accused to the crime beyond a reasonable doubt. Perez, 931 A.2d at 708.

Our review of the record reflects that Officer DiDomenico observed Defendant discarding four clear plastic bags containing crack cocaine. The Officer was in full uniform and in a marked police vehicle on the 3900 block of Melon Street where he observed Defendant exit the driver side of a Pontiac Grand Prix that was double parked with the engine still running. At that time, the Officer was approximately 40 to 45 feet behind the vehicle. The Defendant entered an open lot that was located behind a corner property on Union Street but faced the 3900 block of Melon. The Officer was able to clearly observe, from approximately 20 to 25 feet away, Defendant discard with his hands four clear plastic bags. The plastic bags were discarded at the back of the lot along the fence line. Officer DiDomenico directed his partner, Officer Haye, to the back of the lot, where he saw Defendant discard the plastic bags. Officer Haye recovered the four discarded clear plastic bags. The four clear plastic bags contained 40 smaller clear plastic Ziploc packets with a total of 160 bags. The 160 bags tested positive for crack cocaine base. At

trial, there was a formal stipulation between counsel that the narcotics expert would testify to a reasonable degree of expert certainty that the 160 packets were possessed with intention to deliver. Similar to the defendant in Perez, Defendant did not have a controlled substance in his possession during the arrest. However, because the Officer saw the Defendant discard 160 packets containing a crack cocaine base, circumstantial evidence established that the Defendant possessed an illegal substance. Therefore, the evidence was sufficient to sustain Defendant's conviction of possession with intent to distribute.

**c. The evidence established that Defendant knowingly or intentionally possessed a controlled substance.**

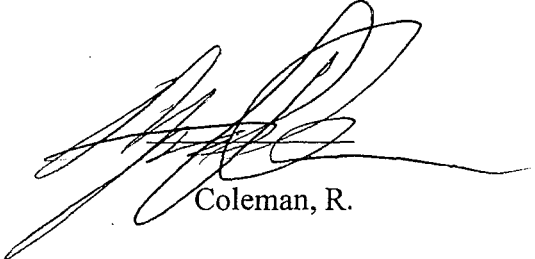
Under Pennsylvania law, it is illegal to “knowingly or intentionally possess a controlled substance by a person not registered under this act, or by a practitioner not registered or licensed by the appropriate State board, unless the substance was obtained directly from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by this act.” 35 P.S. §780-113(a)(16). Under this statute, the Commonwealth has the burden of proving that the defendant possessed a controlled substance knowingly or intentionally in order to obtain a conviction for possession of a controlled substance. Commonwealth v. Sojourner, 408 A.2d 1108, 1111 (Pa. Super. Ct. 1979). Possession can be proven by either actual or constructive possession, but a person does not necessarily “possess” a controlled substance simply because he was aware of its presence or was physically close to it. Commonwealth v. Fortune, 318 A.2d 327, 328-329 (Pa. 1974). Nonetheless, while not possession per se, these factors when viewed under the totality of the circumstance, allows an inference of possession to be drawn. *Id.*

This Court found that the evidence was sufficient to convict Defendant of possession of the 160 bags containing a crack cocaine base. Although the Defendant did not have actual

possession at the time of the arrest, an inference of possession that the Defendant at one point possessed the drugs can be drawn. Officer DiDomenico observed the Defendant enter the open lot and discard the four clear plastic bags along the back fence of the lot. Less than two to three minutes later, Officer Haye recovered the plastic bags that Officer DiDomenico observed the Defendant discard. The four clear plastic bags tested positive for a crack cocaine base. Earlier in the day there was a snowstorm. The 160 bags of crack cocaine were found on top of the snow which leads to an inference that it had just recently occurred. Viewed under the totality of the circumstances, the evidence is sufficient to find that the Defendant knowingly or intentionally possessed a controlled substance.

#### **IV. CONCLUSION**

For the above stated reasons the judgment and sentence of this Court should be upheld and Appellant's claims should be denied.



Coleman, R.