

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
GREG COX,	:	
	:	
Appellant	:	No. 1100 EDA 2011

Appeal from the Judgment of Sentence entered on April 5, 2011
in the Court of Common Pleas of Philadelphia County,
Criminal Division, No. CP-51-CR-0010595-2010

BEFORE: MUSMANNO, WECHT and PLATT*, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: March 18, 2013

Greg Cox ("Cox") appeals from the judgment of sentence imposed after he was convicted of possession with intent to deliver a controlled substance and criminal conspiracy.¹ We affirm.

The pertinent facts and procedural history of this case are set forth in the trial court's Opinion, which we adopt for the purpose of this appeal. **See** Trial Court Opinion, 4/17/12, at 1-4.

In this timely appeal, Cox raises the following issue:

Was not the evidence insufficient to support [Cox's] conviction for delivery/possession with intent to deliver a controlled substance and conspiracy inasmuch as the police did not recover illegal drugs from [Cox] or his alleged co-conspirator, or any illegal drugs from a nearby alley, which was the suspected site of the drug stash and did not see what was transferred to two purported buyers who were later found with drug[] vials in their possession?

¹ 35 P.S. § 780-113(a)(30); 18 Pa.C.S.A. § 903.

*Retired Senior Judge assigned to the Superior Court.

Brief for Appellant at 3.

Cox alleges that the evidence was insufficient to support his conviction of possession with intent to deliver a controlled substance. Cox contends that the evidence that he delivered drugs was speculative because neither Cox nor his co-conspirator personally possessed controlled substances when arrested. Cox also asserts that the evidence was insufficient to sustain his conviction of possession with intent to deliver because the police did not find a drug stash in the alley. He further contends that the Commonwealth did not establish a connection between the money that Cox and his co-conspirator possessed and the alleged drug sales, and that the first buyer, King, was not stopped until an hour after the alleged drug transaction.

The Pennsylvania Rules of Appellate Procedure require that an appellant set forth, in the Argument section of his appellate brief, a reference to the place in the record "where the matter referred to appears." Pa.R.A.P. 2119(c). The failure to develop an argument properly in an appellate brief, including proper citation to the record, results in waiver. ***Commonwealth v. Beshore***, 916 A.2d 1128, 1140 (Pa. Super. 2007). "[T]his Court will not 'scour the record to find evidence to support an argument'". ***Id.*** (citation omitted).

In this case, Cox has failed to include citations to the record in support of his argument. Therefore, he has waived his claim on appeal. ***See id.*** However, even if Cox had preserved his claim on appeal, we would conclude

that the claim lacks merit for the reasons stated in the trial court's Opinion.

See Trial Court Opinion, 4/17/12, at 4-8.²

Judgment of sentence affirmed.

² In addition to the reasons set forth in the trial court's Opinion, we note also that although the police did not recover a "stash" of drugs in the alley, the police observed thousands of used clear plastic sandwich bags in that location, N.T., 4/5/11, at 12; money in small denominations was recovered from both Cox and his co-conspirator, *id.* at 24-26; and the police apprehended King, the first buyer, within thirty minutes after the transaction with Cox and the co-conspirator, *id.* at 16-17.

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF
PENNSYLVANIA

v.

GREG COX

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OPINION

CP-51-CR-0010595-2010

FILED

APR 17 2012

Criminal Appeals Unit
First Judicial District of PA

Coleman, R.

DATE:

I. PROCEDURAL HISTORY

After the bench trial on April 5, 2011, this Court found the Defendant/Appellant Greg Cox guilty of criminal conspiracy and possession with intent to deliver a controlled substance. On the same date, this Court sentenced Defendant to a period of two to six years of confinement and three years of probation. On June 13, 2011, Defendant filed this appeal by and through his counsel, Nyssa Taylor.

II. ISSUE PRESENTED BY DEFENDANT

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

Was not the evidence insufficient to support appellant's convictions for criminal conspiracy and possession with intent to deliver a controlled substance where the officer who observed the two alleged transactions, heard no drug related conversation, did not identify the "small objects" transferred, recovered no drugs from client or his co-defendant, discovered no stash of drugs from which appellant and his co-defendant allegedly sold, and where the Commonwealth merely moved seizure analyses into evidence without testimony from the

chemists, or a stipulation between counsel, to confirm that what the police recovered from the alleged buyers was in fact crack cocaine?

Defendant's Concise Statement of Errors Complained of on Appeal, p. 2 (June 13, 2011).

III. FACTS

At trial, the Commonwealth presented the testimony of Philadelphia Police Officer Prior Pratt, Officer Michael Bransfield, Officer Minita Little, Officer Edwin Vaughn, and Officer Duane White. Viewed in the light most favorable to the Commonwealth, the testimony presented and established the following facts:

On July 27, 2010, at around 7:50 P.M., Officer Pratt was on plainclothes surveillance on the area of 53 North Frazier Street for illegal narcotics sales. Notes of Testimony on April 5, 2011 [hereinafter "N.T."], p. 8. At approximately 8:00 P.M., Officer Pratt saw Defendant approached by a black male, identified as Wayne King. N.T., 8-9. After a brief conversation, Mr. King handed Defendant an unknown amount of United States currency [hereinafter "USC"]. N.T., 9. Defendant then walked eastbound on Arch Street and two minutes later, returned with another black male, identified as Aquil Joyner. *Id.* Defendant and Mr. Joyner proceeded to enter an alleyway on the east side of Frazier Street. *Id.* Approximately two minutes later, both individuals emerged from the alleyway and Officer Pratt observed Defendant hand Mr. King a small object. *Id.* After Mr. King accepted the object, he quickly walked eastbound on Arch Street. Officer Pratt radioed Mr. King's description to backup officers in the area. *Id.*

Five minutes later, at approximately 8:05 P.M., Officer Pratt observed a second black male, identified as Frederick Fields, approach Defendant and Mr. Joyner on Frazier Street. *Id.* After a brief conversation with both males, Mr. Fields handed Mr. Joyner USC. N.T., 10. Afterwards, Officer Pratt observed Mr. Joyner enter the alleyway on Frazier Street. *Id.* Officer

Pratt testified that while Mr. Joyner was in the alley, Defendant would walk and ride a bike on Frazier Street. N.T., 11. Less than two minutes later, Mr. Joyner reemerged from the alleyway and the Officer observed Mr. Joyner hand Mr. Fields small objects. N.T., 10. After accepting the small objects, Mr. Fields walked westbound on Arch Street. *Id.* Officer Pratt radioed Mr. Fields' description to backup officers. *Id.*

The Commonwealth presented the testimony of Officer Bransfield, the arresting officer of Mr. King. N.T., 15-20. Officer Bransfield testified that he saw Mr. King a few minutes after receiving the radio call. N.T., 17. Officer Bransfield testified that he continued to observe Mr. King from a distance and at approximately 8:18 P.M., Mr. King started running away the moment he saw Officer Bransfield. N.T., 17-18. Officer Bransfield gave chase and was eventually able to apprehend Mr. King. N.T., 18. The Officer testified that during the encounter, Mr. King threw a clear plastic vial with a blue cap containing alleged crack cocaine to the sidewalk. *Id.* The Officer recovered the vial and performed a NIK Test G which indicated that the item was cocaine. *Id.* Mr. King was later identified by Officer Pratt as the first buyer. N.T., 19.

The Commonwealth also presented the testimony of Officer Little, the arresting officer of Mr. Fields. N.T., 21-23. Officer Little testified that Mr. Fields was stopped several minutes after receiving the radio call. N.T., 23. The Officer recovered two clear plastic vials with a blue cap inside Mr. Fields' pants pocket. N.T., 22. The vials contained a chunky substance which tested positive for crack cocaine. N.T., 23.

After receiving radio verification that Mr. King and Mr. Fields had ~~illegal~~ an illegal substance in their possession, Officer Pratt called for backup to help arrest Defendant and Mr. Joyner. N.T., 10. Officer Vaughn arrested Defendant and recovered \$20 USC from Defendant.

N.T., 11, 25. Meanwhile, Officer White arrested Mr. Joyner and recovered \$98 USC. N.T., 11, 27. The USC recovered from Defendant and Mr. Joyner in addition to the vials and the subsequent seizure analysis recovered from Mr. King and Mr. Fields were marked Exhibits C-1 through C-6 for identification. N.T., 20, 23, 26, 28. The Exhibits were moved into evidence without objection from Defense Counsel. N.T., 29.

IV. 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). 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). 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 cocaine with intent to deliver.

In order to convict Defendant with possession with intent to deliver [hereinafter “PWID”], 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.* 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.

Relevant facts which established Defendant's guilt are as followed: Officer Pratt observed Defendant and Mr. Joyner engaged in multiple drug transactions. During the first transaction, Defendant was approached by Mr. King and the Officer observed Mr. King hand Defendant USC. Defendant then walked eastbound and returned minutes later with Mr. Joyner. The two entered the alleyway and minutes later, the Officer observed Defendant personally hand Mr. King a small object. Once Mr. King left the area, Officer Pratt gave his description to officers in the area. When Mr. King was stopped by Officer Bransfield, the Officer recovered a plastic vial with a blue cap containing a substance that tested positive for cocaine.

Defendant and Mr. Joyner were also seen participated in a second transaction. The Officer observed Mr. Joyner accept USC from Mr. Fields. Mr. Joyner then entered the alleyway and minutes later, handed Mr. Fields several small objects. Mr. Fields was apprehended minutes later and officers recovered two plastic vials with a blue cap on Mr. Fields. The substance inside the vials tested positive for cocaine. Later that evening, Defendant and Mr. Joyner were arrested and officers recovered USC from each individual. Similar to Perez, the mere fact that Defendant did not have a controlled substance in his person at the time of the arrest does not negate Defendant's criminal conduct. Since Officer Pratt saw Defendant and Mr. Joyner engaged in multiple drug transactions and since the buyers had within their possession similarly packaged vials of cocaine, evidence was sufficient to convict Defendant of PWID.

c. The evidence established that Defendant is guilty of criminal conspiracy.

Under Pennsylvania law, a person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid

such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. 18 Pa.C.S.A. §903(a). However, no person may be convicted of conspiracy to commit a crime unless an overt act in pursuant of such conspiracy is alleged and proven to have been done by him or by a person with whom he conspired. 18 Pa.C.S.A. §903(e).

Courts in this Commonwealth has further explained that “the essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation. The conduct of the parties and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt. Even if the conspirator did not act as a principal in committing the underlying crime, he is still criminally liable for the actions of his co-conspirators in furtherance of the conspiracy.” Commonwealth v. McCall, 911 A.2d 992, 996-997 (Pa. Super. Ct. 2006)(citing Commonwealth v. Johnson, 719 A.2d 778, 784-785 (Pa. Super. Ct. 1998)).

In Perez, Defendant was found guilty of criminal conspiracy. The court held that a successful proof of a conspiracy makes each co-conspirator fully liable for all of the drugs recovered. Perez, 931 A.2d at 709. The court held that the Commonwealth proved a conspiracy between defendant and his companion to sell heroin, and because the Commonwealth proved conspiracy, it did not have to prove defendant's constructive possession of the drugs found in

companion's home. *Id.* As result, the drugs recovered in the companion's home were fully attributable to the defendant even though officers never saw the defendant enter the home. *Id.*

Here, evidence was sufficient to find Defendant guilty of criminal conspiracy. This Court's review of the record reflects that Defendant was a lookout for Mr. Joyner during the second drug transaction. After Mr. Fields handed Mr. Joyner USC, Mr. Joyner went into the alleyway. Officer Pratt testified that the whole time Mr. Joyner was in the alley, Defendant walked and rode a bike on Frazier Street. This Court views such conduct as being consistent with that of a lookout during a drug transaction thus this Court determined the existence of a shared criminal intent. The overt act requirement does not have to be performed by each conspirator in order for either conspirator to be found guilty of criminal conspiracy; however, this Court determined that both Defendant and Mr. Joyner committed an overt act in furtherance of the conspiracy to sell illegal drugs. During the second transaction, Mr. Joyner accepted USC and handed Mr. Fields crack cocaine while Defendant acted as a lookout. The mere act of being a lookout during a drug transaction is sufficient evidence to sustain Defendant's conviction of criminal conspiracy since Defendant was aided his co-conspirator in the commission of a crime.

2) The Defense Counsel waived an appellate issue by failing to timely object to the admittance of evidence at trial.

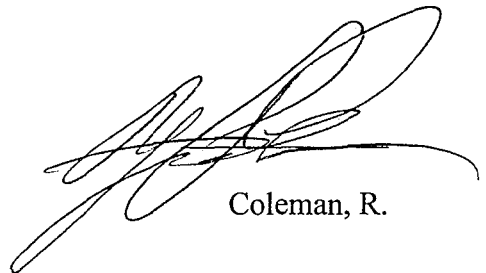
Appellate tribunals have often stated that they are bound to resolve only those issues properly preserved for review. Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority, 489 A.2d 1291, 1296 (Pa. 1985). In order to preserve an issue for appeal, a litigant must make a timely, specific objection at trial and must raise the issue on post-trial motions. *Id.* Issues not preserved for appellate review cannot be considered by an appellate court even though the alleged error involves a basic or fundamental error. *Id.* Additionally, in resolving those issues properly before us, appellate courts may only look to the record prepared in the trial court. *Id.*

Alleging facts in a brief which a trial court has not passed on has been specifically condemned and such practices are viewed as improper. *Id.*

Here, Commonwealth presented testimonies from Officer Bransfield and Officer Little that the vials recovered from Mr. King and Mr. Little tested positive for crack cocaine. The Commonwealth marked these exhibits for identification and eventually moved these exhibits into evidence. Counsel for Defendant effectively waived the issue on appeal by failing to object the introduction of these exhibits into evidence. Defense Counsel did not make a timely, specific objection at trial thus the issue was not properly preserved for appellate review. Because Appellate Courts may only look at records prepared at trial, Defendant's argument that the Commonwealth improperly introduced evidence at trial is without merit.

V. 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.