NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CALVIN FROST Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 123 WDA 2011

Appeal from the Judgment of Sentence of December 10, 2010
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0006162-2009

BEFORE: MUSMANNO, J., BOWES, J., and WECHT, J.

MEMORANDUM BY WECHT, J. Filed: March 1, 2013

Calvin Frost ["Appellant"] appeals from a December 10, 2010 judgment of sentence. Following a non-jury-trial, Appellant was convicted of possession with intent to deliver crack cocaine,[1] receiving stolen property,[2] possession of crack cocaine,[3] possession of drug paraphernalia,[4] criminal conspiracy,[5] and two counts of person not to possess a firearm.[6] Appellant

---

1 35 P.S. § 780-113(a)(30).

2 18 Pa.C.S.A. § 3925(a).

3 35 Pa.C.S.A. § 780-113(a)(16).

4 35 Pa.C.S.A. § 780-113(a)(32).

5 18 Pa.C.S.A. § 903.

6 18 Pa.C.S.A. § 5105(c).

was sentenced to seventy-two months to one-hundred and twenty months of incarceration on the conviction for possession with intent to deliver. Appellant also received one to two years of incarceration on the conviction for receiving stolen property, to run consecutively to the possession with intent to deliver sentence. No additional penalty was imposed at the remaining counts. Upon review, we affirm.

The trial court set forth the factual history of this case as follows:

> As this Court specifically stated on the record, the affidavit of probable cause described a controlled purchase of narcotics at 2018 DeRaud Street, Apartment 6, in the City of Pittsburgh. [According to the affidavit, this was the second controlled buy to take place at this residence.] As set forth in the affidavit, officers met with a confidential informant about conducting a controlled purchase of crack cocaine at the location. The officers discussed how the controlled purchase would occur, including the route the confidential informant would take. The officers searched the confidential informant prior to the purchase and determined that he possessed no drugs or money. The officers provided the confidential informant with $20 in official funds to purchase the crack cocaine. The confidential informant then walked toward the targeted location. The officers maintained constant visual surveillance on the confidential informant until he entered 2018 DeRaud Street. The confidential informant pressed the buzzer. After approximately ten seconds, he entered the building. The confidential informant exited the building after approximately five minutes and returned to the designated meeting location.
>
> He then provided the officers with one loose piece of crack cocaine. The confidential informant explained to the officers that he went into the building and hit a button for Apartment 6. He was immediately "buzzed" in. He walked back a long hallway to a landing going to the second floor where he was greeted by a group of men. He asked for "Red" and a person he knew to be "Red" exited Apartment 6. The confidential informant supplied "Red" with the official funds and "Red" went into Apartment 6 to obtain the crack cocaine. After "Red" exited the apartment, he

gave the crack cocaine to the confidential informant who left the building and returned to the officers. The confidential informant explained that the other males in the building had a large bag of crack cocaine and they appeared to be competing to sell it.

After the officers obtained the crack cocaine from the confidential informant, the officers continued their surveillance of 2018 DeRaud Street. They observed at least ten other individuals go to the door of 2018 DeRaud Street, ring the buzzer and be let into the building. After gaining entry into that building, these individuals would exit back onto DeRaud Street after being inside the hallway for one to three minutes at a time. The officers believed this activity to be consistent with illegal drug sales.

* * *

The credible facts presented at trial demonstrate that on November 19, 2008, officers from the City of Pittsburgh Bureau of Police were executing a search warrant at 2018 DeRaud Street, Apartment 6, in the City of Pittsburgh. Upon gaining entry to the apartment, the officers observed four men in the apartment. As the officers entered the apartment, they observed one of the males quickly move from the dining room of the apartment toward the living room area. They observed another male sitting in a love seat in the living room area. [Appellant] was observed sitting on a couch in the living room area. Officers observed another male throwing money into the air. According to one officer, it looked as though it was a "rain of money" inside the apartment. The officers observed [Appellant] reaching into the cushions of the couch.

Officers ordered him to show his hands and get on the floor. [Appellant] made his way to the floor but refused to show his hands. He placed his hands under his body and started to slide his hand underneath the couch. Officer Brian Nicholas heard something slide across the floor under the couch. According to Officer Nicholas, it sounded like a heavy object. The object was discovered to be a handgun. Officer Nicholas approached [Appellant] and [Appellant] quickly showed his hands. All of the men inside the apartment were placed in custody.

Crack cocaine and plastic baggie corners were recovered from an end table in the living room. The end table was located next to the sofa chair. A box of sandwich baggies was recovered from the couch in the living room. A small amount of marijuana was

> recovered from a sandwich baggie on the couch. As already indicated, a handgun was found under the couch.
>
> The officers searched the rest of the residence. Crack cocaine was found on top of the entertainment center in the living room. Two automatic handguns and a box of sandwich baggies were found on top of the kitchen cabinets. A wallet containing a Pennsylvania identification card of [Appellant] was found with the guns and sandwich baggies. Suspected crack cocaine was found in the kitchen freezer, although upon laboratory testing it was determined that the substance did not actually contain cocaine base.
>
> A digital scale was found in the room next to the living room. Baggie corners were found with the digital scale. Another digital scale was found in the hallway adjacent to the living room. The officers found two envelopes addressed to [Appellant] at the residence. They also found a Waiver of Preliminary Hearing form in the residence. The caption on the Waiver of Preliminary Hearing contained [Appellant]'s name and the address of 2018 DeRaud Street, Pittsburgh, PA 15219. Nineteen cell phones were recovered from the residence. Cash in the amount of $603 was recovered from [Appellant]. The other persons in the residence also had cash recovered from them. A police scanner was located in the entertainment center.
>
> [Appellant] was interviewed after his arrest. After being Mirandized, [Appellant] advised officers that the apartment was leased to his girlfriend. He explained that she had left six months before the arrest but he assumed control of the apartment and continued to pay rent. [Appellant] then asked the officers "I'm in trouble, aren't I? I think I'm going to have to think about this. I don't know if I want to talk to you anymore." The interview was then concluded. Evidence was admitted at trial that [Appellant] was a fugitive at the time of his arrest. Evidence was also admitted that one of the handguns recovered at the scene was stolen.

T.C.O., 9/1/11, at 3-4; 6-8.

Appellant was convicted and sentenced. On December 17, 2010, Appellant filed post-trial motions, which were denied on December 22, 2010. Appellant filed a timely notice of appeal. The trial court ordered Appellant to

file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely complied. Thereafter, the trial court filed a timely Rule 1925(a) opinion.

Appellant raises the following issues for our review:

> 1. SHOULD THE SUPERIOR COURT APPLY A DE NOVO STANDARD OF REVIEW IN DETERMINING WHETHER THE MAGISTRATE WAS CORRECT IN CONCLUDING THAT THE AFFIDAVIT OF PROBABLE CAUSE PROVIDED A SUBSTANTIAL BASIS TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT?
> 2. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION TO SUPPRESS BY CONCLUDING THAT THE MAGISTRATE WAS CORRECT IN FINDING THAT THE AFFIDAVIT OF PROBABLE CAUSE CONTAINED ENOUGH INFORMATION TO PROVIDE A SUBSTANTIAL BASIS TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT?
> 3. WAS THE EVIDENCE PRESENTED BY THE COMMONWEALTH SUFFICIENT[?]

Appellant's Brief at 4.

Appellant first argues that we should apply a *de novo* standard of review to his claim that the trial court erred in denying his suppression motion. Appellant did not explicitly set forth this issue in his 1925(b) statement. Accordingly, we are constrained to find it waived. Pa.R.A.P. 1925(b)(vii); ***Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998) ("Any issues not raised in a 1925(b) statement will be deemed waived.)

Moreover, our Supreme Court has explicitly rejected employing a *de novo* standard of review in this context:

> [A] reviewing court [is] not to conduct a *de novo* review of the issuing authority's probable cause determination, but [is] simply to determine whether or not there is substantial evidence in the record supporting the decision to issue the warrant.

Commonwealth v. Jones, 988 A.2d 649, 655 (Pa. 2010) (citing ***Commonwealth v. Torres***, 764 A.2d 532, 537–38, 540 (Pa. 2001)). Accordingly, even apart from waiver, Appellant's argument is unavailing.

Appellant next argues that the trial court erred in denying his suppression motion. Appellant claims that the magistrate incorrectly determined that the affidavit of probable cause contained sufficient information to support the issuance of a search warrant. Our scope and standard of review are well-settled:

> Our standard of review in addressing a challenge to the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous

Id. at 654.

For several reasons, Appellant claims that the warrant was unsupported by probable cause. First, Appellant argues that the affidavit begins with a description of a controlled purchase but fails to explain why the use of a controlled purchase was warranted in the first place. Second, Appellant argues that the drug purchase initiated by police was not

"controlled," because the police did not conduct the type of surveillance necessary in the moments before the purchase. Specifically, the police saw the informant enter an apartment building, but did not see which particular apartment the informant entered. Thus, the police were required to rely upon hearsay statements made by the informant in order to determine the identity and whereabouts of the drug dealers. Appellant asserts that the veracity of the informant was not established within the four corners of the affidavit of probable cause. Appellant argues that, when the actual purchase is not observed first-hand by police, the affidavit must establish the credibility of the informant. Finally, Appellant argues that the fifteen to twenty minutes of surveillance conducted after the controlled purchase was insufficient to establish probable cause.

In order to determine whether probable cause exists to support the issuance of a search warrant, we must evaluate the totality of the circumstances. ***Commonwealth v. Wallace***, 953 A.2d 1259, 1261 (Pa. Super. 2008) (citation omitted). "Under such a standard, the task of the issuing authority is to make a practical, common sense assessment whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***Id.*** "In determining whether the warrant is supported by probable cause, the magistrate may not consider any evidence outside the four-corners of the affidavit." ***Commonwealth v. Ryerson***, 817 A.2d 510, 513 (Pa. Super. 2003) (citation omitted). We previously have explained that

magistrates are afforded considerable deference in determining whether there is a sufficient basis to issue a search warrant:

> A magistrate is to make a "practical, common sense decision, whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." The information offered to establish probable cause must be viewed in a common sense, non-technical manner. Probable cause is based on a finding of the probability, not a **prima facie** showing of criminal activity, and deference is to be accorded a magistrate's finding of probable cause.

Commonwealth v. Dean, 693 A.2d 1360, 1365 (Pa. Super. 1997) (emphasis in original) (citations omitted). "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." ***Commonwealth v. Minton***, 432 A.2d 212, 214 (Pa. Super. 1981) (citations omitted).

Although Appellant argues that the affidavit does not explain why a controlled purchase was authorized, our precedents suggest that the most recent controlled buy, in and of itself, was adequate to support the issuance of a warrant. Indeed we have upheld the denial of suppression motions in similar circumstances. In ***Dean***, 693 A.2d at 1365-66, we rejected a challenge to a search warrant that was based upon a confidential informant's assertion that the appellant was selling drugs. Police conducted a controlled buy that resulted in the acquisition of narcotics. ***Id.*** at 1365. Similarly, in

Commonwealth v. Johnson, 517 A.2d 1311, 1315-16, (Pa. Super. 1986), we held that there was "abundant probable cause for issuance of the search warrants," where a controlled buy of heroin from the appellant had occurred within forty-eight hours of the execution of the warrant. While the police in ***Johnson*** actually witnessed the buy take place, the police in ***Dean*** witnessed the confidential informant enter the appellant's residence and then return with drugs and without the marked bills. ***Johnson***, 517 A.2d at 1315-16; ***Dean*** 693 A.2d 1365-66.

Here, Appellant's residence was targeted based upon a previous controlled buy. A second controlled buy occurred within forty-eight hours of the issuance of the search warrant. In that buy: the confidential informant explicitly stated that he/she buzzed Apartment Six, and asked to deal with "Red;" the informant exited the apartment complex with crack cocaine; and the police observed activity indicative of drug dealing outside the apartment building. Affidavit of Probable Cause, ¶ 2-4, at p.3. Based upon these facts, police officers believed that drug dealing was occurring in Apartment Six. ***Id.*** Viewed under the applicable standard of review as set forth above, and based upon the totality of the circumstances, the affidavit supported the issuance of a warrant.

In his final issue, Appellant claims that the evidence was insufficient to find him guilty of possession with intent to deliver. Our standard of review in evaluating sufficiency of the evidence claims is well-settled:

> We must determine whether, viewing all the evidence at trial, as well as all reasonable inferences to be drawn therefrom, in the light most favorable to the Commonwealth, the jury could have found that each element of the offense was proven beyond a reasonable doubt. Both direct and circumstantial evidence can be considered equally when assessing the sufficiency of the evidence.

Commonwealth v. Carpenter, 955 A.2d 411, 414 (Pa. Super. 2008) (citations omitted). "In order to prove the offense of possession with intent to deliver a controlled substance, the Commonwealth must prove beyond a reasonable doubt both that the defendant possessed the controlled substance and had the intent to deliver." ***Id.***

Possession with intent to deliver is defined as follows:

> Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30). Appellant argues that the evidence was insufficient because it did not establish that he was in possession of any illegal substance at the time of arrest. However, in order to be found guilty of possession, a defendant need not have illegal drugs on his person at the time of arrest. ***Commonwealth v. Walker***, 874 A.2d 667, 677 (Pa. Super. 2005).

Here, the Commonwealth proved that Appellant had possession of the drugs through a theory of constructive possession. We have observed:

> Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as conscious dominion. We subsequently defined conscious dominion as the power to control the contraband and the intent to exercise that control. To aid application, we have held that constructive possession may be established by the totality of the circumstances.

Id. at 677-78 (citations and quotations omitted).

When Officer Nicholas executed the search warrant, he observed four individuals, including Appellant, sitting or standing in the living room. Notes of Testimony ["N.T."], 9/16/10, 31-33. Officer Nicholas observed one individual throw money into the air, while Appellant reached into the couch cushions. ***Id.*** at 32-33. Officer Nicholas ordered Appellant to show his hands and to get on the ground. ***Id.*** at 33. Appellant refused to show his hands. ***Id.*** at 34. Instead, Appellant brought his hands to his body and then slid his hands under the couch. ***Id.*** Officer Nicholas heard a heavy object slide under the couch and strike the wall. ***Id.***

Detective William Churilla ["Detective Churilla"] aided Officer Nicholas in executing the search warrant. Detective Churilla testified that he recovered loose pieces of suspected crack cocaine and baggie corners on the end table in the living room. ***Id.*** 45-46. He also recovered a box of sandwich baggies, one sandwich baggie containing marijuana, one automatic handgun from underneath the couch, a police scanner, and a total of nineteen cellphones. ***Id.*** at 48-50, 71-72. On top of the entertainment center in the living room, Detective Churilla found a knotted baggie with

suspected cocaine. ***Id.*** at 58. On top of the kitchen cabinets, Detective Churilla recovered two additional automatic handguns, another box of sandwich bags, and a wallet. ***Id.*** at 51. The wallet contained Appellant's identification. ***Id.*** at 52-53. In the kitchen freezer, Detective Churilla found suspected crack cocaine marked "white devil." ***Id.*** at 59. In a room adjoining the living room, Detective Churilla found a plugged-in digital scale and baggie corners. ***Id.*** at 57. Detective Churilla found two pieces of mail addressed to Appellant at the DeRaud Street apartment and a preliminary hearing waiver form containing Appellant's name and the DeRaud street address. ***Id.*** at 60-61. Finally, Detective Churilla recovered approximately $1,000 from the individuals in the apartment, with Appellant possessing $603. ***Id.*** at 70.

Appellant told Officer David Lincoln ["Officer Lincoln"] that the apartment was his girlfriend's, but that she had left six months ago and that he had assumed control of the residence and paid rent each month for the last five months. ***Id.*** at 171. When asked about the narcotics and firearms recovered in the apartment, Officer Lincoln testified that Appellant "placed his head in his hands and said, I'm in trouble, aren't I. And he said, I think I'm going to have to think about this. I don't know if I want to talk to you anymore." ***Id.*** at 172.

In ***Commonwealth v. Bricker***, 882 A.2d 1008, 1014-15 (Pa. Super. 2005), we found evidence sufficient to sustain a conviction for possession under a theory of constructive possession where the appellant lived at the

residence where drugs were found (as indicated by mail found in the residence), and where the appellant was found in the same room as the drugs, which were in plain view. ***Id.*** While some of the drugs in ***Bricker*** were found in other rooms of the residence, the appellant in that case was discovered with drug paraphernalia on his person. ***Id.*** Here, Appellant admitted to residing in the apartment, received mail at the apartment, and was found in a room where drugs were in plain view. Moreover, drugs and drug paraphernalia were found throughout the house. Based upon the totality of the circumstances, there was sufficient evidence to find that Appellant was in constructive possession for intent to deliver purposes. ***See Commonwealth v. Petteway***, 847 A.2d at 713, 716 (Pa. Super. 2004) (evidence sufficient to prove constructive possession where defendant and drugs found in different rooms of same residence); ***Commonwealth v. Walker***, 874 A.2d 667, 668 (Pa. Super. 2005) (evidence sufficient to prove constructive possession where drugs and drug paraphernalia found in basement, defendant admitted to residing in residence, and defendant received mail at residence).

Appellant argues that there were two other individuals in the apartment on the day that the search was executed. Appellant claims that "any of these individuals may have been responsible for bringing the cocaine, baggies, scale, and police scanner into the living and dining rooms of the apartment." Appellant's Brief at 30. Appellant emphasizes that our Supreme Court has recognized that "'the fact of possession loses all

persuasiveness if persons other than the accused had equal access to the place in which the property was discovered.'" ***Id.*** at 29 (quoting ***Commonwealth v. Stamps***, 427 A.2d 141, 145 (Pa. 1981)). However, Appellant neglects to mention that, in ***Stamps***, the drugs were not in plain view, but instead were found hidden in a couch cushion. Because the drugs in ***Stamps*** were not in plain view, some of the individuals present arguably could deny knowing that drugs were present. ***Id.*** at 145-46. Moreover, "[p]ossession of an illegal substance need not be exclusive; two or more [people] can possess the same drug at the same time." ***Commonwealth v. Macolino***, 469 A.2d 132, 136 (Pa. 1983). Here, the drugs were in plain view of all three individuals. Rather than absolving Appellant, the presence of other persons at the time of the search warrant's execution simply implicates the other individuals in the drug dealing operation along with Appellant.

The evidence was sufficient to support a conviction of possession with intent to deliver.

Judgment of sentence affirmed. Jurisdiction relinquished.