NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ALBERT JABBAR,	:	No. 1669 EDA 2011
Appellant	:	

Appeal from the Judgment of Sentence, May 13, 2011,
in the Court of Common Pleas of Philadelphia County
Criminal Division at No. CP-51-CR-0008907-2010

BEFORE: FORD ELLIOTT, P.J.E., BENDER AND SHOGAN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: January 24, 2013

Appellant, Albert Jabbar, appeals from the judgment of sentence entered on May 13, 2011 following his conviction of possessing a controlled substance with intent to deliver. We affirm.

Philadelphia Police Officer Stanley Davis, a member of the Narcotics Field Unit, testified that on June 14, 2010, he received information from a confidential source[1] that narcotics were being sold from a residence located at 3136 D Street in Philadelphia. The confidential source, who lived in the area, also described the individual and provided a cell phone number of

[1] At trial, Officer Davis explained that a confidential source is not to be confused with a confidential informant. A confidential source typically provides anonymous information to police through a hotline, where as a confidential informant is formally screened and registered with the police, assigned a police identification number, and receives payment for their services. (Notes of testimony, 3/22/11 at 14-15, 23-24.)

267-333-3142. (Notes of testimony, 3/22/11 at 14.) Pursuant to this information, Officer Davis drove to this address and observed a black male, appellant, enter with a key. (***Id.*** at 16.)

The following day, the officer returned and observed appellant standing in the doorway, looking up and down the street. (***Id.*** at 17.) Two white males arrived in a gold vehicle and parked on the corner. The passenger, holding cash in his hand, walked up to 3136 D Street and knocked on the front door; appellant answered and let him in the residence. (***Id.*** at 20.) Approximately two minutes later, the white male passenger exited the premises and returned to the vehicle and the car left the area at a high rate of speed. (***Id.*** at 21.)

At this point, Officer Davis contacted fellow Narcotics Field Unit Officers Harold Toomer and Mario Cruz and relayed his observations. Officer Davis requested a confidential informant ("CI") be used to attempt a drug buy at 3136 D Street. The officer supplied the cell phone number of 267-333-3142. (***Id.*** at 24.) The officers met with the CI a few blocks away from the target location. The CI was provided with pre-recorded buy money. The CI was searched for any money or contraband. The CI soon returned with 13 unstamped packets of heroin; these packets were later submitted to the chemistry lab for testing.

That same day, Officer Davis submitted the above information in a affidavit of probable cause in order to obtain a search warrant for 3136 D

Street. The warrant was approved and on June 16, 2011, the officers executed the warrant. The police set up surveillance of the house to be certain that appellant was in the home. Upon arrival, Officer Davis looked inside the door and saw appellant in the dining room, standing face to face with a white male, later identified as Brian Little ("Little"). (***Id.*** at 41.) Officer Davis also testified that a black female, appellant's mother, was sitting on the couch at the time of entry; she was not charged with any offense. (***Id.*** at 61, 74.)

Officer Richard Woertz, who was not involved in the initial investigation, was the first officer to enter the premises. He testified that he observed appellant and Little having a conversation in the dining room by the breakfast bar of the kitchen. (Notes of testimony, 3/23/11 at 53.) Appellant immediately threw a wad of cash over the breakfast bar onto the kitchen floor. (***Id.*** at 52.) Appellant and Little were detained. Little was holding 14 unstamped packets of heroin in his right hand. (***Id.*** at 57-58.) While the bags were not stamped with a brand name, they appeared to be similar in size, shape and color to the bags taken from the CI on the previous day. (Notes of testimony, 3/22/11 at 43.) Officer Woertz recovered the $148 appellant threw into the kitchen and a black cell phone which was in arm's reach of appellant at the time of entry; the cell phone was later confirmed to match the number 267-333-3142. (***Id.*** at 50, 58-59; notes of testimony, 3/23/11 at 52, 55.) Fourteen unstamped packets of

heroin and one stamped "make you sweat" were in plain view in the kitchen. (***Id.*** at 52-56.) No drugs were recovered on appellant's person.

Officer Clarke testified that upon entering the property he went to the second floor. In the rear bedroom, the officer observed a bed and piles of male clothing in the room. Various quantities of pre-packaged heroin and other drugs[2] were recovered in this bedroom. (***Id.*** at 61.) The search of the home also uncovered a loaded nine-millimeter firearm, cash, appellant's driver's license and a letter addressed to appellant at 3136 D Street. (***Id.***; notes of testimony, 3/22/11 at 50-51.) Appellant admitted that he and his mother lived at this address. The Commonwealth also presented stipulated expert ballistic and chemical analysis evidence. (Notes of testimony, 3/23/11 at 65-66.)

Appellant was arrested and charged with possession of a controlled substance, possession with intent to deliver ("PWID"), possession of a firearm prohibited, and criminal use of communication facility. Prior to taking testimony, the appellant litigated a motion to compel disclosure of the identity of the CI. The trial court denied the motion. Upon consideration of the above evidence, the jury found appellant guilty of PWID, specifically related to the heroin packets recovered from the kitchen of 3136 D Street.

[2] Eighteen Ziploc bags of marijuana, an amber pill bottle containing 54 white pills stamped "Endo, 602," and 18 loose, oval shaped yellow pills stamped "10" and "E 712." (Notes of testimony, 3/23/11 at 58-63.) The substance in the Ziploc baggies tested positive for marijuana and the pills recovered tested positive for Oxycodone. (***Id.*** at 65-67.)

However, pursuant to special interrogatories put to the jury on the verdict sheet, the jury was unable to reach a unanimous verdict as to the charges on the heroin recovered from the CI or Little. Nor was the jury able to reach a unanimous verdict in relation to the charges concerning marijuana and pills found in the upstairs rear bedroom. Appellant was specifically found not guilty of possession of a firearm by ineligible person. (Notes of testimony, 3/24/11 at 10-11.)

Appellant was sentenced on May 13, 2011 to the mandatory minimum term of 5 to 10 years' incarceration. A timely notice of appeal was filed on June 10, 2011 and appellant complied with the trial court's order to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A. The trial court has filed an opinion.[3]

The following issues have been presented:

> I. Should the Defendant be awarded an Arrest of Judgment on the charge of PWID where the verdict was not supported by sufficient evidence and where the Commonwealth did not prove its case beyond a reasonable doubt; and where the Commonwealth could not prove the crucial element of the crime, to wit, Possession of Drugs?
>
> II. Is the Defendant entitled to a new trial where the Trial Court erred when it failed to grant the

[3] We note with disapproval that the Commonwealth, while having filed a brief in this matter, has failed to set forth any independent analysis of the claims set forth in appellant's Rule 1925(b) statement, instead, choosing to adopt the analysis provided in the trial court's Rule 1925(a) opinion.

> Defendant's Motion to Reveal the Identity of the [CI]?
>
> III. Should the Defendant be remanded to the Sentencing Court for a new Sentencing Hearing where the Sentencing Court erred by imposing an illegal mandatory minimum sentence of five to ten years on the charge of PWID, believing that a gun and drugs were in proximity to one another, thus triggering the mandatory?

Appellant's brief at 3.

We begin by addressing appellant's second argument, whether the court erred in denying his request that the identity of the CI used in the controlled buy be disclosed. Upon review, we disagree.

When reviewing the denial of a motion to disclose the identity of a CI, our standard of review is "to determine whether the trial court abused its discretion in denying appellant's request for discovery." ***Commonwealth v. Belenky***, 777 A.2d 483, 487 (Pa.Super. 2001), citing ***Commonwealth v. Roebuck***, 681 A.2d 1279, 1282 (1996).

The ability to compel disclosure of the identity of a confidential informant flows from the right to discovery contained in the Rules of Criminal Procedure. Pa.R.Crim.P. 573 (B)(2)(a)(i), 42 Pa.C.S.A. A defendant has a qualified right to discovery of the names of eyewitnesses. However, when the eyewitness is a confidential informant, police departments have a well-placed reluctance to disclose the identity of such eyewitnesses and, in fact, a recognized privilege to refuse disclosure of the

identity of informants. The privilege is not absolute, however, and must give way under appropriate circumstances.

When moving for disclosure, the defendant must first show "that the information sought is material and the request is reasonable." ***Interest of D.B.***, 820 A.2d 820, 822 (Pa.Super. 2003). The defendant must "demonstrate a reasonable probability the informant could give evidence that would exonerate him. More than a mere assertion that disclosure of the informant's identity might be helpful is necessary." ***Belenky***, 777 A.2d at 488 (internal citations omitted). If the defendant satisfies this burden, then the trial court must apply a balancing test, with "the balance initially weigh[ing] in favor of maintaining confidentiality of the informant's identity in order to preserve the public's interest in effective law enforcement." ***Commonwealth v. McCulligan***, 905 A.2d 983, 989 (Pa.Super. 2006).

Herein, the trial court concluded that appellant failed to meet the threshold burden. (Trial court opinion, 11/30/11 at 9.) Appellant did not demonstrate that disclosure was material and reasonable; rather appellant merely asserted that the CI's testimony would be helpful to the defense; such an assertion is insufficient. ***See Commonwealth v. King***, 932 A.2d 937, 952 (Pa.Super. 2007), quoting ***In re R.S.***, 847 A.2d 685, 688 (Pa.Super. 2004), ***appeal denied***, 581 Pa. 679, 863 A.2d 1148 (2004) ("more than a mere assertion that disclosure of the informant's identity might be helpful is necessary.") (emphasis in original).

Further, as the trial court noted, this case was not premised solely on police testimony from a single observation. Beyond any proposed testimony from the CI, evidence directly indicating appellant's culpability was presented. The police observed appellant's activities over the course of three days. The police saw appellant enter the residence with a key, occupy the premises and permit multiple individuals, (two white males and the CI) to enter the premises. During the search, the police found items inside the residence identifying appellant and appellant admits to living in the house. Thus, this is not a case of mistaken identity. Officers observed appellant standing face to face with another male holding 14 packets of heroin. Appellant was holding cash that he threw to the ground. Additional heroin was discovered in plain view in the kitchen a few feet from appellant, as well as a cell phone with the registered number 267-333-3142 within his arms reach. The CI was not present during the search and therefore, would have had little impact concerning this evidence. Additionally, appellant's mother and Little were present and could have been called as witnesses; nor did appellant elect to call the white male passenger who entered his residence on June 15, 2010. No relief is due.

We now turn to appellant's first issue. Appellant claims that the evidence was insufficient to sustain his PWID conviction as the Commonwealth did not demonstrate constructive possession where others had equal access to the premises.

> [O]ur standard of review of sufficiency claims requires that we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751 (2000). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." ***Commonwealth v. Brewer***, 876 A.2d 1029, 1032 (Pa.Super.2005). Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty." ***Id.***; ***see also Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa.Super.2000) ("[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence."). Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. ***See Commonwealth v. DiStefano***, 782 A.2d 574, 582 (Pa.Super.2001).

Commonwealth v. Stays, 40 A.3d 160, 167 (Pa.Super. 2012).

> To convict a person of PWID, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance and did so with the intent to deliver it. In determining whether there is sufficient evidence to support a PWID conviction, all facts and circumstances surrounding the possession are relevant, and the Commonwealth may establish the essential elements of the crime wholly by circumstantial evidence. Factors to consider in determining whether the drugs were possessed with the intent to deliver include the particular method of packaging, the form of the drug, and the behavior of the defendant.

Commonwealth v. Bricker, 882 A.2d 1008, 1015 (Pa.Super. 2005) (citations omitted).

Since, in this case, no drugs were actually found on appellant's person, the Commonwealth had to prove that appellant constructively possessed the drugs. "Constructive possession requires proof of the ability to exercise conscious dominion over the substance, the power to control the contraband, and the intent to exercise such control. Constructive possession may be established by the totality of the circumstances." ***Id.*** at 1014 (citations omitted).

Appellant essentially claims that his "mere presence" in the house when the police arrived is insufficient to sustain his convictions. Appellant argues that he was not in possession of any drugs, money, or paraphernalia at the time of his arrest and that his mother was in the house at the time. "Without meaning to be politically incorrect, is it not more true that the mother would be closely associated with the kitchen area than the son?" (Appellant's brief at 10.) We find absolutely no merit to appellant's argument.

Applying the above principles to the case at hand, the evidence is clearly sufficient to sustain appellant's conviction. Again, after receiving an anonymous tip that appellant was dealing heroin from his home and watching appellant's activities over the course of three days, the officers structured a drug transaction between appellant and the CI. After obtaining a search warrant, the police entered the premises in the midst of another drug transaction. Appellant was observed holding cash and a white male

was clutching 14 bags of heroin. Upon seeing the police, appellant threw the money over the counter into the kitchen. In the kitchen the police found an additional 15 packets of heroin on the counter. The evidence presented refutes appellant's contention that he was "merely present" at the scene. The fact that his mother had access to the kitchen in the home that they shared does not discount the overwhelming circumstantial evidence adduced at trial connecting appellant to the packets of heroin recovered in the kitchen. This evidence was clearly sufficient for the trial court to infer that appellant possessed the drugs with intent to deliver.

The final issue presented is whether the court erred in applying the mandatory minimum sentence under 42 Pa.C.S.A. § 9712.1. Appellant raises a non-waivable challenge to the legality of his sentence.

> Ordinarily, a challenge to the application of a mandatory minimum sentence is a non-waivable challenge to the legality of the sentence. This is so because, by statute, courts have no authority to avoid imposing the mandatory minimum, assuming certain factual predicates apply. Issues relating to the legality of a sentence are questions of law, as are claims contesting a court's application of a statute. Our scope of review in such matters is plenary.

Commonwealth v. Harley, 924 A.2d 1273, 1277-1278 (Pa.Super. 2007) (citations omitted).

At the outset, we summarily dismiss appellant's suggestion that because he was acquitted of the firearms charge the court erred in considering the weapon when sentencing him. Recently, in

Commonwealth v. Stokes, 38 A.3d 846, 861 (Pa.Super. 2011), this court held that a sentencing court may reject a jury's acquittal in determining whether a defendant possessed or used a firearm under 42 Pa.C.S.A. § 9712. We proceed, therefore, in considering appellant's argument that the sentencing court erred by imposing the mandatory minimum sentence because the Commonwealth did not prove by a preponderance of the evidence that the firearm was in "close proximity" to the contraband at issue.

The statute provides:

> **§ 9712.1. Sentences for certain drug offenses committed with firearms**
>
> > **(a) Mandatory sentence.**--Any person who is convicted of a violation of section 13(a)(30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, when at the time of the offense the person or the person's accomplice is in physical possession or control of a firearm, whether visible, concealed about the person or the person's accomplice or within the actor's or accomplice's reach or in close proximity to the controlled substance, shall likewise be sentenced to a minimum sentence of at least five years of total confinement.

42 Pa.C.S.A. § 9712.1(a).

In assessing the application of this provision, the sentencing court must consider "any evidence presented at trial and determine, by a preponderance of the evidence if [the mandatory minimum] is applicable." 42 Pa.C.S.A. § 9712.1(c). Again, the jury's verdict does not bind the

sentencing court in its application of the mandatory minimum sentencing provisions. ***Stokes***, ***supra***; ***Commonwealth v. Gutierrez***, 969 A.2d 584, 592 (Pa.Super. 2009). Rather, "the sentencing court's application of the mandatory minimum [by a preponderance of all the evidence presented] could be inconsistent with the jury's inability to reach a unanimous verdict." ***Id.***

Appellant's challenge to the applicability of this statute centers upon the statutory term "in close proximity." As appellant argues, the sentencing court erroneously concluded that the firearm was "in close proximity" to the drugs, as the firearm was found in the second-floor bedroom while the drugs were found in the first-floor kitchen. According to appellant, when the sentencing court interpreted the term "in close proximity" to mean anywhere in the house, the court violated the plain meaning of the statute and our principles of statutory construction. We disagree with appellant.

First, we note that under the plain meaning of the statute, it is irrelevant that appellant was not in physical possession of the firearm. The statute simply requires that the firearm be "in close proximity to the controlled substance." 42 Pa.C.S.A. § 9712.1(a). Our courts have construed the phrase "in close proximity" broadly, and as such, held the presence of both a controlled substance and a firearm together in the same residence satisfied the statutory requirement. ***See Commonwealth v.***

Hawkins, 45 A.3d 1123 (Pa.Super. 2012) (gun in basement was in close proximity to the drugs in bedroom).

We find ***Commonwealth v. Zortman***, 985 A.2d 238 (Pa.Super. 2009)[4] to be instructive. In ***Zortman***, the police searched the defendant's home and discovered an inoperable handgun in the bedroom as well as marijuana both in the kitchen and in another, unspecified bedroom. ***Id.*** at 239. After the defendant pleaded guilty to PWID, the Commonwealth notified the defendant that it intended to invoke the mandatory minimum sentence under 42 Pa.C.S.A. § 9712.1, because the firearm was discovered "in close proximity" to the marijuana. ***Id.*** While the sentencing court originally imposed the mandatory minimum sentence, the defendant filed a post-sentence motion and argued that Section 9712.1 did not apply, as "the gun was not in close proximity to the drugs . . . [and] the gun was inoperable." ***Id.*** at 240. Following a hearing, the sentencing court concluded that, because the handgun was inoperable, Section 9712.1 could

[4] On April 16, 2010, the Pennsylvania Supreme court granted allowance of appeal in ***Zortman***. ***Commonwealth v. Zortman***, 605 Pa. 658, 993 A.2d 869 (2010). However, the supreme court's grant of allocatur did not encompass any issue relating to our interpretation of the "in close proximity" language. Instead, allowance of appeal was limited to the issue of whether an inoperable handgun is a firearm for sentencing enhancement purposes. Further, we note that the grant of allocatur does not diminish the precedential value of ***Zortman*** for "we have long held that as long as the decision has not been overturned by our Supreme Court, a decision by our Court remains binding precedent." ***Marks v. Nationwide Ins. Co.***, 762 A.2d 1098, 1101 (Pa.Super. 2000), ***appeal denied***, 567 Pa. 751, 788 A.2d 381 (2001).

not apply. The court thus vacated the defendant's sentence and imposed a sentence of probation. ***Id.*** The Commonwealth filed an appeal to this court.

On appeal, we held that the inoperable handgun was a firearm for the purpose of Section 9712.1 and the sentencing court erred in concluding otherwise. ***Id.*** at 243. As a result of this holding, we were then required to determine whether the firearm was "in close proximity" to the marijuana. ***Id.*** at 244. The ***Zortman*** court held that the "in close proximity" requirement was satisfied, as the firearm was discovered in the same residence as the marijuana. ***Id.*** We explained:

> In [***Commonwealth v. Sanes***, 955 A.2d 369 (Pa.Super. 2008)], we interpreted the meaning of "in close proximity" for purposes of application of § 9712.1. We gave that term an expansive meaning and held that a handgun found hidden in a closet was in close proximity to drugs located in the same room.
>
> We applied Pennsylvania decisions determining the meaning of the term "in close proximity" in another statutory provision, the Forfeiture Act, 42 Pa.C.S. § 6801. At § 6801(a)(6)(ii), the Forfeiture Act states that where money or negotiable instruments are found "in close proximity" to illegally-possessed drugs, there is a rebuttable presumption that those items were the proceeds of unlawful drug sales and thus, subject to forfeiture. In ***Commonwealth v. Giffin***, 407 Pa.Super. 15, 595 A.2d 101, 104 (1991), we concluded that cash located in the same residence was in close proximity to drugs found in another portion of the residence for purposes of the Forfeiture Act's presumption.
>
> As noted, § 9712.1 is designed to deter drug dealers who utilize weapons. [The defendant] was involved in a significant drug distribution scheme. When the

> search was conducted, there were drugs in the kitchen as well as in a briefcase located in another room of the residence. We conclude that the gun found in the bedroom was in close proximity to the drugs in question within the meaning of § 9712.1.

Id.

In accordance with the clear precedent established in ***Zortman***, we must conclude that Section 9712.1 applies to the case at bar and that the sentencing court properly imposed the mandatory minimum sentence. As was true in ***Zortman***, the firearm was discovered in the bedroom while the controlled substance - that appellant was convicted of possessing with intent to distribute - was discovered in the kitchen of the same residence. Thus, pursuant to ***Zortman***, the "in close proximity" requirement of Section 9712.1 was satisfied.[5]

Judgment of sentence affirmed.

[5] Moreover, we note that ***Zortman***'s relatively broad interpretation of the "in close proximity" language furthers the statutory intent of 42 Pa.C.S.A. § 9712.1. As the ***Zortman*** panel explained, our legislature designed section 9712.1 so as "to deter drug dealers who utilize weapons." ***Zortman***, 985 A.2d at 244. By interpreting "in close proximity" to include other rooms within the residence, ***Zortman*** realized that when a drug dealer stores his firearm in a separate room from the drugs he is distributing, the dealer still has ready access to the firearm and can thus retrieve and utilize the firearm in all of his drug transactions.