

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

WILLIAM DEMBY,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1695 EDA 2012

Appeal from the Judgment of Sentence May 1, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007488-2010

BEFORE: BENDER, BOWES, and LAZARUS, JJ.

MEMORANDUM BY BOWES, J.:

FILED MAY 08, 2013

William Demby appeals from the aggregate judgment of sentence of five to ten years incarceration followed by five years probation imposed by the trial court after he was convicted at a non-jury trial of possession with intent to deliver (PWID) marijuana, conspiracy to commit PWID, and persons not to possess a firearm. We affirm.

The salient facts are as follows. Officer Edward Markowski was conducting narcotics surveillance at the 2500 block of North Marshall Street in Philadelphia, Pennsylvania, on May 11, 2010 at approximately 6:30 p.m. While performing this surveillance, Officer Markowski observed Appellant and Kareem Spadey in front of 2545 North Marshall Street. Within twenty minutes, Officer Markowski witnessed Nathaniel Austin exit the front passenger seat of a green Honda that was parked on North Marshall Street

and approach Mr. Spadey. After a brief conversation between Mr. Spadey and Mr. Austin, Mr. Austin turned over money to Mr. Spadey, who returned to the porch at 2545 North Marshall Street. Mr. Spadey then handed Mr. Austin an unknown item. Mr. Austin returned to the car he arrived in, which left North Marshall Street by turning onto Lehigh Avenue.

Mr. Spadey transferred the money he received from Mr. Austin to Appellant, and Appellant placed the money in his pocket. Thereafter, police stopped Mr. Austin on the 800 block of Lehigh Avenue and recovered a clear plastic jar containing marijuana as well as a clear Ziploc bag with marijuana. Both items were discovered on Mr. Austin's person. Subsequently, at approximately 8:00 p.m., police attempted to arrest Appellant and Mr. Spadey on North Marshall Street. Both men attempted to flee and retreated into 2545 North Marshall Street.

Officer Jason Seigafuse forced open the door to the residence and observed Appellant exiting a rear bedroom. The officer placed Appellant under arrest and handed him over to another officer before entering the aforementioned bedroom. Upon entering, Officer Seigafuse noticed that a window in the room was open. When he peered out the window, he saw a white envelope on the roof of the kitchen directly below. The envelope was addressed to Appellant at that address. The police then secured the home and obtained a consent to search from Appellant's sister. In addition, Officer Seigafuse recovered \$167 dollars from Appellant's person.

The search of the home resulted in the recovery of a loaded handgun between the mattress and box spring in the room that Appellant was seen leaving when Officer Seigafuse entered the house. A clear plastic jar of marijuana was found on the roof outside the bedroom and four identical plastic jars of marijuana, which were the same as the jar located on Mr. Austin, were recovered in the rear yard of the home in some bushes. The parties stipulated that an Officer Clausson heard something hitting the ground in the rear yard when police were trying to enter the home and that Appellant was previously convicted of a crime rendering him ineligible to possess a firearm.

The trial court, acting as the fact-finder, convicted Appellant of the previously delineated crimes. Thereafter, with the aid of a pre-sentence report, the court sentenced Appellant, imposing a five-year mandatory minimum sentence pursuant to 42 Pa.C.S. § 9712.1, which applies to certain drug offenses where a firearm is present. Specifically, the court sentenced Appellant to five to ten years incarceration for PWID and a consecutive five years probation for conspiracy to commit PWID. This timely appeal ensued. The court directed Appellant to file and serve a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Appellant complied, and the court authored its 1925(a) decision. The matter is now ready for our review. Appellant presents three questions for our consideration.

1. Did the trial court err in finding that appellant was engaged in a conspiracy to sell marijuana?

2. Did the trial court err in finding that the gun that was recovered had been possessed by the appellant at any time?
3. Did the trial court err in imposing a mandatory minimum sentence under 42 Pa.C.S. § 9712.1 (sentences for certain drug offenses committed with firearms).

Appellant's brief at 4.

Appellant's first two claims pertain to the sufficiency of the evidence.

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. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and 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. Additionally, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered.

Commonwealth v. Stokes, 38 A.3d 846, 853-854 (Pa.Super. 2011)

(internal citations and quotations omitted).

Section 903 of the Crimes Code sets forth the crime of conspiracy.

(a) Definition of conspiracy.—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. § 903.

“To sustain a conviction for criminal conspiracy, the Commonwealth must establish the defendant: 1) entered into an agreement to commit or aid in an unlawful act with another person or persons; 2) with a shared criminal intent; and 3) an overt act was done in furtherance of the conspiracy.” ***Commonwealth v. Devine***, 26 A.3d 1139, 1147 (Pa.Super. 2011). “The conduct of the parties and the circumstances surrounding such conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt.” ***Id.*** The conspiratorial agreement “can be inferred from a variety of circumstances including, but not limited to, the relation between the parties, knowledge of and participation in the crime, and the circumstances and conduct of the parties surrounding the criminal episode.” ***Id.***

We cannot find that the evidence herein is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. A reasonable jury could infer that Appellant and Mr. Spadey were working together to supply marijuana. Immediately after Mr. Austin purchased marijuana from Mr. Spadey, Mr. Spadey handed the

cash to Appellant. Marijuana recovered from Mr. Austin was located in packaging identical to the jars found outside Appellant's sister's residence, where Appellant fled and was arrested. Additionally, police heard items being discarded from that home and discovered the jars containing marijuana. Accordingly, Appellant's first issue does not entitle him to relief.

Next, Appellant contends that he did not constructively possess the gun police found under the mattress in the bedroom that he was observed exiting when the police entered his sister's residence to arrest him. We have delineated the law regarding constructive possession as follows:

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. ***Commonwealth v. Petteway***, 847 A.2d 713, 716 (Pa.Super. 2004). Constructive possession may be established by the totality of the circumstances. ***Commonwealth v. Parker***, 847 A.2d 745, 750 (Pa.Super. 2004). We have held that circumstantial evidence is reviewed by the same standard as direct evidence—a decision by the trial court will be affirmed “so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt.” ***Commonwealth v. Johnson***, 818 A.2d 514, 516 (Pa.Super. 2003) (citations omitted)

Commonwealth v. Bricker, 882 A.2d 1008, 1014 (Pa.Super. 2005).

Instantly, the Commonwealth introduced a bill dated May 4, 2010, addressed to Appellant that was located on the roof outside the room where police found the gun. Appellant was seen leaving that room when police entered and unquestionably previously resided in the home. The jury was free to reject Appellant's sister's claim that he no longer lived in the house or

stayed in the relevant room. Here, viewing the circumstantial evidence in its totality, the proof supports a reasonable and logical inference that Appellant constructively possessed the gun in question. The firearm did not belong to Appellant's sister, who rented the home. Appellant was seen hastily leaving the room where the firearm was found when police were attempting to arrest him, and directly outside that room on the roof was a letter demonstrating that Appellant was receiving mail at the house.

Appellant's final challenge relates to the mandatory sentence imposed for his possession of a firearm. "Application of a mandatory sentence, even where the trial court could have issued the same sentence without invocation of that mandatory, has been held to raise a legality of sentencing question." **Stokes, supra** at 857-858 (citations omitted). We add that Appellant's issue is premised on the sufficiency of the evidence introduced relative to the trial court's imposition of the mandatory. In **Commonwealth v. Manahan**, 45 A.3d 413 (Pa.Super. 2012), we delineated that where the defendant's issue is fact-based and relates to the sufficiency of the evidence giving rise to the mandatory sentence, "the trial court's findings of fact are binding upon a reviewing court, unless those findings were clearly erroneous." **Id.** at 416. Further, consistent with this approach, we review the evidence in a light most favorable to the Commonwealth. **Id.** Our scope of review, of course, is plenary. **Id.**

The sentencing court sentenced Appellant to five to ten years imprisonment based on 42 Pa.C.S. § 9712.1. That statute reads:

(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. § 9712.1 (footnote omitted).

Appellant bootstraps his previous argument that he did not possess the firearm discovered by police to support that the court erred in utilizing the relevant provision. Since we have rejected Appellant's argument that he did not possess the gun, this aspect of his argument fails. Additionally, Appellant maintains that the weapon was not within close proximity to the drugs found by police.

The Commonwealth responds that the gun was in close proximity to a jar of marijuana located on a small ledge outside the open window in Appellant's room, a window located directly above the bed where police discovered the firearm. We agree that this evidence is sufficient to establish by a preponderance of the evidence that the gun was in close proximity to the marijuana. **See Commonwealth v. Hawkins**, 45 A.3d 1123 (Pa.Super. 2012); **Commonwealth v. Zortman**, 985 A.2d 238 (Pa.Super. 2009).

Judgment of sentence affirmed.

J-S21026-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambett", written over a horizontal line.

Prothonotary

Date: 5/8/2013