

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

KAREEM BARNES

Appellant

No. 1784 EDA 2013

Appeal from the Judgment of Sentence November 1, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0005943-2009

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY JENKINS, J.:

FILED JUNE 27, 2014

Appellant Kareem Barnes appeals the judgment of sentence entered on November 1, 2010, following his convictions for Possession of a Controlled Substance with Intent to Deliver ("PWID"),¹ Possession of a Controlled Substance,² Possession of Drug Paraphernalia³, Possessing an Instrument of Crime,⁴ Possession of Firearm Prohibited,⁵

¹ 35 P.S. § 780-113(a)(30).

² 35 P.S. § 780-113(a)(16).

³ 35 P.S. § 780-113(a)(32).

⁴ 18 Pa.C.S. § 907.

⁵ 18 Pa.C.S. § 6105.

Altering/Obliterating Marks of Identification,⁶ and Possession of a Firearm With Altered Manufacturer's Number.⁷ We affirm.

We summarize the factual and procedural history of this matter as follows. On October 2, 2008, police executed a search warrant for the apartment where Appellant lived with his two younger brothers, his mother, and her boyfriend. The search yielded a 9-mm semi-automatic pistol with one live round in the chamber, and seven rounds in the magazine. The gun's serial number was obliterated.⁸ In the same bedroom, police recovered assorted ammunition, drugs,⁹ drug paraphernalia,¹⁰ and Appellant's identification listing his residence as the searched apartment.¹¹

On April 16, 2010, the trial court conducted a waiver trial. Appellant's youngest brother initially testified that the Appellant occupied the bedroom

⁶ 18 Pa.C.S. § 6117.

⁷ 18 Pa.C.S. § 6110.2.

⁸ Police recovered another gun from beneath a mattress in another bedroom.

⁹ Police found two clear baggies containing twenty smaller packets of marijuana, three clear baggies containing marijuana, and one blue-tinted baggie containing marijuana. The total package weight was approximately 277 grams.

¹⁰ The paraphernalia (in addition to the drug-packaging materials) included three scales (one with residue on it) and numerous unused packets of assorted sizes and colors.

¹¹ 2711 South 54th Street, Apartment B.

with the contraband. The brother then testified that he, not Appellant, occupied the bedroom and owned the contraband. The trial court did not credit the brother's testimony, and instead found Appellant guilty of the previously listed crimes. The court sentenced Appellant to 5 to 10 years of incarceration on the PWID conviction. This sentence included a 5-year mandatory minimum sentence of incarceration pursuant to 42 Pa.C.S. § 9712.1. The sentencing court imposed no further penalty for the other convictions. Appellant appealed,¹² and raises the following issues for our review:

- I. Was the evidence sufficient to establish beyond a reasonable doubt that the appellant possessed a firearm, drug paraphernalia and controlled substances?
- II. Does the minimum mandatory sentence statute apply to the appellant?

Appellant's Brief, p. 2.

First, Appellant raises sufficiency of the evidence claims regarding his convictions. **See** Appellant's Brief at 7-12. As to each conviction, he claims the Commonwealth failed to prove that he actually possessed the drugs, paraphernalia, and/or firearms. He is incorrect.

¹² The instant appeal comes to this Court *nunc pro tunc*: Appellant had his direct appeal rights reinstated after litigating a PCRA petition in which he alleged trial counsel had ignored his requests for an appeal. The Commonwealth agreed Appellant was entitled to the reinstatement of his direct appeal rights.

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder 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. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [trier] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Hansley, 24 A.3d 410, 416 (Pa.Super.2011), *appeal denied*, 32 A.3d 1275 (Pa.2011).

The Commonwealth may prove possession through proof of constructive possession:

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.

Commonwealth v. Parker, 847 A.2d 745, 750 (Pa.Super.2004). “As with any other element of a crime, constructive possession may be proven by circumstantial evidence.” **Commonwealth v. Haskins**, 677 A.2d 328, 330 (Pa.Super.1996). “The intent to exercise conscious dominion can be inferred from the totality of the circumstances.” **Commonwealth v. Kirkland**, 831 A.2d 607, 610 (Pa.Super.2003).

Here, that Appellant lived in the apartment where the police found the drugs, paraphernalia, and firearms was beyond dispute – Appellant’s brother testified Appellant lived there and the police found Appellant’s identification listing the apartment as his residence in the same room as the contraband. This Court has found constructive possession in cases with similar fact patterns. **See Commonwealth v. Walker**, 874 A.2d 667, 668 (Pa.Super.2005) (constructive possession established where police found drugs, paraphernalia, and defendant’s mail in the basement of defendant’s admitted residence). The fact that others may have had access to the room does not defeat Appellant’s constructive possession. Multiple people may constructively possess the same item. **Haskins**, 677 A.2d at 330; **Commonwealth v. Valette**, 613 A.2d 548, 550 (Pa.1992) (“Constructive possession may be found in one or more actors where the item [at] issue is in an area of joint control and equal access.”). Further, contrary to Appellant’s contention, the Commonwealth was not required to show that Appellant was home at the time of the search. Viewed in the light most favorable to the Commonwealth as verdict winner, the Commonwealth’s

evidence was sufficient to convict Appellant of the possessory drug and weapons offenses.

Next, Appellant claims that the sentencing court improperly applied the 5-year mandatory minimum sentence for drug offenses committed with firearms. **See** Appellant's Brief at 13. He is again incorrect.

Our standard of review regarding the imposition of a mandatory sentence is as follows:

Generally, a challenge to the application of a mandatory minimum sentence is a non-waivable challenge to the legality of the sentence. Issues relating to the legality of a sentence are questions of law, as are claims raising a court's interpretation of a statute. Our standard of review over such questions is *de novo* and our scope of review is plenary.

Commonwealth v. Hawkins, 45 A.3d 1123, 1130 (Pa.Super.2012).

The Sentencing Code provides:

§ 9712.1. Sentences for certain drug offenses committed with firearms

(a) Mandatory sentence.—Any person who is convicted of violation of section [1]13(a)(30) of [] 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.

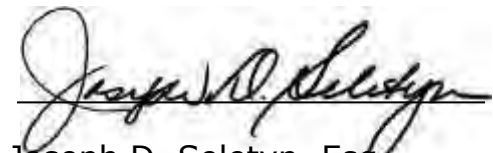
42 Pa.C.S. § 9712.1 (emphasis provided). This Court has found Section 9712.1's requirement that the firearm be in "close proximity" to controlled substances satisfied where the loaded handgun was in a closet six to eight

feet away from a sandwich bag containing cocaine. **Commonwealth v. Sanes**, 955 A.2d 369, 376 (Pa.Super.2008). The Court also found a firearm to be in "close proximity" of drugs located in a defendant's bedroom where the gun was in the building's basement, and the defendant could access the basement from his apartment within 10 to 15 seconds. **Hawkins**, 45 A.3d at 1131.

Here, police found the loaded handgun and the drugs in the same bedroom. This satisfies the "close proximity" requirement for the imposition of the 5-year mandatory minimum sentence outlined by 42 Pa.C.S. § 9712.1.¹³

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/27/2014

¹³ Further, the imposition of the Section 9712.1 mandatory minimum sentence does not violate the requirement announced by the Supreme Court of the United States in **Alleyne v. United States**, 133 S.Ct. 2151 (2013), that the finder of fact find all elements of increased punishments proven beyond a reasonable doubt. **See Commonwealth v. Watley**, 81 A.3d 108, 118-119 (Pa.Super.2013) (*en banc*) (holding that a jury's contemporaneous convictions for PWID and possessory firearms charges authorized imposition of mandatory minimum sentence pursuant to 42 Pa.C.S. § 9712.1).