NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
HADDAD RASHID,	:	
	:	
Appellant	:	No. 351 EDA 2013

Appeal from the Judgment of Sentence January 3, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-CR-0005084-2011

BEFORE: BENDER, P.J.E., SHOGAN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JUNE 24, 2014**

Appellant, Haddad Rashid, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas following a jury trial and conviction for possession with intent to distribute[1] ("PWID"). Appellant challenges the sufficiency and weight of the evidence, as well as whether the trial court erred by denying his suppression motion. We affirm.

We adopt the facts set forth in the trial court's opinion.[2] ***See*** Trial Ct. Op. 10/22/13, at 3-7, 16-18. Following a jury conviction, the court

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* Former Justice specially assigned to the Superior Court.

[1] 35 P.S. § 780-113(a)(30).

[2] To the extent we review the trial court's suppression ruling, we adopt the facts set forth in the trial court's opinion that are based on the transcript of

sentenced Appellant on January 3, 2013, to three to ten years' imprisonment. Appellant filed a timely post-sentence motion challenging, *inter alia*, the weight of the evidence. The court denied Appellant's motion on January 10, 2013. Appellant timely appealed and timely filed a court-ordered Pa.R.A.P. 1925(b), which was detailed and specific.[3]

Appellant raises the following issues:

> Whether the evidence was sufficient to sustain the verdict?
>
> Whether the verdict was against the weight of evidence?
>
> Whether the trial court erred by denying the motion to suppress physical evidence?

Appellant's Brief at 4.

We summarize Appellant's arguments for all of his issues. He suggests that the evidence was insufficient to establish constructive possession of the drugs hidden in the vehicle. Appellant opines that the verdict was against the weight of the evidence because his conduct was inconsistent with knowledge that drugs were present. Finally, he maintains that the trial court should have suppressed the currency seized after a pat-down search and the police lacked reasonable suspicion to search a vehicle that Appellant did not

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the suppression hearing. ***See generally In re L.J.***, 79 A.3d 1073, 1084 (Pa. 2013).

[3] ***See generally Commonwealth v. Williams***, 959 A.2d 1252, 1257 (Pa. Super. 2008).

own or have permission to operate. We hold Appellant is not entitled to relief.

With respect to Appellant's challenge to the sufficiency of the evidence, the standard of review for a challenge to the sufficiency of evidence is *de novo*, as it is a question of law. ***Commonwealth v. Ratsamy***, 934 A.2d 1233, 1235 (Pa. 2007). Our Crimes Code defines the offense of PWID as follows:

> (30) 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). "In order to uphold a conviction for possession of narcotics with the intent to deliver, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance and did so with the intent to deliver it." ***Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa. Super. 2000) (*en banc*). In evaluating the sufficiency of evidence for PWID, an appellate court considers the quantity of the contraband, "the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large[ ] sums of cash found in possession of the defendant. The final factor to be considered is expert testimony." ***Ratsamy***, 934 A.2d at 1237-38 (citation omitted).

> In order to prove that a defendant had constructive possession of a prohibited item, the Commonwealth must establish that the defendant had both the ability to consciously exercise control over it as well as the intent to exercise such control. An intent to maintain a conscious dominion may be inferred from the totality of the circumstances, and circumstantial evidence may be used to establish a defendant's possession of drugs or contraband.

Commonwealth v. Gutierrez, 969 A.2d 584, 590 (Pa. Super. 2009) (quotation marks and citation omitted).

Appellate review of a trial court's decision to deny a motion for a new trial based on a weight-of-evidence claim is of the exercise of the trial court's discretion, and not a ruling on the underlying question of whether the verdict is against the weight of evidence. ***Commonwealth v. Blackham***, 909 A.2d 315, 320 (Pa. Super. 2006). "An appellate court cannot substitute its judgment for that of the finder of fact [and] may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice." ***Commonwealth v. Lewis***, 911 A.2d 558, 565 (Pa. Super. 2006).

> 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. Where, as here, the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.
>
> Moreover, it is within the suppression court's sole province as fact finder to pass on the credibility of witnesses and the weight to be given their testimony.

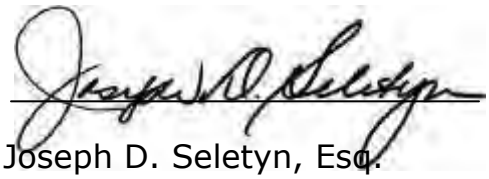
Commonwealth v. Baker, 24 A.3d 1006, 1015 (Pa. Super. 2011) (punctuation and citations omitted), *affirmed on other grounds*, 78 A.3d 1044 (Pa. 2013).

After careful consideration of the record, the parties' briefs, and the well-reasoned decision of the Honorable Charles J. Cunningham, III, we affirm on the basis of the trial court's decision. ***See*** Trial Ct. Op. at 7-10, 13-21 (holding: (1) recovery of sixty packets of heroin, large quantity of cash, and loaded handgun from concealed compartment in vehicle sufficient to establish PWID; (2) Appellant had no expectation of privacy in vehicle not owned by him and Appellant did not establish he was given permission to operate vehicle; and (3) police justified in conducting pat-down search after smelling marijuana and observing Appellant's furtive movements within vehicle). We also discern no abuse of discretion in the trial court's determination that the verdict was not against the weight of the evidence.

See Blackham, 909 A.2d at 320. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/24/2014

COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	351 EDA 2013
v.	CP-51-CR-0005084-~~2010~~ 2011
HADDAD RASHID	

OPINION

STATEMENT OF THE CASE

Defendant appeals his conviction on the charge of Possession with Intent to Deliver a Controlled Substance (PWID) resulting from his arrest related to heroin and a loaded firearm found in a hidden dashboard compartment in the vehicle he was driving. Defendant seeks a new trial on the grounds that his conviction was against the weight and sufficiency of the evidence to prove constructive possession or intent to deliver and that the Court improperly denied his motion to suppress physical evidence ($4,595.00 on his person). Defendant's complaints are without merit.

PROCEDURAL HISTORY

On March 26, 2011 Defendant was arrested and charged with inter-alia: 1) PWID pursuant to 35 Pa.C.S.A. §780-113(a)(30); and 2) Firearms not to be Carried without a License pursuant to 18 Pa.C.S.A. §6106(a)(1). On November 7, 2011, at the conclusion

of his jury trial, Defendant was found guilty on the charge of PWID and not guilty on the charge of Carrying a Firearm Without a License. On January 3, 2013 the Defendant was sentenced to a period of confinement in a state correctional facility of 3-10 years. On January 8, 2013 the Defendant timely filed his "Post-Sentence Motion" seeking reconsideration of his sentence or a new trial. The Court denied Defendant's motion without a hearing on January 10, 2013.

On January 30, 2013, Defendant timely filed the instant appeal to the Superior Court of Pennsylvania. On February 6, 2013, this Court filed and served on Defendant an Order pursuant to Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure, directing Defendant to file and serve a Statement of Errors Complained of on Appeal, within 21 days of the Court's Order. Although the notes of testimony were not available until March 26, 2013, Defendant timely filed his Statement of Errors Complained of on Appeal, on February 26, 2013, raising three issues, namely:

> "1. The evidence was insufficient as a matter of law to sustain the verdict of guilty on the charge of Possession with Intent to Deliver a Controlled Substance. At trial the evidence failed to establish that the appellant constructively possessed the narcotics that were secreted in the secret compartment of the vehicle owned by the front passenger occupying the vehicle. At no time was appellant seen accessing or attempting to access the location where the narcotics were found.
>
> As such, the evidence failed to establish the requisite elements on the charge of Possession with Intent to Deliver a Controlled Substance because the evidence was insufficient to establish constructive possession.
>
> 2. The verdict was against the weight of the evidence and as such, a new trial is required. A new trial is the proper remedy when the verdict is found to be against the weight of the evidence.
>
> A review of the evidence, as presented by the Commonwealth, requires that appellant be awarded a new trial in order to allow right to prevail. The Commonwealth's evidence failed to establish that appellant possessed drugs with intent to deliver. The evidence failed to establish that the defendant was

in constructive possession of the narcotics secreted in the vehicle owned, or connected to, the front seat passenger. If anything, the front seat passenger was culpable. A verdict based on this scant evidence must shock one's sense of justice.

3. The court erred in denying the motion to suppress physical evidence. More specifically, the search of the appellant and recovery of the United States currency from his person was beyond the permissible scope of a pat-down search. Thus the currency should have been suppressed.

   Additionally, the Commonwealth failed to meet its burden to establish that the officers were justified in conducting the extended investigatory detention of the appellant and passenger that cumulated [sic] into the K-9 search. The fruits of the aforementioned searches and detentions served as the basis for probable cause in the search warrant. The results should have been excised from the probable cause affidavit and the search warrant invalid for lack of sufficient probable cause."

EVIDENCE AT TRIAL

The evidence presented at trial is clear and uncontradicted. Philadelphia Police Officer Jonathan Castro testified that on March 25, 2011, at approximately 6:30 PM, while on patrol in a marked police vehicle with his partner, Police Officer Hustler, he observed a blue Jeep Grand Cherokee ("Jeep") make a turn onto westbound Catharine Street from 51st St., in West Philadelphia, without signaling, in violation of the Motor Vehicle Code. Officer Castro and his partner activated the lights and sirens, eventually stopping the Jeep approximately one block from where it was initially observed. (N.T., 11/06/12 pgs. 8-10, 27) Officer Castro testified that as they approached the Jeep and began speaking with the occupants he noticed a strong smell of "burnt marijuana." (N.T., 11/06/12 pg. 10) After obtaining identification from Defendant and his passenger the officers returned to their patrol car to "run the two males' IDs." (N.T., 11/06/12 pgs. 10, 28) Officer Castro then noticed Defendant making "heavy movements" in a forward

direction, describing it as, "it's just not something we usually see when we do a traffic stop." On seeing this, he and his partner decided to remove the Defendant from the Jeep for safety reasons. (N.T., 11/06/12 pg. 11, 29, 30)

Both officers approached from the driver's side and, after removing Defendant, Officer Castro "conducted a pat down search for officers' safety". (N.T., 11/06/12 pgs. 11, 14) Officer Castro recovered from Defendant's pocket fifty-three bills of U.S. currency, in various denominations, totaling $4,595.00 which he immediately returned to Defendant. (N.T., 11/06/12 pgs. 14, 15, 17)

Officer Castro also testified that, as he approached Defendant to remove him from the Jeep, he noticed that the "gauge cluster" of the dashboard was "off track...about a half-inch to an inch." (N.T., 11/06/12, pgs. 11, 12, 23) Officer Castro testified that he knew the gauge cluster was off track because he personally drives the same type of vehicle. (N.T., 11/06/12, pg. 13) Given the smell of burnt marijuana, the large amount of currency and the dashboard's appearance, Officer Castro "sealed the car up," notified his supervisor and requested that a K9 unit respond to investigate the vehicle. (N.T., 11/06/12 pg.15)

A "short time later, K-9 did arrive on location, K-9 dog Leo, Officer Leo....did have a positive indication on that vehicle in his presence." After another police vehicle arrived on the scene, Officer Castro and his partner transported Defendant to Southwest Detectives for further investigation and to secure a search warrant for the Jeep. (N.T., 11/06/12 pgs.15, 16)

Officer Castro testified that he then issued a traffic citation to Defendant for failing to signal on making a turn. (N.T., 11/06/12 pg. 21) He also testified that a DMV

check on the vehicle disclosed that neither Defendant nor his passenger was the registered owner of the vehicle. (N.T., 11/06/12 pg. 21)

Officer Castro also testified that, upon checking the VIN, he realized he had had two prior encounters with this particular Jeep. (N.T., 11/06/12 pg. 14) In June of 2010, when Officer Castro attempted to stop this Jeep, a short pursuit ensued and sixty packets of heroin were recovered. The Jeep had a different license plate at the time of this incident. (N.T., 11/06/12 pg. 33) In July of 2010, when Officer Castro again attempted to stop this Jeep, the driver attempted to run him over. (N.T., 11/06/12 pgs. 33, 34) Officer Castro testified that, although it was the same driver in both instances, the driver was not the Defendant or Defendant's passenger. (N.T., 11/06/12 pgs. 34-37)

Philadelphia Police Detective Vincent Parker testified that on March 25, 2011 he prepared and secured a search warrant for Defendant's Jeep looking for "[f]irearms, any narcotics, anything illegal pertaining to this investigation." (N.T., 11/06/12 pgs. 38-40) Detective Parker executed the warrant at approximately 11:20 p.m. at the intersection of 52nd and Catherine Streets in Philadelphia, where the Jeep had been originally stopped. (N.T., 11/06/12 pgs. 39, 40) On examining the dashboard, on the driver's side, he noticed an area that "looked like a compartment that wasn't totally shut, and all I had to do is lift it with my fingertip." (N.T., 11/06/12 pg. 40) From inside this compartment, he recovered a total of $5,194 in cash, a hand gun and 32 small clear packets, each of which contained a blue piece of paper with a brownish substance inside. (N.T., 11/06/12 pg. 41, 42) From under the driver's seat he also recovered a traffic ticket issued on February 2, 2011 to Defendant's passenger. (N.T., 11/06/12 pg. 48-51)

He described these packets as being wrapped in three bundles with black rubber bands. Two bundles contained 14 packets, the third bundle contained three packets and one packet was loose. Before submitting the packets for analysis, Detective Parker performed a NIK test on a few samples, which came back positive for heroin. (N.T., 11/06/12 pgs. 41, 43) Furthermore, it was stipulated by and between counsel "that the drugs were submitted to the chem. lab....and they weighed 1.021 grams, and they were positive for heroin." (N.T., 11/06/12 pg. 62)

Detective Parker also testified that the money he recovered was wrapped in two bundles by the same type of rubber band used to bundle the drugs. "The first bundle of money was $1,194. The denominations were 1 $100 bill, 44 $20 bills, 10 $10 bills 19 $5 bills and 19 $1 bills. The second bundle was 5 $100 bills, 6 $50 bills, 20 $10 bills and 150 $20 bills." (N.T., 11/06/12 pg. 46) It was further stipulated by counsel that the hand gun recovered was operable and successfully test fired by the firearms unit of the Philadelphia Police Department. (N.T., 11/06/12 pg. 50, 62)

Detective Parker testified that the Jeep was registered in the name of an individual other than Defendant or his passenger. He further testified that he attempted to contact the registered owner of the Jeep and in fact visited the owner's registered address on two separate occasions, but was unable to locate her. He also stated that she never contacted him to retrieve the vehicle and that it was eventually confiscated. (N.T., 11/06/12 pgs. 49, 51-53)

Philadelphia Police Officer Peggy McGrory, testified that she has been a Philadelphia Police Officer for 20 years, including over 18 years as a member of the Philadelphia Police Narcotics Unit. She was qualified at trial, without objection, as an

expert in "the packaging of narcotics and whether or not narcotics are possessed with the intent to deliver." (N.T., 11/06/12 pgs. 54-57) Officer McGrory testified that, after a review of the file and testimony of the Commonwealth's witnesses, it was her expert opinion that the drugs recovered from Defendant's Jeep "were possessed with the intent to deliver." (N.T., 11/06/12 pg. 58)

In reaching her conclusion she took into account the traffic ticket issued to Defendant's passenger and the involvement of the Jeep in the recovery of 60 packets of heroin in July of 2010, as well as the money, heroin and gun recovered from the hidden compartment. She also took into account the money recovered from Defendant's person. She concluded that the compartment discovered while searching the vehicle was used "to hide drugs, to transport money back and forth. There's a gun there that was easily – in my opinion – easily accessed to protect that money and those drugs, if the need should arise." (N.T., 11/06/12 pg. 59)

DISCUSSION OF THE ISSUES RAISED

I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION.

Defendant, in his first Statement of Errors, complains that the evidence at trial was insufficient to sustain the verdict of guilty because the Commonwealth "failed to establish that the appellant constructively possessed the narcotics." Defendant's complaint is without merit.

At the outset, the Court notes that Defendant's complaint that the vehicle driven by Defendant was "owned by the passenger occupying the vehicle" misconstrues the

evidence at trial. As noted above, Detective Parker testified that the Jeep was registered in the name of someone other than Defendant or his passenger. Additionally, Defendant presented no testimony or evidence contradicting Detective Parker's testimony.

"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." ***Commonwealth v. Caban***, 60 A.3d 120, 132 (Pa. Super. 2012) citing ***Commonwealth v. Quel,*** 27 A.3d 1033, 1037–38 (Pa. Super. 2011). Additionally, "a court may draw inferences from the facts so long as the inferred facts are more likely than not to flow from the proven facts." ***Commonwealth v. Wodjak,*** 466 A.2d 991, 996 (Pa. 1983).

Defendant challenges the sufficiency of evidence, complaining that the Commonwealth failed to prove that the defendant "constructively possessed" the heroin found "secreted in the secret compartment." Our Supreme Court has described constructive possession as a "legal fiction" where an individual possesses "conscious dominion" over contraband, or "the power to control the contraband and the ability to

exercise that control." ***Commonwealth v. Thompson***, 779 A.2d 1195, 1199 (Pa. Super. 2001) (Citations omitted). In circumstances where a defendant does not physically possess a controlled substance, the Commonwealth may rely on the "totality of the circumstances" leading to "an inference arising from a set of facts that possession of the contraband was more likely than not," to prove constructive possession. ***Commonwealth v. Brown***, 48 A3d. 426, 430 (Pa. Super. 2012). Constructive possession may also be found in one or more factors where the item in issue is in an area of joint control and equal access. ***Commonwealth v. Murdrick***, 510 Pa. 305, 507 A2d 1212 (Pa. 1986). Pennsylvania courts often find evidence of constructive possession sufficient where a defendant is not seen accessing or attempting to access contraband. *See e.g.*, ***Commonwealth v. West***, 937 A.2d 516, 524 (Pa. Super. 2007) (Cocaine discovered in motorcycle compartment that defendant owned and was seen riding an hour prior); ***Commonwealth v. Harvard***, 64 A.3d 690, 699 (Pa. Super. 2013) (Firearm found in shed of shared residence containing items from armed robberies); ***Commonwealth v. Jones***, 874 A.2d 108, 113 (Pa. Super. 2005) (Driver of rental vehicle with two passengers convicted for cocaine found between passenger door and seat).

In the instant matter, the Commonwealth presented more than sufficient evidence to support Defendant's conviction. It is clear from the evidence at trial that a significant amount of money and heroin, along with a loaded fully operational hand gun, were recovered from a secret compartment hidden underneath the dashboard of the Jeep. It is of no moment that Defendant was not "seen accessing or attempting to access the location where the narcotics were found." Both Officer Castro and Detective Parker testified that not only was the secret compartment on the driver's side of the dashboard

within easy reach of Defendant its opening was clearly visible. Officer Castro also observed Defendant making "heavy, furtive movements" in a forward direction. Additionally, Detective Parker testified that he was able to open the secret compartment simply by "lifting it with his fingertip." Furthermore, Officer McGrory testified that the gun recovered was "easily accessed to protect that money and those drugs, if the need should arise." Finally, the registered owner of the Jeep made no attempt to contact Detective Parker or to recover it following its seizure. The Court finds it reasonable to infer from these facts that Defendant was in constructive possession of the heroin found in the secret compartment on the driver's side dashboard.

II. THE VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

Defendant, in his second Statement of Errors, complains the verdict was against the weight of the evidence. Specifically, the Commonwealth's evidence "failed to establish that the Defendant possessed the drugs with the intent to deliver," and "failed to establish that the Defendant was in constructive possession of the narcotics secreted in the vehicle owned, or connected to, the front seat passenger." The Court notes again that the vehicle driven by Defendant was not "owned by the passenger occupying the vehicle." Defendant's complaint is without merit.

Although Defendant, in his second complaint, challenges the weight of the evidence, he is in fact challenging the sufficiency of the evidence. For the reasons stated above the evidence at trial was more than sufficient to support his conviction.

Defendant's complaint that the verdict was against the weight of the evidence challenges the discretionary power of the Court. ***Commonwealth v. Widmer***, 744 A.2d

745, 751-2 (Pa. 2000). The scope of review is whether the Court abused its discretion in its verdict. The Superior Court of Pennsylvania, in ***Commonwealth v. Rossetti***, 863 A.2d 1185, 1191 (Pa. Super. 2004) citing ***Commonwealth v. Hunter***, 554 A.2d 550 (Pa. Super. 1989), held that "[b]efore a trial court may award a new trial on the ground that the verdict is against the weight of the evidence, it must appear that the verdict was so contrary to the evidence as to shock one's sense of justice and make the award of a new trial imperative." Furthermore, a complaint that the verdict was against the weight of the evidence challenges the credibility of a witness or witnesses at trial. In ***Commonwealth v. Champney***, 574 Pa. 435, 832 A.2d 403, 408 (2003), our Supreme Court held that "[t]he weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we must only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice." (Citations omitted) Finally, "[a] motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. ***Commonwealth v. Widmer***, 560 Pa. 308, 319, 744 A.2d 745, 751 (2000).

The Defendant's second complaint, challenging the weight of the evidence, simply restates the essence of his first complaint that the evidence was insufficient to "establish that the defendant was in constructive possession of the narcotics secreted in the vehicle." As noted above, whether or not the "front seat passenger was culpable" is not relevant when considering whether or not Defendant had constructive possession of

the narcotics recovered, as both may be held equally culpable for possessing the narcotics.

Intent to deliver, like constructive possession, can be established "wholly by circumstantial evidence," and the court should "[look] to all facts and circumstances in each case surrounding the possession of the controlled substance." ***Commonwealth v. Ratsamy***, 594 Pa. 176 at 1892; 934 A.2d 1233 at 1237 (Pa., 2007), citing ***Commonwealth v. Drummond***, 775 A.2d 849 (Pa. Super. 2001). The Court noted that multiple factors may be considered including "manner in which the controlled substance is packaged, the behavior of the Defendant, the presence of drug paraphernalia... large sums of cash found in possession of the Defendant," and emphasized the importance of expert testimony regarding the intent to deliver. ***Id.*** 1237-8. Relying on ***Ratsamy***, in ***Commonwealth v. Carpenter***, 955 A.2d 411, 414 (Pa. Super. 2008), our Superior Court stated that "expert testimony of a witness qualified in the field of drug distribution, coupled with the presence of drug paraphernalia, is sufficient to establish intent to deliver."

As noted above, Officer McGrory was qualified, without objection, as an expert in "the packaging of narcotics and whether or not narcotics are with the intent to deliver." In summarizing the factors leading to her conclusion, Officer McGrory testified that: "In that compartment you have close to $5,100.00, you have a gun, and you have 32 packets of heroin. The street value of that heroin is $320.00. Each packet on the street is sold for $10... the defendant had another $4,000.00." (N.T., 11/06/12, pg. 59) The packets of heroin and currency were bundled in the "same [black rubber bands]," in a compartment within arm's reach of the Defendant and easily accessible. (N.T., 11/06/12 pgs. 41, 46)

Officer McGrory concluded her testimony by stating: "In my experience, in vehicles usually that have compartments, they are used for hiding things. In this case, I believe it's to hide the drugs, to transport the money back and forth. There's a gun in there that was easily – in my opinion – easily accessed to protect that money and those drugs, if the need should arise. For those reasons, I believe these drugs and that vehicle were possessed with the intent to deliver, and it had been delivering." (N.T., 11/06/12 pgs. 59-60)

The jury, as the trier of fact, was free to accept or reject her testimony. After a careful review of the record, the Court finds Officer McGrory's uncontradicted testimony coupled with that of Detective Parker and Officer Castro clearly and convincingly established possession with intent to deliver by the Defendant. The Court finds further, that the jury's verdict of guilty is not "so contrary to the evidence as to shock one's sense of justice."

III. THE COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS.

The Defendant's third Statement of Errors complains that the Court erred "in denying the motion to suppress physical evidence" asserting the initial search of Defendant was "beyond the permissible scope of a pat-down search. Defendant asserts further that the search warrant was unsupported by "sufficient probable cause" and, therefore, any evidence recovered there from is inadmissible. This complaint raises two separate issues which will be addressed in turn: 1) the Defendant complains that the pat-down unlawfully revealed the currency on his person requiring suppression and 2) the

search warrant was issued without sufficient probable cause. The Court will address these issues in reverse order. Defendant's complaints are without merit.

A. THE AFFIDAVIT OF PROBABLE CAUSE WAS SUFFICIENT TO SUPPORT THE ISSUANCE OF THE SEARCH WARRANT.

The Defendant, in his third Statement of Errors, essentially complains that the search warrant was issued without "sufficient probable cause" and, therefore, any evidence recovered there from is inadmissible. This complaint is without merit.

"A defendant moving to suppress evidence has the preliminary burden of establishing standing and a legitimate expectation of privacy." ***Commonwealth. v. Maldonado***, 14 A.3d 907, 910 (Pa. Super. 2011) citing ***Commonwealth v. Burton***, 973 A.2d 428, 435 (Pa.Super.2009) "With more specific reference to an automobile search, this Court has explained as follows: generally under Pennsylvania law, a defendant charged with a possessory offense has automatic standing to challenge a search. However, in order to prevail, the defendant, as a preliminary matter, must show that he had a privacy interest in the area searched." *Id.* at 910-911 (Citations omitted) In considering a motion to suppress the fruits of a search of an automobile: "Pennsylvania courts have been .....reluctant to find that an individual has a reasonable expectation of privacy absent a showing of ownership or express permission to borrow the vehicle." ***Commonwealth v. Arthur***, 62 A.3d 424, 430 (Pa. Super. 2013)

The evidence recovered from the secret compartment behind the gauge cluster was clearly admissible as Defendant had no legitimate expectation of privacy in the contents of the Jeep. At the suppression hearing held on March 5, 2012, Officer Castro testified that, in preparing the traffic citation he issued to Defendant, he determined that

neither Defendant nor his passenger were the registered owners of the Jeep. (N.T., 3/5/12, pg. 15) Furthermore, Defendant, both at the suppression hearing and at trial, failing to meet his burden, did not produce any evidence that he had a reasonable expectation of privacy in the Jeep. He presented no evidence of having had permission to operate the Jeep, let alone proof of ownership.

Notwithstanding the issue of Defendant's expectation of privacy, the evidence recovered from the Jeep is otherwise admissible. In ***Commonwealth v. Ellis***, 541 Pa. 285; 662 A.2d 1043, 1048 (Pa., 1995), our Supreme Court held that official police encounters with the general public fall into three categories: 1) "mere encounters" which need not be supported by any level of suspicion, but carries no official compulsion to stop or respond; 2) "investigative detention" which must be supported by reasonable suspicion; and 3) "custodial detention" which must be supported by probable cause. When the interaction between police officers and individuals rises to the level of "investigative detention" as in a vehicle stop for a traffic violation, it "must be supported by a reasonable suspicion; it subjects a suspect to a stop and a period of detention, but does not involve such coercive conditions as to constitute the functional equivalent of an arrest." ***Commonwealth v. Gutierrez***, 36 A.3d 1104, 1107-08 (Pa. Super. 2012) citing ***Commonwealth v. Holmes***, 14 A.3d 89, 96 (Pa. 2011). "Reasonable suspicion exists only where the officer is able to articulate 'specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity.'" ***Commonwealth v. Plante***, 914 A.2d 916,

922-23 (Pa. Super. 2006) Investigative detention can ripen into custodial detention when the initial investigation reveals sufficient evidence to support probable cause.

The Supreme Court of Pennsylvania, in ***Commonwealth v. Thompson***, 985 Pa. 23; 985 A.2d 928, at 931 (Pa., 2009), citing its decision in ***Commonwealth v. Rodriguez***, 526 Pa. 268, 585 A.2d 988, 990 (Pa. 1991), reiterating the long standing jurisprudence of Pennsylvania, held that probable cause exists when "the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime." The Supreme Court went on to hold that in "determining whether probable cause exists, we apply a totality of the circumstances test." ***Thompson***, 985 A.2d, at 931 The "standard of review in addressing a challenge to a trial court's denial of a suppression motion is whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. ... [W]e must consider only the evidence of the prosecution and so much of the evidence of the defense as remains uncontradicted when read in the context of the record as a whole." ***Commonwealth v. Dixon***, 977 A.2d 368, 372-373 (Pa. Super. 2010), citing ***Thompson***, 985 A.2d, at 931 "Affidavits for search warrants must be interpreted in a commonsense and realistic fashion. A magistrate's determination of probable cause should be paid great deference by reviewing courts." ***Commonwealth v. Ryan***, 300 Pa.Super. 156, 446 A.2d 277 (Pa. Super. 1982)

At the suppression hearing held on March 5, 2012, Officer John Castro testified that on the evening of March 26, 2011, at approximately 6:30 p.m., he and his partner stopped a vehicle, he identified as a Jeep Grand Cherokee, being driven by Defendant

after it made a turn without using its turn signals, in violation of the vehicle code. (N.T., 3/5/12, pgs. 9-12) After asking the driver to roll down the car's windows, Officer Castro detected "a strong scent of marijuana emanating from the vehicle." (N.T., 3/5/12, pgs. 11, 20) On obtaining the driver's information, both officers returned to their vehicle to conduct a DMV check. (N.T., 3/5/12, pgs. 11, 12) After returning to his vehicle, Officer Castro observed Defendant making "heavy movements forward....I could see him leaning forward, just moving back and leaning forward again, just something that doesn't normally happen when we stop vehicles." (N.T., 3/5/12, pgs. 12, 21, 23)

On observing this activity, Officer Castro, along with his partner, exited the patrol car, removed Defendant from the Jeep, conducted a pat down of Defendant for his safety and recovered a large sum of money, which he immediately returned to Defendant. (N.T., 3/5/12, pgs. 13, 24, 25) It wasn't until Defendant was transported to the 18th Police District that the money was removed from Defendant and counted. (N.T., 3/5/12, pgs. 13-14, 24, 25) Officer Castro testified that after both Defendant and his passenger were secured in the back of the patrol car, based on the smell of marijuana and Defendant's furtive movements, he called for K-9 back up. (N.T., 3/5/12, pgs. 14-16) Officer Castro also testified that he would have requested that K-9 unit "regardless of the money" found on the Defendant. (N.T., 3/5/12 pg. 15) It was stipulated that, on arriving at the scene, K-9 Officer Leo, "trained in narcotics recognition... made positive indication on the driver's side and passenger's side doors" of the Jeep. (N.T., 3/5/12, pg. 31)

Officer Castro then secured the Jeep and transported Defendant to the 18th Police District for further investigation. (N.T., 3/5/12, pg. 14) After returning to the 18th

District, Officer Castro gave a statement to Detective Farley which was used in the preparation of the search warrant for Defendant's vehicle. (N.T., 3/5/12, pg. 22, 23, 27)

It is clear from the record that, after having observed Defendant's vehicle make a turn in violation of the vehicle code, Officer Castro and his partner were justified in initiating a traffic stop, giving rise to the initial investigatory detention. It is also clear that it was "reasonable," based on his observation of a "strong scent of marijuana" and Defendant's furtive movements, for Officer Castro "to conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity" in justifying the extension of the "investigative detention" to both Defendant and the jeep.

It is equally clear that the inclusion of Officer Leo's "positive indication" on the jeep provided sufficient probable cause for Officer Castro to elevate Defendant's "investigative detention" to "custodial detention" leading to Defendant's subsequent arrest. At the conclusion of the suppression hearing, the Court found the evidence of the cash recovered from Defendant "a nonevent with regard to the warrant." (N.T., 3/5/2012, pg. 43) The Court also found Commonwealth had established sufficient probable cause to warrant the issuance of the search warrant without reference to the cash. Before denying Defendant's motion, the Court summarized the relevant evidence contained in the affidavit of probable cause noting: "We have the smell of marijuana coming from inside of the car. We have the movements of the driver toward the bottom of the seat, and then the positive reaction of the police dog." (N.T., 3/5/12, pg. 43, 44) "[I]nterpreted in a commonsense and realistic fashion," this evidence alone was sufficient justification to authorize the issuance of the search warrant.

THE SEARCH OF DEFENDANT'S PERSON WAS LAWFUL.

The Defendant, in his third Statement of Errors, also complains "the search of the appellant and recovery of the United States currency from his person was unlawful." Defendant's complaint is without merit.

The Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures. ***Commonwealth v. Pratt***, 930 A.2d 561, 563 (Pa. Super. 2007) citing ***Commonwealth v. Campbell,*** 862 A.2d 659 (Pa.Super.2004). "A forcible stop of a motor vehicle by a police officer constitutes a seizure of a driver and the occupants; this seizure triggers the protections of the Fourth Amendment. An officer is permitted to stop a motor vehicle to investigate a vehicle code violation which he or she observed." ***Id.*** 563. Our Superior Court has held that "when an officer detains a vehicle for violation of a traffic law, it is inherently reasonable that he or she be concerned with safety and, as a result, may order the occupants of the vehicle to alight from the car." ***Commonwealth v. Brown***, 654 A.2d 1096, 1102 (Pa. Super. 1995) Upon doing so, the officer may conduct a "*Terry* 'stop and frisk,' permit[ting] a police officer to briefly detain a citizen for investigatory purposes if the officer 'observes unusual conduct which leads him to reasonably conclude, in light of his experience, that criminal activity may be afoot.'" ***Commonwealth v. Simmons***, 17 A.3d 399, 403 (Pa. Super. 2011) (Citations omitted)

The permissible scope of such a frisk is "strictly limited" to searching for weapons and in assessing the validity of a pat-down, the "totality of the circumstances" must be considered. ***Commonwealth v. Parker***, 957 A.2d 311, 315 (Pa. Super. 2008)

As noted above, Officer Castro stopped the Jeep being driven by Defendant after it made a turn without using its turn signals, in violation of the vehicle code. After detecting "a strong scent of marijuana" and observing Defendant's furtive movements, Officer Castro removed Defendant from the vehicle and conducted a pat-down for his safety and recovered, from Defendant's pocket, a large sum of money in the form of 53 bills of various denominations and immediately returned it to Defendant. He testified that: "I took the currency out just to look at it." (N.T., 3/5/12, pg. 24)

It was not unlawful for Officer Castro to have removed the cash from Defendant's pocket to determine whether or not the object represented a hazard to his safety. The Court noted: "Well, the police officer is clearly justified in conducting a pat-down. Having made the stop, having smelled the odor of marijuana, there's apparently criminal activity going on. And then when he sees the movements inside the car, something indicating that the driver was trying to retrieve something, could be a weapon..." (N.T., 3/5/12, pgs. 40, 41) The cash found in Defendant's pocket could have been a small weapon. As the Court noted, "fifty bills is a bulk...Whether they're hundreds or ones, it was 53 bills folded over. He certainly should be able to go in and find out what that bulk is: a small caliber weapon in a pocket holster, could be. About the same size." (N.T., 3/5/12, pg. 41) Officer Castro acted properly in promptly returning the money to Defendant once he determined the object he recovered did not present a hazard to his safety.

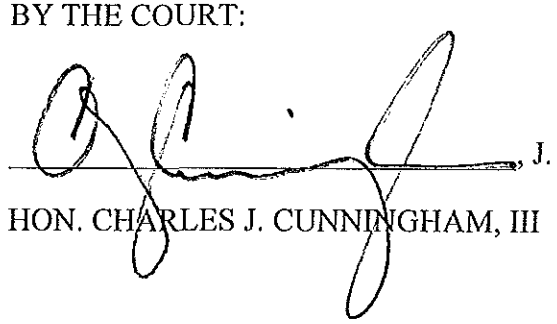
The doctrine of inevitable discovery allows the admission of evidence which is otherwise inadmissible, if its discovery was inevitable incident to lawful arrest or emanates from an independent origin. "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means...then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." ***Commonwealth v. Ingram***, 814 A.2d 264, 272 (Pa. Super. 2002) citing ***Nix v. Williams***, 467 U.S. 431, 435 (1984). Additionally, "[i]t is well established that a warrantless search incident to a lawful arrest is *reasonable,* and no justification other than that required for the arrest itself is necessary to conduct such a search." ***Commonwealth v. Williams***, 390 A.2d 1281, 1283 (Pa. Super. 1990).

As noted above, the Court determined the money found on Defendant was not necessary for the purpose of establishing probable cause in the search warrant. Moreover, under the doctrine of inevitable discovery, the cash in Defendant's possession at the time of his arrest was properly admissible at trial, for whatever evidentiary value it may have had.

CONCLUSION

The Court finds that sufficient credible evidence was presented at trial to sustain the Defendant's conviction for PWID and that the conviction was not against the weight of the evidence. The Court finds that there was no reason to grant the Defendant's motion to suppress the currency found on his person and that all the evidence was properly admitted at trial.

BY THE COURT:



October 22, 2013

, J.

HON. CHARLES J. CUNNINGHAM, III