

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MIGUEL LOPEZ,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 217 MDA 2013

Appeal from the Judgment of Sentence entered August 29, 2012,  
in the Court of Common Pleas of Lebanon County,  
Criminal Division, at No(s): CP-38-CR-0001010-2011.

BEFORE: SHOGAN, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY ALLEN, J.:

**FILED NOVEMBER 22, 2013**

Miguel Lopez, ("Appellant"), appeals from the judgment of sentence imposed after a jury convicted him of possession with intent to deliver a controlled substance, possession of a controlled substance, and possession of drug paraphernalia.<sup>1</sup> We affirm.

The trial court summarized the pertinent facts and procedural history as follows:

On June 21, 2011, members of the Lebanon County Drug Task Force executed a search warrant on 1421 Willow Street, an apartment occupied by Roberto Montalvo and [Appellant]. Sergeant Jonathan Hess testified at trial that the Task Force had difficulty making entrance into the apartment. Because Sergeant Hess believed that there were individuals inside the apartment attempting to destroy or conceal evidence, he

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<sup>1</sup> 35 P.S. §§ 780-113(a)(30), (16), and (32).

attempted to kick the door in but was hindered by furniture blocking the entry.

Once inside, the Task Force members conducted a thorough search of the apartment. Officers found a large quantity of cocaine hidden in the ceiling of the bathroom and in the ceiling of [Appellant's] bedroom. Smaller quantities of cocaine were found throughout Montalvo's bedroom as well. Marijuana and drug paraphernalia were also located throughout the apartment. Both [Appellant] and Roberto Montalvo were arrested.

Appellant was charged with [numerous violations of the Controlled Substance, Drug, Device and Cosmetic Act, as well as criminal conspiracy]. A jury trial was held on April 18, 2012, where the jury found [Appellant] guilty on Count 1, Possession with Intent to Distribute Cocaine; Count 5, Possession of Cocaine; and Count 9, Possession of [drug paraphernalia]. On August 29, 2012, [Appellant] was sentenced to an aggregate sentence of three (3) years to ten (10) years in a state correctional institution. On September 6, 2012, [Appellant] filed a post-sentence motion....

Trial Court Opinion and Order, 3/27/13, at 2-3.

On January 2, 2013, the trial court denied Appellant's post-sentence motion. This appeal followed. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises two issues for our review:

- I. Whether the prosecutor intentionally subverted the court process to the extent that [Appellant] was denied a fair trial?
- II. Did the Commonwealth present sufficient evidence to enable the fact-finder to find every element of the crime of Possession with Intent to Deliver Cocaine beyond a reasonable doubt?

Appellant's Brief at 4.

In his first issue, Appellant raises a claim of prosecutorial misconduct, arguing that the prosecutor engaged in tactics intended to demean or subvert the truth-seeking process, thereby depriving Appellant of a fair trial. Appellant's Brief at 7-8.

"Our standard of review for a claim of prosecutorial misconduct is limited to whether the trial court abused its discretion. In considering this claim, our attention is focused on whether the defendant was deprived of a fair trial, not a perfect one." ***Commonwealth v. Lewis***, 39 A.3d 341, 352 (Pa. Super. 2012) (internal quotes and citations omitted).

Appellant explains that, prior to trial, the Commonwealth secured an expert report from Detective Adam Saul of the Lebanon City Police Department's drug task force. Appellant's Brief at 7-8. However, Detective Saul was subsequently dismissed from the drug task force for misconduct. *Id.* The Commonwealth then retained Sergeant Jonathan Hess to prepare a new expert report. Sergeant Hess subsequently testified as the Commonwealth's expert witness at trial, opining that some of the drugs retrieved from the residence were intended for distribution based on, *inter alia*, their quantity and the manner in which they were packaged. N.T., 4/13/12, at 73-83.

Appellant argues that the prosecutor's failure to call Detective Saul or otherwise make him available as an expert witness at trial prevented Detective Saul's misconduct from being assessed by the jury, and impeded

the rendering of a "true verdict." Appellant's Brief at 8. Appellant maintains that as a consequence of the Commonwealth's conduct, he was denied a fair trial. We find no merit to Appellant's claim.

Appellant does not cite any authority, nor are we able to find any, indicating that the Commonwealth must call at trial all the witnesses identified during the discovery period. **See Commonwealth v. Barnosky**, 400 A.2d 168, 172 (Pa. Super. 1979) ("The calling of witnesses is within the discretion of the prosecution under the general direction of the trial judge.); **Commonwealth v. Black**, 142 A.2d 495 (Pa. Super. 1958) (decision as to whether to call a witness is properly a matter within the discretion of the prosecuting attorney).

The Commonwealth presented Sergeant Hess as its expert witness. Sergeant Hess provided expert testimony at trial that, in his opinion, the contraband found in Appellant's residence was intended for distribution rather than personal use. N.T., 4/18/12, at 73-83. There is no indication in the record that the Commonwealth failed to make a pre-trial disclosure to Appellant of its substitution of Sergeant Hess for Detective Saul. Nor does the record indicate that Appellant at any time prior to trial objected to the substitution. **See Commonwealth v. English**, 667 A.2d 1123, 1126 (1995), *affirmed*, 699 A.2d 710 (Pa. 1997) ("one must object to errors, improprieties or irregularities at the earliest possible stage of the criminal or civil adjudicatory process to afford the jurist hearing the case the first

occasion to remedy the wrong and possibly avoid an unnecessary appeal to complain of the matter”).

While Appellant makes a bald assertion that the Commonwealth’s failure to call Detective Saul or make him available for cross-examination constituted reversible error, Appellant does not explain in what manner the Commonwealth’s failure to present Detective Saul’s expert testimony impaired the jury’s ability to render a true verdict, or how impeachment of Detective Saul would have affected the jury’s verdict. ***See Commonwealth v. Philistin***, 53 A.3d 1, 17 (Pa. 2012) (citations omitted) (“To prevail on a prosecutorial misconduct claim, appellant must **show** the prosecutor’s actions had the unavoidable effect of undermining the fact-finder’s neutrality so as to preclude a true verdict.”) (emphasis added). For the foregoing reasons, we find no merit to Appellant’s claim of prosecutorial misconduct for failure of the Commonwealth to call Detective Saul as an expert witness. As the trial court observed, “[t]he Commonwealth is permitted to determine which witness it will call as an expert. In this case, a new expert report was prepared and submitted prior to trial. [The] Commonwealth did not commit any type of misconduct by not calling Detective Saul as a witness.” Trial Court Opinion, 3/27/13, at 7.

Appellant next argues that the Commonwealth failed to present sufficient evidence to support his conviction of possession of a controlled

substance with intent to deliver. Appellant's Brief at 9-14. Our standard of review of sufficiency challenges is well settled:

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 [finder] 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. Jones***, 886 A.2d 689, 704 (Pa. Super. 2005), *appeal denied*, 587 Pa. 686, 897 A.2d 452 (2006) (citations omitted).

To sustain a conviction of possession of a controlled substance with intent to deliver, "the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance with the intent to deliver it. The trier of fact may infer that the defendant intended to deliver a controlled substance from an examination of the facts and circumstances surrounding the case. 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. Kirkland***, 831 A.2d 607, 611 (Pa. Super. 2003).

To sustain a conviction for possession with intent to deliver where the controlled substance is not found on the defendant's person, the Commonwealth must demonstrate the defendant's knowing or intentional possession by proof of constructive possession. ***Commonwealth v. Valette***, 613 A.2d 548, 549-550 (Pa. 1992) (citations omitted). Under Pennsylvania law, “[c]onstructive 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. Thompson***, 779 A.2d 1195, 1199 (Pa. Super. 2001) (internal citations and quotations omitted).

In addition to possession, the Commonwealth must prove that the defendant had the intent to deliver the controlled substance. The facts and circumstances surrounding possession are relevant in making a determination of whether contraband was possessed with intent to deliver. ***Commonwealth v. Lee***, 956 A.2d 1024, 1028 (Pa. Super. 2008) (citations omitted). Relevant factors to consider include the quantity of drugs

possessed, the manner of packaging, the absence of paraphernalia for drug use, the behavior of the defendant, the presence of large amounts of cash, and expert opinion testimony. ***Commonwealth v. Heater***, 899 A.2d 1126, 1131 (Pa. Super. 2006).

Here, Appellant argues that he did not constructively possess the cocaine recovered from his residence, and that the Commonwealth failed to present sufficient evidence of Appellant's ability to exercise conscious dominion and control over the cocaine, the power to control the cocaine, and the intent to exercise such control. Appellant's Brief at 11-12. The trial court however concluded that the evidence was sufficient to sustain Appellant's conviction, explaining:

[Upon the arrival of the police at Appellant's residence], Sergeant Hess ... testified [that the officers] could hear people inside the apartment, but they had difficulty gaining entrance into the apartment. [The] [o]fficers knocked and announced at both the interior entrance door and the fire escape entrance door for approximately five to ten minutes. Sergeant Hess later discovered furniture had been placed in front of the fire escape door to prevent access. Eventually someone opened the interior access door. Appellant stated he had only lived with Montalvo for three weeks prior to the incident; however he made no attempt to immediately open the door for the officers.

Officer Larry Minnick testified he went onto the roof of the house and through a window could see people moving around in the apartment. He testified he saw a person making short, repeated trips in and out of the bathroom. Officer Minnick described the person he saw in the bathroom as an individual with a "larger frame." After gaining entry, Officer Minnick determined it was Appellant he saw in the bathroom because Montalvo had a smaller frame than the person he saw. Appellant's larger frame matched the individual Officer Minnick saw in the bathroom. Cocaine was found in the ceiling of the



bathroom that Officer Minnick had been watching. Sergeant Hess testified that it is common for people to hide contraband in drop ceilings. Cocaine was also found in the ceiling of Appellant's room. Officer Minnick testified that he had been with the Drug Task Force for over ten (10) years. Sergeant Hess testified he had been a co-coordinator and had supervisory duties on the Drug Task Force for four years. These officers have extensive training and experience in the investigation of controlled substances and both testified that the cocaine and marijuana were packaged both in bulk and consistent with the way it is sold on the street.

Trial Court opinion, 3/27/13 at 4-5 (citations to notes of testimony omitted).

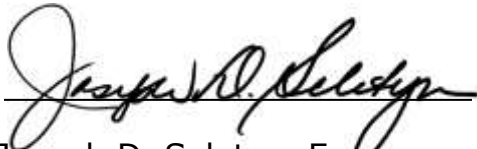
Our review of the record supports the trial court's determination that Appellant constructively possessed contraband with intent to deliver. Sergeant Hess testified that upon arriving at Appellant's residence, he knocked on the door "pretty loud and pretty hard" and shouted "police, search warrant" repeatedly, but received no response. N.T., 4/18/12, at 9. However, the officer was able to hear sounds of activity inside the residence. *Id.* at 10. Officer Minnick, who was able to see inside the apartment through a window, observed Appellant moving around the apartment, and repeatedly travelling to and from the bathroom. *Id.* at 34-36. Once the officers gained entry into the residence, they found cocaine and marijuana in the ceiling of Appellant's bedroom, as well as in the bathroom ceiling. *Id.* at 12-18, 70. This collective evidence was sufficient to establish Appellant's constructive possession of the contraband. Although Detective Keith Ulrich testified that Mr. Montalvo told him that "[Appellant] didn't know anything about the drugs" and that "the drugs that were found in [Appellant's] room [Mr.

Montalvo] believed he put there at some point prior to when [Appellant] moved in," the jury, in an exercise of its discretion, opted not to credit this testimony, and concluded instead, based on the Commonwealth's evidence, that Appellant constructively possessed the cocaine. *Id.* at 64. It is not within our province to reweigh the evidence or substitute our judgment for the fact-finder. ***Jones, supra.*** Viewing all the evidence admitted at trial in the light most favorable to the verdict winner, we conclude that the evidence was sufficient to support the jury's verdict.

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 11/22/2013