**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee<br><br>v.<br><br>EDDY HERALCIO COLON,<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br><br>No. 2291 EDA 2011 |

Appeal from the Judgment of Sentence August 4, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0007287-2009

BEFORE: BOWES, LAZARUS, and PLATT,* JJ.

MEMORANDUM BY BOWES, J.: Filed: February 15, 2013

Eddy Heralcio Colon appeals from the judgment of sentence of five to ten years imprisonment imposed after his conviction at a nonjury trial of possession of a controlled substance, possession with intent to deliver ("PWID"), possession of paraphernalia, and criminal conspiracy. We affirm.

The trial court succinctly summarized the evidence adduced during the nonjury trial as follows:

> According to the evidence, on January 15, 2009, Philadelphia Police Officer James Crown and other officers were in the area of 3800 block of Bennington Avenue when Officer Crown observed a man named Edwin Avila engage in several hand-to-hand transactions. When police pulled up Avila retreated down an alley and as he did so, he discarded two packets of a green weedy substance and a bag filled with 40 purple pills stamped with "[G] 163." Avila then ran into a

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* Retired Senior Judge assigned to the Superior Court.

> residence located at 3845 Bennington Avenue and police followed him inside the location.
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> Upon entering the property, Officer Crown saw defendant exiting a second floor bathroom. Officer Crown and the other officers explained to defendant why they were in the residence at which time defendant consented to a search of the premises. As a result of that search police recovered several pill bottles filled with different pills testing later revealed to be Oxycodone, amphetamines, codeine, and alpaprazolam [sic].[1] One of the pills confiscated by police matched the pills discarded by Avila.
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> In addition thereto, police seized $1378.00 which was comprised of bills of small denomination, which defendant admitted was his, as well as indicia of residency for defendant. Police also found a log book containing a list of names next to which were the names of the drugs found inside the residence and amounts of money.
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> Defendant stipulated to the testimony of a drug expert who, had he testified, would have opined that the [drugs] were possessed with the intent to deliver.

Trial Court Opinion, 1/26/12, at 1-2.

Following a nonjury trial, the trial court convicted Appellant of the above-referenced offenses. On August 4, 2011, the trial court denied Appellant's motion for extraordinary relief wherein Appellant apparently invoked his trial counsel's failure to advise him of his right to testify on his own behalf. In denying the motion, the trial court reasoned that it was a matter for collateral review and that special relief was inappropriate. On the

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[1] Officer Crown testified that an unidentified third party, a woman who entered the residence during the police search, claimed ownership of some of the prescription medication; however, the police discounted her claims because the prescription bottles did not bear her name. N.T., 9/22/10, at 19.

same date, the trial court imposed five to ten years imprisonment for PWID and five years of probation for criminal conspiracy. The court imposed no further penalties on the remaining offenses. This timely appeal followed.

Appellant raises the following questions for our review.

> A) Whether the evidence was insufficient as a matter of law where there was no evidence to connect the Appellant to the drugs and there was no evidence to indicate that he exercised control or dominion over the drugs or that he conspired to distribute the drug?
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> B) Whether [t]he Appellant was denied his constitutional right to testify on his own behalf where the court did not inquire or colloquy the defendant about his right to testify or whether he had any witnesses to present on his behalf?

Appellant's brief at 5.

Appellant's first issue challenges the sufficiency of the evidence that the Commonwealth adduced at trial to sustain the PWID conviction. Specifically, Appellant asserts that the Commonwealth did not establish his constructive possession of the contraband found in his residence. Our standard of review is as follows:

> 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.
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> 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.
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> ***Commonwealth v. Mobley***, 14 A.3d 887, 889–890 (Pa.Super. 2011). Additionally, "in applying the above test, the entire record must be evaluated and all evidence actually received must be considered." ***Commonwealth v. Coleman,*** 19 A.3d 1111, 1117 (Pa.Super. 2011).

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

In order to sustain a conviction for PWID, the Commonwealth must establish that Appellant knowingly or intentionally possessed a controlled substance without being properly registered to do so and with the intent to manufacture, distribute, or deliver it. ***See Commonwealth v. Brown***, 48 A.3d 426, 430 (Pa.Super. 2012); 35 P.S. § 780–113(a)(30). "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." ***Commonwealth v. Bricker***, 882 A.2d 1008, 1015 (Pa.Super. 2005).

Since Officer Crown did not discover Appellant in actual possession of the controlled substances, the Commonwealth must establish that Appellant constructively possessed the contraband. This Court explained the concept of constructive possession as follows:

> 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.

***Brown, supra*** at 430 (quoting ***Commonwealth v. Parker***, 847 A.2d 745, 750 (Pa.Super. 2004)). "Constructive possession by its nature is not amenable to 'bright line' tests." ***Commonwealth v. Carroll***, 507 A.2d 819, 821 (Pa. 1986). When reviewing the totality of the circumstances, the "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.'" ***Bricker***, ***supra*** at 1014 (quoting ***Commonwealth v. Johnson***, 818 A.2d 514, 516 (Pa.Super. 2003)).

Herein, Appellant contends that the Commonwealth did not establish that he constructively possessed the controlled substances that were recovered from his residence. Specifically, Appellant argues that since the police did not find him near the contraband and his cohort, Avila, had equal access to the drugs that were discovered in the residence, the evidence was insufficient to establish possession. Appellant relies upon the Supreme Court's holding in ***Commonwealth v. Florida***, 272 A.2d 476 (Pa. 1971), and our conclusion in ***Commonwealth v. Schuloff***, 275 A.2d 835

(Pa.Super. 1971), as support for his argument. Unfortunately for Appellant, neither case is helpful.

In ***Florida***, our Supreme Court found that the Commonwealth adduced insufficient evidence to establish that each of four partygoers constructively possessed a jar of marijuana that was discovered on the floor of a room that they occupied with three other party guests. In finding that the evidence could not sustain the four convictions for possession, the High Court observed: 1) the police did not witness the defendants smoking or possessing marijuana; 2) the closest any of the defendants were to the jar of marijuana was eight feet; and 3) the resident and hostess of the party pled guilty to possession. ***Florida***, ***supra*** at 477-78. Under those particular facts and circumstances, the Supreme Court declined to adopt the Commonwealth's theory that the defendants' presence in the game room evinced an "opportunity to commit or join in the possession or control of the marijuana[.]" ***Id***. at 478. Thus, it reversed the judgments of sentence and discharged the defendants.

In ***Schuloff***, this Court invoked ***Florida***, ***supra*** to summarily reverse the judgment of sentence for possession against a co-tenant of an apartment. In that case, the police discovered marijuana and hashish in a living room couch as the result of a search that it executed while the appellant and three other people were sleeping in different rooms. Although we did not provide any independent analysis beyond the mere citation to

***Florida***, it appears that the pertinent facts therein did not establish the appellant's dominion or control of the drugs the police discovered in a couch located in a room that the appellant shared with his roommate.

Unlike the circumstances underlying ***Florida*** and ***Schuloff***, the Commonwealth's evidence is not limited to Appellant's presence in a residence occupied by multiple individuals. Indeed, the Commonwealth established that the drugs discovered in the case *sub judice* were located in **Appellant's** residence and not a home that he was visiting or a shared apartment. N.T., 9/22/10, at 17-18. Moreover, as we discuss *infra*, in contrast to the factual scenarios that Appellant cites, a nexus exists in the instant case that links Appellant to the drugs, albeit circumstantially. Hence, Appellant's reliance upon ***Florida*** and ***Schuloff*** is unpersuasive.

Herein, the totality of the circumstances demonstrates that Appellant possessed the power and intent to exercise control of the contraband that he and his cohort used to conduct a drug-trafficking operation. Officer Crown observed Avila complete a drug transaction, and when Officer Crown attempted to intervene, Avila fled down an alley directly to the rear of Appellant's residence. ***Id***. at 10-11. As Avila ran, he discarded two packets of marijuana and a bag containing forty purple pills. ***Id***. at 11, 20. Officer Crown followed Avila into Appellant's residence, kicking in the rear door, where he observed Appellant descending the stairs from the second floor. ***Id***. at 11-12. He discovered on the dining room table an open ice

cream box that contained seventy grams of marijuana, greater than fifty grams of oxycodone, forty-three doses of alprazolam, amphetamine capsules, new and used drug packaging, and a digital scale. ***Id***. at 12-13, 15, 23. The subsequent search of the dining room revealed a second scale near a jacket containing small denominations of United States currency totaling $1,398, which Appellant owned. ***Id***. at 14, 15-16, 17. In addition, the police found *indicia* of Appellant's residency located in the living room along with an "old marble coffee book" that delineated people's names, types of drugs, and sums of money. ***Id***. at 14. The drugs identified in the ledger located in Appellant's living room corresponded with the types of contraband the police confiscated from his dining room. ***Id***. at 14. Similarly, the stamp on the prescription drugs that Avail discarded during his attempt to elude Officer Crown matched the stamp on the purple pills that were confiscated from Appellant's residence.

Furthermore, unlike the scenarios in ***Florida*** and ***Schuloff***, the drugs were not found in a common location where multiple individuals had access. Only Avila and Appellant could control the marijuana and prescription drugs recovered from Appellant's dining room table. The circumstantial evidence that the Commonwealth adduced during the non-jury trial linked that contraband with the drug paraphernalia, suspicious currency, and ledger of drug transactions that all were discovered in other locations in Appellant's home. Similarly, there is no indication from Officer Crown's testimony that

Avila possessed the bountiful ice cream box full of drugs when he bolted down the alley and entered the residence. The logical inferences derived from these facts and circumstances establish beyond a reasonable doubt that Appellant constructively possessed the marijuana and pills discovered on his dining room table. ***See Bicker***, ***supra*** at 1015 ("all facts and circumstances surrounding the possession are relevant, and the Commonwealth may establish the essential elements of the crime wholly by circumstantial evidence"). Accordingly, we find that the evidence sustains the nonjury verdict convicting Appellant of possession and PWID.

Next, we address Appellant's claim that he was not properly informed of his right to testify. Appellant concedes, as he must, that the trial court was not required to perform an on-the-record colloquy; however, he complains that the trial court did not ask him directly if he wished to testify. Appellant continues that his testimony was critical to his defense in this case and the court's failure to ensure that he understood his right to testify warrants a new trial. For the following reasons, we disagree.

As we noted *supra*, the trial court is not required to conduct a colloquy to ensure that a defendant understands his right to testify. ***Commonwealth v. Todd***, 820 A.2d 707 (Pa.Super. 2003) ("there is no express requirement that a trial court conduct [an on-the-record] colloquy with regard to a defendant's right to testify"). Indeed, a defendant is expected to decide whether to testify on his own behalf after a full

consultation with his counsel. ***Commonwealth v. Daniels***, 999 A.2d 590, 596 (Pa.Super. 2010). Thus, mindful of trial counsel's express obligation to consult with his client regarding his decision to testify, and the absence of a corresponding obligation for the trial court to ensure that a defendant understands his rights, we reject Appellant's contention that the trial court erred in the case at bar by failing to inform him of his right to testify. Simply stated, Appellant's assertion of trial court error does not state a basis for relief.

Moreover, we observe that even though Appellant does not specifically complain that his trial counsel failed to consult with him about his right to testify, gave him advice so unreasonable that it effectively vitiated his right to testify, or otherwise interfered with his ability to exercise that right, to the extent that we could interpret his argument as raising these assertions, such complaints would not be subject to review on direct appeal in light of the procedural posture of this case. ***See Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002) (ineffective assistance of counsel claims are precluded on direct appeal and must be raised on collateral review); ***Commonwealth v. Barnett***, 25 A.3d 371, 377 (Pa.Super. 2011) (quoting ***Commonwealth v. Liston***, 977 A.2d 1089 (Pa.Super. 2008) (Castille, C.J., concurring)) ("this Court cannot engage in review of ineffective assistance of counsel claims on direct appeal absent an 'express, knowing and voluntary waiver of PCRA review.'"). Since Appellant's position implicates trial counsel's

ineffectiveness, we dismiss that claim without prejudice for Appellant to raise it during post-conviction collateral review.

Judgment of sentence affirmed.