

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CHRIS ASHBURN,	:	
	:	
Appellant	:	No. 3096 EDA 2010

Appeal from the Judgment of Sentence of April 17, 2009,
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No: CP-51-CR-1108221-2003

BEFORE: LAZARUS, J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY STRASSBURGER, J.: Filed: March 19, 2013

Chris Ashburn (Appellant) appeals from his April 17, 2009 judgment of sentence of three and one half to seven years of imprisonment following his convictions for possession of a controlled substance and possession with intent to deliver (PWID) a controlled substance.¹ We affirm.

The trial court summarized the facts of the case as follows.

On September 24, 2003 at approximately 8:10 p.m., Philadelphia Police Detective Joseph Farrell, Officer Patrick Sitek, and two other officers were in plain clothes in an unmarked vehicle checking for drug activity in the area of the 3300 block of Waterloo Street in Philadelphia. As the officers' vehicle was stopped in the middle of the 3300 block of Mascher Street, Detective Farrell observed [A]ppellant walk into an alleyway from Waterloo Street. Appellant walked in the direction of the officers. Detective Farrell then observed [A]ppellant stop in the middle of the alleyway where he reached over and picked up a white plastic bag. He watched as [A]ppellant opened the bag,

¹ 35 P.S. § 780-113(16) and (30), respectively.

*Retired Senior Judge assigned to the Superior Court.

pulled out a round object the size of a palm, and handed it to an Hispanic male in a white T-shirt. The detective stated that the area was well lit due to light sensors from a nearby speak-easy.

Detective Farrell exited the vehicle and followed [A]ppellant while Officer Sitek entered the alleyway behind the detective and retrieved the plastic bag. Officer Sitek found the bag stuffed behind a piece of wood in a fence. The bag contained six (6) clear knotted baggies. Inside each knotted baggie were twelve (12) clear glass jars with pink lids containing PCP. After Officer Sitek radioed Detective Farrell that the bag contained drugs, the detective followed [A]ppellant through the open door of a house he entered at 3342 Waterloo Street and placed him under arrest. The detective recovered \$320.00 in US currency from [A]ppellant's person - thirteen \$20.00 bills, fifty \$1.00 bills and two \$5.00 bills.

Appellant stipulated that if Officer Bradford Mitchell testified at trial he would testify that in his expert opinion the PCP was possessed with the intent to deliver. Officer Bradford's opinion was based upon the quantity of jars of PCP (72), the fact that they were packaged in bundles, and the fact that the particular area and the alleyway itself are known for PCP trafficking.

Trial Court Opinion, 6/28/2012, at 2-3 (citations omitted).

A bench trial resulted in verdicts of guilty as to the possession and PWID counts on June 18, 2004. On April 17, 2009, Appellant was sentenced as indicated above.² Appellant did not file a direct appeal; however, by order of October 27, 2010, his direct appeal rights were reinstated *nunc pro tunc* following his filing of a timely petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546.

² The record reflects that sentencing was scheduled and continued numerous times between June 2004 and April 2009, with bench warrants issued, because Appellant failed to appear.

Appellant filed a timely notice of appeal, and both Appellant and the trial court complied with Pa.R.A.P. 1925. On appeal, Appellant challenges the sufficiency of the evidence to sustain his convictions. Specifically, Appellant claims that the Commonwealth failed to prove beyond a reasonable doubt that Appellant possessed the PCP found in the alleyway. Appellant's Brief at 6-8.

We address Appellant's argument mindful of the following standard of review.

[O]ur standard of review of sufficiency claims requires that we evaluate the record in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty. 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.

Commonwealth v. Stays, 40 A.3d 160, 167 (Pa. Super. 2012) (internal quotations and citations omitted). The Commonwealth may sustain its burden by means of wholly circumstantial evidence, and we must evaluate the entire trial record and consider all evidence received against the defendant. ***Commonwealth v. Markman***, 916 A.2d 586, 598 (Pa. 2007).

To sustain a conviction for the crime of possession of a controlled substance, the Commonwealth must prove that Appellant knowingly or

intentionally possessed a controlled substance without being properly registered to do so under the Act. **See** 35 P.S. § 780-113(a)(16). The crime of possession of a controlled substance with intent to deliver requires the Commonwealth to prove an additional element: that Appellant possessed the controlled substance with the intent to manufacture, distribute, or deliver it. **See** 35 P.S. § 780-113(a)(30).

In the instant case, Appellant does not argue that the Commonwealth failed to prove that the bag retrieved from the alleyway contained a controlled substance. Nor does Appellant claim that the evidence was insufficient to support the finding that the drugs were intended for delivery based upon their quantity, packaging, and location. Appellant argues only that the evidence was insufficient to prove beyond a reasonable doubt that he possessed the PCP.

Because Appellant was not found with contraband on his person, the Commonwealth was required to establish that Appellant had constructive possession of the seized items to support his convictions. **See** *Commonwealth v. Kirkland*, 831 A.2d 607, 611 (Pa. Super. 2003).

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) (internal citations omitted).

Here, as the trial court aptly noted, the Commonwealth offered evidence not only that Appellant had the power to exercise control over the bag of PCP, but that he did in fact exercise control over it by retrieving it from, and returning it to, its hiding place in the alleyway. Trial Court Opinion, 6/28/2012, at 3-4. Appellant's argument clearly lacks merit and entitles him to no relief. ***See, e.g., Commonwealth v. Wright***, 846 A.2d 730, 737-738 (Pa. Super. 2004) (holding evidence sufficient where arresting officers witnessed the defendant conduct apparent drug transactions and crack cocaine packaged for sale was found in a bag discarded by the defendant); ***Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa. Super. 2000) (same).

Judgment of sentence affirmed.