NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. JEROME EVANS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 378 EDA 2012

Appeal from the Judgment of Sentence of December 2, 2011
In the Court of Common Pleas of Northampton County
Criminal Division at No(s): CP-48-0000642-2011

BEFORE: MUSMANNO, J., WECHT, J., and PLATT, J.*

MEMORANDUM BY WECHT, J.: **FILED MAY 17, 2013**

Jerome Evans ("Appellant") challenges his judgment of sentence for possession with intent to deliver (heroin), 35 P.S. § 780-113(a)(30). As well, Appellant challenges the trial court's imposition of the mandatory minimum sentence of five years' imprisonment prescribed by 42 Pa.C.S. § 9712.1(a) ("Sentences for certain drug offenses committed with firearms"). For the reasons (and to the extent) set forth below, we adopt the well-reasoned opinion of the trial court and affirm.

Because we adopt the trial court's opinion in this case, we need not render the factual history with anything approaching the ample detail provided by the trial court. It suffices to say that police officers executed a

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* Retired Senior Judge assigned to the Superior Court.

search warrant for Appellant's apartment, whereupon they found 267 glassine packets of heroin, stamped "Resident Evil," stored in a baggie of uncooked rice located in a backpack found in a hamper in the apartment's lone bedroom. Collectively, these packets contained 4.8 grams of heroin. As well, they found a 9-millimeter Taurus handgun in a dresser in the same room, which handgun was loaded with eighteen rounds; in the same dresser, police recovered a second magazine. In addition to these items, the police found a box of ammunition secreted between the mattress and box spring in the same room. Police also recovered, *inter alia*, $700 in cash from a freezer in the kitchen.

The jury heard extensive Commonwealth evidence, including that of a narcotics expert who testified at length concerning his opinion that the various items found in the apartment were consistent with the intent to deliver narcotics rather than personal use. In addition to the individual packaging, the storage of the packets in rice (a desiccant that acts as a preservative), and the currency found in the freezer, all of which the expert identified as hallmarks of narcotics distribution, the expert also indicated that 4.8 grams of heroin was enough to keep an average user of heroin high for over one month. ***See*** Trial Court Opinion ("T.C.O."), 5/11/2012, at 4-6, and footnotes thereto.

Appellant's statement of the issues suffices to sketch out the bases for his appeal:

1. Whether the trial court erred in refusing to permit [Appellant] to cross-examine [former] Detective [Thomas] Beiser about disciplinary action from another incident with an alleged drug dealer[1] and failing to require the Commonwealth to disclose [former Detective Beiser's] personnel file about same.

2. Whether the trial court erred by applying the mandatory sentence provisions of 42 Pa.C.S. § 9712.1.

Brief for Appellant at 4 (capitalization modified and serial typographical errors corrected for clarity).

With two caveats, we find the trial court's resolution of these issues in its opinion pursuant to Pa.R.A.P. 1925(a) to be fully responsive to Appellant's arguments on appeal, requiring no material supplementation. Accordingly, we adopt that opinion's thorough account of the factual and procedural history of the case, T.C.O. at 1-7, and to the extent set forth below, its analysis and resolution of issue 1, ***id.*** at 8-15, and its analysis and resolution of issue 2, ***id.*** at 22-32.

Our caveats touch upon each of Appellant's issues. Regarding Appellant's challenge to the trial court's ruling denying him the opportunity to cross-examine Officer Beiser regarding the misconduct in another case

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[1] The parties do not dispute that Thomas Beiser, a detective with the City of Easton Police Department Vice Unit, was demoted to patrolman months after the investigation and arrest here at issue, which concomitantly disqualified him for continued membership in the Vice Unit. ***See*** T.C.O. at 9. In order to evaluate Appellant's request to admit evidence of this disciplinary action, the trial court permitted Appellant to question Officer Beiser outside the presence of the jury. Officer Beiser testified that he was demoted "as a result of [him] cursing at an alleged drug dealer who had crack cocaine secreted in his buttocks." ***Id.*** (quoting Notes of Testimony, 10/4/2011, at 110).

that led to his demotion from detective, we agree with the trial court that Appellant failed to establish through any meaningful proffer the sort of nexus between the alleged misconduct and the instant arrest that would justify pursuit of that line of inquiry. T.C.O. at 11-15 (finding this case controlled by ***Commonwealth v. Bozyk***, 987 A.2d 753 (Pa. Super. 2009), in which officer misconduct was unrelated to defendant's underlying charges, and there was no motive to fabricate). However, regarding Appellant's effort to obtain Officer Beiser's personnel file, we wish to clarify that we would go no further than to observe that such a ruling appears to us correct based upon our determination that the trial court correctly found Appellant's proffer regarding relevance to be insufficient in light of the governing case law. That ruling moots Appellant's desire to review the personnel file, because Appellant failed to establish a foundation to justify such an intrusion. Consequently, we need not reach, and do not endorse, the trial court's determination that Appellant waived his right to challenge the trial court's denial of Appellant's requests for Officer Beiser's personnel file for failure to file a formal motion. ***See*** T.C.O. at 15. The transcript is replete with occasions upon which Appellant sought that file in open court, and in each instance the trial court rejected the request. ***See*** Brief for Appellant at 8-12 (quoting notes of testimony for instances when the issue was raised and re-raised by Appellant). The trial court did not suggest at trial that Appellant's request was nugatory for want of a formal motion, and we do not believe that such a motion was required in this instance. Rather, Appellant's serial

efforts to obtain the requested information amply preserved the issue for appellate review. Nonetheless, for the substantive reasons alluded to above and elucidated in detail by the trial court, T.C.O. at 11-15, the preservation issue is immaterial to the disposition of the issue on appeal. Thus, the trial court properly ruled that Appellant is entitled to no relief on his first issue.

In connection with his sentencing issue, Appellant's argument, in support of which he cites only ***Commonwealth v. Person***, 39 A.3d 302, 305 (Pa. Super. 2012), rests upon the proposition that section 9712.1(a) applies only when the firearm in question is **both** controlled by the defendant and found in close proximity to the narcotics in question. The trial court acknowledged that ***Person*** can be read for precisely that proposition. However, the court also observed that numerous cases, none of which is unacknowledged by Appellant, have issued suggesting that **either** control **or** proximity will suffice to support imposition of the mandatory sentence. T.C.O. at 25-28 & n.25 (discussing ***Commonwealth v. Sanes***, 955 A.2d 369 (Pa. Super. 2008); ***Person***, *supra*; ***Commonwealth v. Stein***, 39 A.3d 365 (Pa. Super. 2012); ***Commonwealth v. Hawkins***, 45 A.3d 1123 (Pa. Super. 2012)).[2]

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[2] The trial court also noted that our Supreme Court granted *allocatur* to review our decision in ***Commonwealth v. Hanson***, 29 A.3d 366 (Pa. Super. 2011), specifically to address aspects of the issue presented herein. T.C.O. at 28 n.25. ***Hanson*** was argued before our Supreme Court on May 8, 2012. ***See*** Docket, 55 EAP 2011. As of this writing, the Court has yet to issue its decision.

We agree with the trial court's learned discussion of the case law concerning this issue, as well as that court's observation that the law appears to be unsettled with regard to the ***Person***-reliant argument pressed by Appellant. However, we also agree with the trial court, for all the reasons stated in its opinion, that the circumstances of this case support imposition of the mandatory minimum sentence even under the conjunctive interpretation of section 9712.1(a) reflected in ***Person***. ***See*** T.C.O. at 28-32. Accordingly, interpretive uncertainty notwithstanding, we agree with the trial court that its imposition of the mandatory sentence was not illegal in this case.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

Prothonotary

Date: 5/17/2013

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
v.	)	No. CP-48-CR-642-2011
	)	
JEROME EVANS,	)	Superior Court No. 378 EDA 2012
	)	
Appellant.	)	

MEMORANDUM OPINION

The appellant, Jerome Evans, appeals from the judgment of sentence entered on December 2, 2011. This memorandum opinion is filed pursuant to Pennsylvania Rule of Appellate Procedure ("Pa.R.A.P.") 1925(a).

I. Factual And Procedural History

On January 28, 2011, the City of Easton Police Department charged the appellant with Unlawful Possession of a Controlled Substance (Heroin) with Intent to Deliver[1] and Persons Not to Possess Firearms (two counts)[2] for acts that allegedly occurred on that same date. On February 22, 2011, Magisterial District Judge Ralph W. Litzenberger held a preliminary hearing and all charges were bound over for trial.

The appellant was formally arraigned on March 10, 2011, and Attorney Steven R. Mills entered his appearance on the appellant's behalf on that date. On May 19, 2011, the appellant filed an Omnibus Pretrial Motion, and the Honorable Craig A. Dally held a hearing on the appellant's motions on June 14, 2011.[3] The appellant filed a brief in support of his motions on July 7, 2011, and the Commonwealth filed an opposing brief on July 15, 2011. Despite being represented by Attorney Mills, the appellant filed a *pro se* memorandum of law on July 18, 2011,

[1] 35 P.S. § 780-113(a)(30).
[2] 18 Pa.C.S. § 6105(a)(1).
[3] In the Omnibus Pretrial Motion, the appellant raised a (1) motion to suppress evidence obtained during execution of search warrant because (a) the warrant was not supported by probable cause and (b) the police violated the knock-and-announce rule; (2) motion for disclosure of the identity of a confidential informant; and (3) a motion to dismiss/writ of *habeas corpus*.

and another *pro se* letter with attached document on July 20, 2011. The appellant also filed a *pro se* "Motion for Sanctions for Violation of Duty to Disclose" on July 25, 2011.

On July 26, 2011, Attorney Mills filed a Motion to Withdraw as Counsel. On July 27, 2011, Judge Dally denied the appellant's Omnibus Pretrial Motions via an order with statement of reasons. Although Judge Dally denied the omnibus motions, the appellant filed a *pro se* Motion to Exclude Evidence on August 1, 2011.[4] On August 8, 2011, Judge Dally permitted Attorney Mills to withdraw as counsel, but required him to stay on as standby counsel pursuant to Pennsylvania Rule of Criminal Procedure 121.

The appellant filed a *pro se* "Petition for [*Hall*] Motion" on August 16, 2011. Although the docket entries do not show the exact date, Attorney Edward J. Andres, Esquire, was appointed to represent the appellant. On September 23, 2011, we held a conference with the parties. During the conference, we granted a motion *in limine* by the appellant to preclude the Commonwealth from referencing that the appellant was a member of a gang. [Notes of Proceedings, 9-23-11, at 4.] Additionally, in response to the appellant's *pro se* motion, we determined that we would hold a hearing pursuant to *Commonwealth v. Hall*, 302 A.2d 342 (Pa. 1973) and *Franks v. Delaware*, 438 U.S. 154 (1978) prior to trial. [*Id.* at 3.]

After severing the Persons Not to Possess Firearm offenses from the Possession with Intent to Deliver Heroin charge, we proceeded with a jury trial on October 3, 2011. On October 4, 2011, prior to counsel's opening statements to the jury, we held a *Franks* hearing during which the appellant called Officer Thomas Beiser of the City of Easton Police Department as his sole witness. At the conclusion of the hearing, we denied the appellant's *Franks* motion.

We then proceeded with the jury trial in this matter. During the trial, the following relevant evidence was presented concerning the appellant's guilt: At approximately 6:05 a.m.

[4] The docket reflects a filing date of July 29, 2011.

on January 28, 2011, then-Detective Thomas Beiser (hereinafter referred to as "Officer Beiser") of the City of Easton Police Department was part of a team executing a search warrant for the basement apartment at 1401 Lehigh Street in Easton. [Notes of Testimony – Day One ("Day One Tr."), 10-4-11, at 49, 50, 101. 157.][5] The Pennsylvania State Police Special Emergency Response Team ("SERT") initially entered the building and, after securing the individuals inside, turned over the building to Officer Beiser and the other members of the City of Easton Police Department. [*Id.* at 51, 151.][6]

Upon entering the basement apartment, Officer Beiser observed the appellant and a sixteen-year-old female, who were located in the bedroom. [*Id.* at 52.] There were no other individuals inside of the apartment. [*Id.*] Officer Beiser described the layout of the apartment as follows:

> As you entered the apartment through the exterior entrance, you're entering what I called the kitchen and living room. It's one room. I'll estimate it at about 15 by 12 feet approximately. It's a relatively small room.
>
> There's items consistent with a kitchen; a stove, a refrigerator there on the left the left side of this room. On the right side of the room there's a couch and a T.V. there, so I'll designate that as the living room/kitchen area.
>
> As you continue straight through the living room/kitchen area, you enter the one and only bedroom of the apartment. And again, this bedroom is approximately 12 by 14 feet roughly, approximately. It's a relatively small bedroom.
>
> One bed located in there. And if you enter that bedroom, there's another doorway to the right that leads into the area of the basement where I believe the water heater was located, some shelves appeared as if individuals were storing things there. And then there's a bathroom in the far corner of that residence that would be the northwest corner of the building.

[*Id.* at 52-53.]

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[5] Officer Beiser was also a member of the Northampton County Drug Task Force and the Federal Bureau of Investigation's Violent Crime and Anti-Gang Task Forces. [Day One Tr. at 49-50, 101.]

[6] Apparently, the search team used a battering ram to gain entrance to the apartment. [Day One Tr. at 151-52.] Some windows leading to the bathroom of the apartment were broken during the breach. [*Id.* at 156-57.]

Officer Beiser also noted that the apartment building at 1401 Lehigh Street is a multi-story building with approximately three living units within the building. [*Id.* at 145.][7] There was only one exterior entrance into the basement apartment and one interior entrance from an interior stairwell. [*Id.* at 55, 57, 146-47; Commonwealth's Exhibits 1, 2.] There is a door near the internal stairwell that leads to a larger storage area in the basement. [Day One Tr. at 148.] This storage area contains a furnace and hot water heater and can be accessed through a door in the appellant's bedroom. [*Id.* at 149, 150.]

During the search of the apartment, the police located 267 packets of heroin stored in a baggie of uncooked rice. [*Id.* at 62, 63, 66; Commonwealth's Exhibits 4, 21.][8] This baggie was located in a black North Face backpack, which was found in a white hamper in the southwest corner of the bedroom. [Day One Tr. at 63, 71, 72.][9] The heroin packets were stamped in red ink with the words, "Resident Evil." [*Id.* at 69, 193; Commonwealth's Exhibit 22.]

In addition to the aforementioned heroin, the police seized, *inter alia*, the following items: (1) a 9 millimeter Taurus handgun loaded with a magazine containing eighteen 9 millimeter rounds, which was located in between several pairs of blue jeans inside a dresser in the bedroom; (2) an additional handgun magazine also located in the dresser in the bedroom; (3) a box of ammunition in the corner of the bed between the mattress and the box spring; (4) four cash receipts (dated in January 2011) containing the appellant's name, which were located in the

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[7] Officer Beiser had been in that apartment building on prior occasions for prior investigations. [Day One Tr. at 146.]

[8] Officer Beiser indicated that the inventory receipt from the search mistakenly showed that there were approximately 270 packets of heroin. [Day One Tr. at 63, 67, 68.]

[9] Officer Beiser pointed out that there were two hampers in the bedroom, one was lying on the floor with clothes falling out of it and the other was standing up in the back corner of the bedroom and was partially concealed behind a pillow with a maroon pillowcase. [Day One Tr. at 70.] The recovered heroin was located in the hamper that was standing in the corner of the room. [*Id.* at 71.]

Additionally, Robert Weber of the City of Easton Police Department was assigned to the K-9 unit at the time of the search on January 28, 2011. [*Id.* at 220-21, 222.] After conducting a search of the apartment and the storage area with his partner, K-9 Bram, Officer Weber indicated that K-9 Bram only "indicated" the presence of narcotics on the two laundry baskets located in the bedroom. [*Id.* at 223, 225-26.]

living room; (5) a black wallet containing miscellaneous items, $10.00, and the appellant's identification; (6) four baggies of uncooked rice located in the kitchen cabinet; and (7) $700.00 located in the freezer in the kitchen. [Day One Tr. at 76, 77, 81, 82, 84, 86-87, 89, 94, 95, 175; Commonwealth's Exhibits 9, 10, 11, 12A-12D, 13, 13A, 15, 16, 17, 18, 19, 20.][10] Officer Beiser also observed that the appellant had a state identification number with a listed address at 1401 Lehigh Street, Easton, Pennsylvania 18042. [*Id.* at 99, 100.]

The 267 white glassine baggies recovered by the police contained a total of 4.8 grams of heroin. [*Id.* at 193.] Inspector Salvatore Crisafulli of the City of Easton Police Department was admitted as an expert in narcotics investigations and narcotics trafficking. [*Id.* at 202.][11] Inspector Crisafulli explained that he examines the totality of the circumstances when opining as to whether a particular defendant has possessed narcotics with the intent to deliver. [*Id.* at 203.] Some of the factors he considers are (1) the amount of drugs, (2) the weight of the drugs, (3) the presence of other items along with the drugs, and (4) the presence or absence of paraphernalia or other items or tools that might be used in the drug trade. [*Id.*]

After examining the facts in this case, Inspector Crisafulli opined that the appellant possessed this heroin with the intent to deliver based on the following factors: First, Inspector Crisafulli pointed out that the police recovered 267 packets of heroin, which was more than a heroin user would possess. [*Id.* at 205-06.][12] Also, an average bag of heroin would cost

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[10] The handgun was underneath at least one pair of blue jeans. [Day One Tr. at 82.] The police also recovered $10 located elsewhere in the residence. [*Id.* at 175.]

[11] Inspector Crisafulli has been employed with the City of Easton Police Department since September 1999, and he is assigned to the Vice Unit of the Criminal Investigations Division. [Day One Tr. at 194-95.] Inspector Crisafulli is also assigned to the Northampton County Drug Task Force and assists the F.B.I. in investigating organized crime and large scale drug activity. [*Id.* at 196.] He has also received training concerning drug trafficking including analyzing whether drugs are merely possessed or possessed with the intent to deliver. [*Id.* at 197-99.] Inspector Crisafulli has been accepted as an expert on at least twenty occasions in various Courts of Common Pleas in the Commonwealth of Pennsylvania. [*Id.* at 200-01.] Without objection by the appellant, Inspector Crisafulli was accepted as an expert in narcotics investigations and narcotics trafficking. [*Id.* at 202.]

[12] While acting undercover as a heroin user, Inspector Crisafulli had purchased heroin on several occasions, and he had also conducted controlled purchases of heroin. [Day One Tr. at 206.] The maximum amount of drugs that he

anywhere from $10 to $20; thus, the police recovered heroin costing at least $2,670. [*Id.* at 209-10.] Second, Inspector Crisafulli focused on the weight of the heroin recovered insofar as the 4.8 grams of heroin recovered would be enough to cause an average heroin user to remain high for over one month. [*Id.* at 206-07.][13] Third, the way the heroin was packaged in this case was indicative of being possessed with the intent to deliver. [*Id.* at 207.] Inspector Crisafulli pointed out that the heroin was recovered with rice and it was "not uncommon" for heroin dealers to store heroin in rice because it keeps moisture out of the heroin and prevents the heroin from going bad. [*Id.*] Fourth, Inspector Crisafulli noted that the police recovered money inside of the freezer and it was not unusual for drug dealers to hide their money in unusual locations such as a freezer. [*Id.* at 207-08, 212.] Fifth, Inspector Crisafulli pointed out that it was "very likely" for a drug dealer to possess a firearm because they are susceptible to robberies. [*Id.* at 208-09, 216.] This firearm was also located in close proximity to the heroin. [*Id.* at 212-13, 214.] Finally, Inspector Crisafulli indicated that (1) there was a lack of user paraphernalia found in the appellant's residence, (2) someone would have to have a "very, very, very strong habit" to possess 267 packets of heroin, and (3) the most efficient way to use heroin is by injection and the police did not recover any needles or straws in the apartment. [*Id.* at 210-11.]

At the conclusion of the trial, the jury found the appellant guilty of Unlawful Possession of a Controlled Substance (Heroin) with the Intent to Deliver on October 6, 2011. The Commonwealth then placed the appellant on notice that it was seeking to invoke the mandatory minimum sentences of five years pursuant to 18 Pa.C.S. § 9712.1(a) and two years pursuant to

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would purchase or arrange to purchase were anywhere from two to a maximum of twenty packets of heroin. [*Id.*] In addition, Inspector Crisafulli noted that despite effectuating numerous arrests in his career, he never came across a heroin user possessing 267 bags of heroin. [*Id.*]

[13] Inspector Crisafulli explained that the 4.8 grams of heroin would convert to 4800 milligrams. [Day One Tr. at 206.] The average heroin user with a moderate habit would use only approximately 20 milligrams in a dosage, and that amount would give the user a high for approximately 4 to 5 hours. [*Id.* at 206-07.] Thus, the 4800 milligrams of heroin recovered was enough heroin to keep the user high for over one month. [*Id.* at 207.]

18 Pa.C.S. § 7508(a)(7)(i). [*See* Notes of Trial – Day Three, 10-6-11 ("Day Three Tr."), at 167.] We then scheduled sentencing in this matter and ordered the Northampton County Probation Office to conduct a pre-sentence investigation and prepare a pre-sentence report prior to sentencing. We also ordered that the appellant submit to a drug and alcohol evaluation.

On December 2, 2011, we held a sentencing hearing after which we sentenced the appellant to a period of state incarceration for a minimum of seven years to a maximum of fifteen years for the offense of Unlawful Possession of a Controlled Substance with Intent to Deliver.[14] On December 28, 2011, the appellant timely filed a Notice of Appeal to the Superior Court of Pennsylvania. Upon receiving notice of the Notice of Appeal, we ordered the appellant to file a concise statement of the matters complained of on appeal pursuant to Pa.R.A.P. 1925(b) on January 11, 2012.[15] The appellant timely filed his concise statement on January 31, 2012, in which he complains as follows:

Defendant challenges the following on appeal:

1. THE DENIAL OF DEFENDANT'S OMNIBUS PRETRIAL MOTION, INCLUDING DENIAL OF MOTION TO SUPPRESS AND REQUIRING DISCLOSURE OF IDENTITY OF CONFIDENTIAL INFORMANT.

2. THE COURT'S RULING IN REFUSING TO PERMIT DEFENDANT TO CROSS-EXAMINE DETECTIVE BEISER ABOUT DISCIPLINARY ACTION FROM ANOTHER INCIDENT WITH ALLEGED DRUG DEALER AND FAILURE TO REQUIRE COMMONWEALTH TO DISCLOSE PERSONNEL FILE ABOUT SAME.

3. THE COURT'S RULING ALLOWING COMMONWEALTH TO INTRODUCE EVIDENCE OF ALLEGED "CONTROLLED PURCHASE" MONEY FROM ALLEGED PRIOR ILLEGAL DRUG DELIVERIES.

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[14] During our conference after the jury reached the verdict in this matter, the Commonwealth had indicated that it was going to withdraw the charge of Persons Not to Possess Firearms. [Day Three Tr. at 171.] According to the docket, the Commonwealth formally withdrew that charge on the date of sentencing.

[15] Although the order was dated January 10, 2012, it was not docketed until January 11, 2012.

4. WHETHER THE COURT ERRED BY APPLYING THE MANDATORY SENTENCE PROVISIONS OF 42 PA.C.S.A. 9712.1.

[Defendant's Concise Statements of Matters Complained of on Appeal Per Pennsylvania Rule of Appellate Procedure 1925(b) Statement.]

II. Discussion

A. Denial of Appellant's Omnibus Pretrial Motion

The appellant contends that the court erred by denying his omnibus pretrial motion, which included a motion to suppress and a motion to disclose the identity of a confidential informant. This issue appears to relate to Judge Dally's decision denying his omnibus pretrial motions. Accordingly, we respectfully submit that the place in the record where the reasoning for the denial of the omnibus pretrial motions is in Judge Dally's July 27, 2011 Order with Statement of Reasons.[16]

B. Refusal to Permit the Appellant to Cross-Examine Detective Beiser Regarding Prior Disciplinary Action

The appellant contends that we erred by (1) refusing to permit his counsel to cross-examine Officer Beiser regarding a disciplinary action involving an incident with another drug dealer, and (2) failing to require the Commonwealth to disclose Officer Beiser's personnel file to the appellant for review. As discussed below, this allegation of error lacks merit.

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[16] We note that the appellant has not specifically referenced his *Franks/Hall* motion as part of this particular issue. In addition, the appellant did not include the motion as part of his Omnibus Pretrial Motions that were resolved by Judge Dally. As such, it appears that the appellant has waived any issue relating to our resolution of his *Franks/Hall* motion by failing to specifically include it in his Pa.R.A.P. 1925(b) concise statement. *See* Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived."); *Commonwealth v. Carpenter*, 955 A.2d 411, 415 (Pa. Super. 2008) (citing *Commonwealth v. Lord*, 719 A.2d 306, 309 (Pa. 1998) and Pa.R.A.P. 1925(b)(4)(vii) and pointing out that "[i]t is well established that an appellant's failure to include claims in the court-ordered 1925(b) statement will result in a waiver of that issue on appeal").

1. Appellate Standard of Review

The Superior Court has described the standard of review concerning a claim that a trial court improperly limited the cross-examination of a witness as follows:

> "The determination of the scope and limits of cross-examination are within the discretion of the trial court, and we cannot reverse those findings absent a clear abuse of discretion or an error of law." *Commonwealth v. Brown*, 449 Pa.Super. 346, 673 A.2d 975, 978 (1996) (citing *Commonwealth v. Nolen*, 535 Pa. 77, 82, 634 A.2d 192, 195 (1993)), appeal denied, 545 Pa. 675, 682 A.2d 306 (1996). [A]n abuse of discretion is not a mere error in judgment, but, rather, involves bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law.

Commonwealth v. Davis, 17 A.3d 390, 395 (Pa. Super. 2011) (quotation and quotation marks omitted).

2. Analysis

Before proceeding with our analysis of this issue, we will set forth the somewhat unusual manner in which this issue was raised and resolved. Shortly after starting to cross-examine Officer Beiser, the appellant's counsel inquired as to whether Officer Beiser had been removed from the Vice Unit for disciplinary reasons. [Day One Tr. at 102.] The Commonwealth objected to this question, and we held a side bar conference with counsel. [*Id.*]

During the side bar conference, the Commonwealth indicated that it was objecting to this question and overall line of inquiry because it was irrelevant. [*Id.* at 102.] We then heard additional argument from counsel until determining that counsel should be permitted to question Officer Beiser about this issue outside of the presence of the jury. [*Id.* at 108-10.] After the jury exited from the courtroom, the appellant's counsel asked Officer Beiser "isn't it correct that you were removed from the vice squad for disciplinary reasons?" [*Id.* at 109.] In response to this question, Officer Beiser stated that "[a]ccording to the chief of police, I was demoted to patrolman from detective as a result of me cursing at an alleged drug dealer who had crack cocaine secreted in his buttocks." [*Id.* at 110.] This incident occurred at the end of April 2011,

approximately three months after the search and arrest in the appellant's case. [*Id.* at 112.] Officer Beiser also indicated that he never received any disciplinary action relating to his conduct in the appellant's case. [*Id.* at 111.] According to Officer Beiser, while he can still work with the vice unit, he is no longer a member because he needs to be a detective to be a member. [*Id.* at 110-13.]

After hearing Officer Beiser's testimony, the appellant's counsel argued that his question about the disciplinary action taken against Officer Beiser was relevant insofar as it showed hostility and bias towards drug dealers and impacted the officer's veracity. [*Id.* at 119-23.] We then heard additional argument from counsel before adjourning to, *inter alia*, allow counsel to further research this issue. [*Id.* at 124-25.] Subsequent to the break, we heard further argument from counsel after which we indicated that we were inclined to sustain the Commonwealth's objection because we found the proposed questioning was improper. [*Id.* at 126-30.] After hearing additional argument from counsel, the appellant's counsel requested that we sustain the objection at that point in the proceedings and possibly revisit the issue at a later stage in the proceedings if he could establish an adequate foundation. [*Id.* at 125-36.] In accordance with the request, we sustained the objection without prejudice. [*Id.* at 135-36.]

At the conclusion of the appellant's case-in-chief, his counsel again sought a ruling concerning cross-examining Officer Beiser about the other disciplinary action. [Notes of Trial – Day Two, 10-5-11 ("Day Two Tr."), at 167.] We informed the appellant that there was no additional information presented warranting changing our prior ruling that the evidence sought was irrelevant and unrelated to the appellant's case. [*Id.* at 169-70.] We respectfully submit that we did not err in this ruling.

In this regard, we note that concerning the scope of cross-examination of a witness,

> an attorney is entitled to question the witness about subjects raised during direct examination as well as any facts tending to refute inferences arising from matters raised during direct testimony. *Commonwealth v. Karenbauer*, 552 Pa. 420, 439-40, 715 A.2d 1086, 1095 (1998); *Commonwealth v. Green*, 525 Pa. 424, 454, 581 A.2d 544, 558-59 (1990). Similarly, an attorney may discredit a witness by cross-examining the witness about omissions or acts that are inconsistent with his testimony. *Karenbauer*, 552 Pa. at 439-40, 715 A.2d at 1095.

Commonwealth v. Begley, 780 A.2d 605, 627 (Pa. 1999). In addition,

> [c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1105, 39 L.Ed.2d 347 (1974).

In this case, since the issue involves the cross-examination of a police officer, we submit that the Superior Court's holding in *Commonwealth v. Bozyk*, 987 A.2d 753 (2009) is directly applicable here. In *Bozyk*, the trial court had granted the Commonwealth's motion *in limine* to prevent the appellant from questioning a police officer concerning an internal affairs investigation into the officer's conduct in a narcotics arrest that resulted in a two-day suspension. *Id.* at 755. A jury eventually convicted the appellant, and the appellant filed an appeal contending that the trial court's ruling violated the Confrontation Clause to the United States Constitution. *Id.* at 755-56.

In analyzing this issue, the court explained that

> The Confrontation Clause of the Sixth Amendment confers a constitutional right upon the defendant to conduct cross-examination that reveals any motive that a witness may have to testify falsely; however, that right is not unlimited:
>
> > The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The right of

> confrontation, which is secured for defendants in state as well as federal criminal proceedings, *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), "means more than being allowed to confront the witness physically." *Davis v. Alaska,* 415 U.S. [308,] 315, 94 S.Ct. [1105,] 1110 [39 L.Ed.2d 347 (1974)]. Indeed, "'the main and essential purpose of confrontation is **to secure for the opponent the opportunity of cross-examination.**' " *Id.,* at 315–316, 94 S.Ct., at 1110 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)). Of particular relevance here, "we have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis, supra,* at 316–317, 94 S.Ct., at 1110 (citing *Greene v. McElroy,* 360 U.S. 474, 496[,] 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959)). It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, and prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an **opportunity** for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer,* 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (*per curiam*).

Delaware v. Van Arsdall, 475 U.S. 673, 678–679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (emphases in original).

A witness may be questioned about pending criminal charges because the witness may be tempted to help convict the defendant in order to obtain leniency on the charges that he currently faces. *Commonwealth v. Evans,* 511 Pa. 214, 512 A.2d 626 (1986). Similarly, a witness may be examined about prior criminal convictions due to the possibility that the witness may be guilty of the crime in question and motivated to deflect blame from him. *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In this case, Officer Schweizer had neither a prior nor pending criminal matter against him. Thus, Appellant's reliance upon *Owens* and *Davis* is misplaced.

The pertinent case law permits a police witness to be cross-examined about misconduct as long as the wrongdoing is in some way related to the defendant's underlying criminal charges and establishes a motive to fabricate. *Commonwealth v. Peetros,* 517 Pa. 260, 535 A.2d 1026 (1987) (police witness had been demoted after it was discovered he repeatedly took bribes; defendant

> was improperly restricted from impeaching him with this evidence since it bolstered entrapment defense in defendant's bribery prosecution); *Commonwealth v. Dawson,* 486 Pa. 321, 405 A.2d 1230 (1979) (police officer was under investigation at trial and had been demoted for beating defendant's co-defendant; defendant should have been permitted to question officer about the matter since it provided officer with motive to obtain conviction against defendant as well as to fabricate fact that defendant had confessed); *Commonwealth v. Sullivan,* 485 Pa. 392, 402 A.2d 1019 (1979) (police witness faced suspension based upon outcome at defendant's trial and defendant should have been allowed to explore that matter at his trial); *Commonwealth v. Shands,* 338 Pa.Super. 296, 487 A.2d 973 (1985) (defendant awarded new trial because he had not been permitted to impeach officer with fact that he was part of group of police officers who were racially biased, made false arrests, and perjured themselves in criminal prosecutions).
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> However, if the prior police behavior is unrelated to the present matter and irrelevant, the trial court is permitted to restrict questioning on the prior incident. *Commonwealth v. Boczkowski,* 577 Pa. 421, 846 A.2d 75 (2004) (fact that police witness withheld evidence in prior case was not relevant because there was no evidence of withholding evidence in case at hand); *Commonwealth v. Bright,* 279 Pa.Super. 1, 420 A.2d 714 (1980) (defendant could not impeach police officer with potential disciplinary action for excessive use of force by different officer since that cross-examination had no relationship to case in question); *see also Commonwealth v. Guilford,* 861 A.2d 365, 369 (Pa.Super.2004) (quoting *Bright, supra* at 716) ("a witness may not be contradicted on 'collateral' matters, ... and a collateral matter is one which has no relationship to the case at trial.").

Id. at 756-57.

In this case, the appellant generally maintained that Officer Beiser's prior discipline provided a motive for him to lie during this prosecution and showed a bias towards drug dealers. We submit that we did not abuse our discretion by prohibiting the appellant's counsel from cross-examining Officer Beiser about the other disciplinary incident.

Similar to the conduct mentioned in *Bozyk,* the conduct at issue in Officer Beiser's prior disciplinary action was totally unrelated to the appellant's arrest and prosecution and was otherwise irrelevant to the appellant's case. "The threshold inquiry for the admission of evidence is whether particular evidence is relevant." *Commonwealth v. Cook,* 952 A.2d 594, 612 (Pa. 2008) (citations omitted). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence." Pa.R.E. 401. "All relevant evidence should be admitted unless a specific rule bars its admission." *Commonwealth v. Dean*, 693 A.2d 1360, 1367 (Pa. Super. 1997).

Other than generalized assertions of relevance, the appellant was unable to articulate how the evidence relating to Officer Beiser's demotion had the tendency to make the existence of any fact of consequence to the determination of his case more probable or less probable than it would have been without the evidence.[17] In this regard, there was no evidence introduced that Officer Beiser's demotion was related to the appellant's case. In addition, by the time of the appellant's trial, Officer Beiser had already been disciplined for his infraction with the other drug dealer and there is no evidence that he was under further investigation for his conduct in that case. Moreover, there was no evidence elicited that the type of improper conduct in the prior incident occurred in this case, *i.e.* there was no evidence that Officer Beiser was overly aggressive or cursed at the appellant in this case. In fact, while part of the appellant's defense during the trial focused on the injuries he suffered when the SERT team entered his apartment, Officer Beiser was not a part of the entry team and there was no evidence that Officer Beiser contributed to the appellant's injuries in any way. Finally, despite the appellant's generalized assertion to the contrary, nothing about Officer Beiser's prior incident impacted his honesty or veracity in the prior case or in the appellant's case.[18] Accordingly, we respectfully submit that we did not abuse

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[17] Similarly, although the appellant generally argued that this evidence satisfied one of the exceptions in Rule 404(b)(2) of the Rules of Evidence, insofar as it showed a motive and bias towards drug dealers, he failed to articulate or otherwise demonstrate how this prior incident satisfied any of the exceptions in Rule 404(b)(2).

[18] In this regard, Pennsylvania Rule of Evidence 607(b) states that "[t]he credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these rules." Pa.R.E. 607(b). Rule 608(b) supplements Rule 607(b) by providing in pertinent part that "the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct." Pa.R.E. 608(b).

In addition, while we are by no means countenancing Officer Beiser's prior conduct, the incident itself involved even more attenuated circumstances to the appellant's case than the officer's conduct referenced in *Bozyk* to the trial in that case. In *Bozyk*, the officer actually placed false information in a police report and the court

our discretion in prohibiting the appellant from cross-examining Officer Beiser about a collateral matter, which had no relation to the appellant's case.[19]

We also submit that we did not err to the extent that we refused the appellant's request to review Officer Beiser's personnel file. In this regard, "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Although the appellant's counsel repeated on a number of occasions that he believed that he could not properly question Officer Beiser about the alleged disciplinary incident without the personnel file, we have not located any instance in the record of the appellant actually moving for the disclosure of said file and we did not issue a ruling on such a motion. Nonetheless, based on the aforementioned discussion relating to the admissibility of the evidence relating to the prior disciplinary incident, to the extent that the appellate court would determine that the appellant moved for this disclosure and we denied such a request, we did not err or abuse our discretion in refusing the disclosure.

C. Failure to Preclude Evidence of Alleged Controlled Purchase Money

The appellant's third issue on appeal relates to his contention that we erred by not precluding the Commonwealth from introducing evidence that the police recovered pre-marked currency among the $700 recovered from the appellant's freezer. This allegation also lacks merit.

The admission of rebuttal testimony is within the sound discretion of the trial court. *Commonwealth v. Jones*, 610 A.2d 931, 942 (Pa. 1992). Also, "[t]he appropriate scope of rebuttal has always been defined according to the evidence that it is offered to rebut."

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determined that this did not provide the officer with a motive to lie in the appellant's case. *Id.* at 755. Here, Officer Beiser was demoted because he had cursed at a drug dealer who had secreted items in his buttocks.

[19] In addition to the reasoning set forth in this Memorandum Opinion, we also incorporate herein our reasoning set forth on the record for concluding that this line of questioning was also improper under Pennsylvania Rules of Evidence 403, 404, 607 and 608. [*See* Day One Tr. at 125-36.]

Commonwealth v. Hughes, 865 A.2d 761, 797 (Pa. 2004) (citing *Commonwealth v. Hickman*, 309 A.2d 564, 567 (Pa. 1973) ("It is not proper to submit on rebuttal, evidence which does not in fact rebut the opponent's evidence.")).

During his direct testimony, the appellant testified that he was employed by Vector Marketing as a salesperson for Cutco Knives. [Day Two Tr. at 41.] He also testified that after a burglary at his apartment, he purchased a decoy clock that also acted as a safe. [*Id.* at 68-69.] The appellant kept cash in the clock safe to serve as emergency money, and he indicated that he was keeping money in the clock safe at the time the police entered his apartment. [*Id.* at 69.] The appellant denied keeping any money in his freezer. [*Id.*]

On cross-examination, the Commonwealth questioned the appellant regarding his employment with Vector Marketing and the money found in the freezer. During cross-examination, the appellant stated that Vector Marketing provided him with a base salary and paid him a commission for any sales. [*Id.* at 74-75.] Although he was getting paid, he never filled out a W-2 form or filed for taxes. [*Id.* at 76-77.] The appellant considered the job as only a part-time job. [*Id.* at 77.]

Vector Marketing would pay the appellant weekly if he worked enough hours. [*Id.* at 75.] The appellant would pick up his paycheck by going to an office in downtown Easton. [*Id.* at 76.] On a good week, the appellant would work approximately ten to fifteen hours and earn a couple hundred dollars. [*Id.* at 75-76, 77, 78.] The appellant received his last paycheck – totaling approximately one hundred dollars – one week prior to his arrest. [*Id.* at 78.]

The appellant conceded that there was $700 in his apartment at the time of his arrest, but claimed that he had stored it in his clock safe and not the freezer. [*Id.* at 89, 94.] The appellant

claimed that he received the $700 through his job. [*Id.* at 89, 95.][20] The last time he contributed to his $700 "emergency fund" was at "[s]ome time in the beginning of January." [*Id.* at 100.] This contribution occurred prior to January 10, 2011, and the contribution was from withdrawing money from the bank. [*Id.* at 100-01.]

After the defense rested, the Commonwealth sought to introduce into evidence Officer Beiser's testimony that some of the $700 the police recovered from the appellant's freezer was pre-recorded money that was used in a controlled purchase of narcotics. [*Id.* at 171.] The Commonwealth indicated that this testimony was necessary to rebut the appellant's testimony on direct (and further delineated during cross-examination) concerning how and when he obtained the $700 in his emergency fund. [*Id.* at 171-73.] The appellant objected to this evidence claiming, *inter alia*, that (1) the probative value of this evidence was outweighed by the danger of unfair prejudice, (2) the evidence was not actually rebutting any part of the appellant's testimony because he never admitted that he had money in his freezer, and (3) the evidence was inadmissible bad character evidence. [*See, e.g.*, *id.* at 171-72, 173, 175, 203-04.]

After a lengthy conference with counsel, we determined that the Commonwealth could introduce evidence relating to the pre-recorded currency located in the appellant's freezer. [*Id.* at 210-11.] In addition, since the Commonwealth was disclosing the name of the confidential informant to the appellant and we were providing the appellant with time to contact the confidential informant and determine whether the defense would call the confidential informant as a witness, we permitted the Commonwealth to introduce evidence concerning how the currency went out of the control of the City of Easton Police Department, who the money was provided to, and for what purpose. [*Id.* at 211-12, 213.] We further prohibited the

[20] The appellant also had a bank account and, although he stated that the $700 in his apartment was money he received from his job, he also testified that the $700 was money he obtained from his bank account. [Day Two Tr. at 90, 95.]

Commonwealth from introducing evidence that the confidential informant purchased drugs from the appellant. [*Id.* at 213.][21]

We respectfully submit that we did not err in permitting the Commonwealth to introduce Officer Beiser as a rebuttal witness to testify that part of the $700 recovered from the appellant's freezer was pre-recorded money used in a controlled purchase of narcotics. The appellant's testimony concerning how and when he obtained the $700 found in his apartment tended to contradict part of the facts that Inspector Crisafulli relied upon in reaching his opinion that the appellant possessed the 267 packets of heroin with the intent to deliver. As we explained during our conference with counsel, the Commonwealth's proffered evidence was relevant as it directly rebutted the appellant's testimony concerning how he obtained the $700 and when he obtained this money.

We also submit that the probative value of this evidence was not outweighed by any unfair prejudice. Rule 403 of the Pennsylvania Rules of Evidence provides that "[a]lthough relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pa.R.E. 403. The term "unfair prejudice" means

> a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially. Additionally, when weighing the potential for prejudice, a trial court may consider how a cautionary jury instruction might ameliorate the prejudicial effect of the proffered evidence.

Commonwealth v. Dillon, 925 A.2d 131, 141 (Pa. 2007) (internal citations and quotations omitted). Nonetheless, "[e]vidence will not be prohibited merely because it is harmful to the

[21] Officer Beiser testified in accordance with our ruling. [Day Three Tr. at 46-54.] In addition to the rebuttal testimony relating to the pre-recorded money, Officer Beiser also provided testimony in an attempt to rebut the appellant's testimony that Officer Beiser had informed the appellant that he was charging him with possessing narcotics found in the storage room. [*Id.* at 54-58.]

[party seeking its exclusion]." *Id.* Instead, "exclusion is limited to evidence so prejudicial that it would inflame the jury to make a decision based upon something other than the legal propositions relevant to the case." *Commonwealth v. Owens*, 929 A.2d 1187, 1191 (Pa. Super. 2007) (citation omitted).

Here, despite the appellant's generalized assertions, he was unable to assert how the probative value of the evidence relating to the pre-recorded money was outweighed by the danger of unfair prejudice. As indicated above, the evidence was probative as to whether the money found in the freezer was part of his drug dealing enterprise and tended to rebut the appellant's testimony about how he obtained the $700 found in his apartment. Although the appellant contended that he kept his emergency fund of $700 in his clock safe and not in the freezer, the jury was free to disbelieve this explanation and find that the $700 in the freezer was his money. In addition, the only prejudice that the appellant could point to was that it would be harmful to his case.[22]

We also submit that Officer Beiser's testimony was not impermissible character evidence under Rule 404(b) of the Pennsylvania Rules of Evidence. In this regard, it does not appear that

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[22] The appellant also argued that he was prejudiced because his prior counsel had attempted to obtain the name of the confidential informant as part of his omnibus pretrial motions and the Commonwealth had objected to this request. Judge Dally had denied the appellant's request pointing out that, *inter alia*, the appellant failed to identify how disclosing the name of the confidential informant would aid his defense. [7-27-11 Order with Statement of Reasons, at 13 (Dally, J.).] Judge Dally also pointed out that the Commonwealth's charges were not based on any controlled purchases using the confidential informant; rather, they were based on the evidence seized during the search of his apartment. [*Id.* at 13 n.6.]

In this case, the evidence of the controlled purchases was not part of the Commonwealth's case-in-chief. Once the issue arose because of the appellant's testimony as part of the defense case, the Commonwealth provided the appellant with the name of the confidential informant and we provided the appellant's counsel with an opportunity to seek and confer with the confidential informant. On the morning of the third day of trial, and prior to the Commonwealth's rebuttal evidence, the appellant's counsel did not seek an extension of time to speak to the confidential informant and stated on the record that the appellant did not intend to call the confidential informant as a witness. [Day Three Tr. at 3.]

We also note that during our conferences with counsel on this evidentiary issue, the appellant references a motion *in limine* that we allegedly decided relating to the pre-recorded currency. We have reviewed the transcripts of record and cannot find such a ruling by this court. To the extent, however, that we have missed this reference, any ruling concerning the admissibility was limited to the evidence that the Commonwealth would introduce as part of its case-in-chief, and the appellant did not and could not argue that any such ruling would pertain to the Commonwealth's ability to introduce evidence about the pre-recorded currency if the appellant chose to testify in his own defense.

this evidence constitutes prior bad acts evidence because we expressly prohibited the Commonwealth from introducing evidence from Officer Beiser that the pre-recorded money was used in a controlled purchase of narcotics from the appellant. Nonetheless, the evidence would be properly admitted under Rule 404(b).

Rule 404(b) provides as follows:

> **(b) Other crimes, wrongs, or acts.**
>
> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.
>
> (2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
>
> (3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.
>
> (4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Pa.R.E. 404(b).

In *Commonwealth v. Cascardo*, 981 A.2d 245 (Pa. Super. 2009), the court restated the law concerning the admission of bad acts evidence under Rule 404(b) as follows:

> In *Commonwealth v. Lark*, 518 Pa. 290, 543 A.2d 491 (1988), our Supreme Court summarized the law regarding the admission of prior bad acts as follows:
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> > Evidence of distinct crimes [is] not admissible against a defendant being prosecuted for another crime solely to show his bad character and his propensity for committing criminal acts. *Commonwealth v. Banks*, 513 Pa. 318, 349, 521 A.2d 1 (1987); *Commonwealth v. Morris*, [493 Pa. 164, 174, 425 A.2d, 715, 720 (1981)]. However, evidence of other crimes and/or violent acts may be admissible in special circumstances where the evidence is relevant for some other legitimate purpose and not merely to prejudice the defendant by showing him to be a person of bad

character. *Commonwealth v. Claypool*, 508 Pa. 198, 495 A.2d 176 (1985). As we recently stated in *Banks*:

> [T]he general rule prohibiting the admission of evidence of prior crimes nevertheless
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> allows evidence of other crimes to be introduced to prove (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial, in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other.
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> [*Morris*, 493 Pa. at 175, 425 A.2d at 715]. This list of "special circumstances" is not exclusive, and this Court has demonstrated it will recognize additional exceptions to the general rule where the probative value of the evidence outweighs the tendency to prejudice the jury. [*Claypool*,] *supra* (evidence of defendant's prior criminal activity is admissible where defendant makes statement about such activity in order to threaten and intimidate victim and where force or threat of force is element of crime for which defendant is being prosecuted).

[*Banks*,] 513 Pa. at 350, 521 A.2d at 17. Another "special circumstance" where evidence of other crimes may be relevant and admissible is where such evidence was part of the chain or sequence of events which became part of the history of the case and formed part of the natural development of the facts. *Commonwealth v. Murphy*, [346 Pa.Super. 438, 499 A.2d 1080, 1082 (1985)], quoting *Commonwealth v. Williams*, 307 Pa. 134, 148, 160 A. 602, 607 (1932). This special circumstance, sometimes referred to as the "res gestae" exception to the general proscription against evidence of other crimes, is also known as the "complete story" rationale, i.e., evidence of other criminal acts is admissible "to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." McCormick, Evidence, § 190 (1972 2d ed.); *Carter v. United States*, 549 F.2d 77 (8th Cir.1977); *United States v. Weeks*, 716 F.2d 830 (11th Cir.1983); *see also Commonwealth v. Coyle*, 415 Pa. 379, 389-91, 203 A.2d 782, 787 (1964) (evidence of other

> crimes admissible as these crimes were interwoven with crimes for which defendant was being prosecuted).

Lark, 518 Pa. at 302-04, 543 A.2d at 497.

Cascardo, 981 A.2d at 250.

In this case, to the extent that the Commonwealth's rebuttal evidence relating to the pre-recorded currency constituted evidence of other crimes, wrongs, or acts, the evidence was admissible to show that the appellant intended to deliver the heroin found in the hamper. Also, as indicated above, the probative value of this evidence outweighed any potential for prejudice. As such, the rebuttal evidence would also be properly admitted under Rule 404(b). Accordingly, we respectfully submit that we did not abuse our discretion in permitting the Commonwealth from introducing Officer Beiser's testimony about the pre-marked currency in rebuttal.

D. Application of Mandatory Sentence Provisions of 42 Pa.C.S. § 9712.1

The appellant's final contention on appeal is his claim that we erred in applying the mandatory sentence provision of 42 Pa.C.S. § 9712.1.[23] As discussed below, this contention lacks merit.

We note that

> "[c]hallenges to a court's application of a mandatory sentencing provision implicate the legality of the sentence." *Commonwealth v. Lewis,* 885 A.2d 51, 55 (Pa. Super. 2005), *appeal denied,* 588 Pa. 777, 906 A.2d 540 (2006). *See also Commonwealth v. Vasquez,* 560 Pa. 381, 744 A.2d 1280 (2000) (holding application of mandatory provision implicates legality, not discretionary, aspects of sentencing). A challenge to the legality of a sentence cannot be waived. *Commonwealth v. Rossetti,* 863 A.2d 1185, 1193 (Pa. Super. 2004), *appeal denied,* 583 Pa. 689, 878 A.2d 864 (2005). Further, we note:

[23] In addition to the five-year mandatory minimum pursuant to 42 Pa.C.S. § 9712.1(a), the Commonwealth sought and we also sentenced the appellant to the mandatory minimum sentence of two years pursuant to 18 Pa.C.S. § 7508(a)(7)(i). We imposed the two mandatory minimum sentences consecutively, and we note that the aggregation of these two mandatory minimums did not violate 42 Pa.C.S. § 9712.1(b) because the statutory maximum sentence of imprisonment allowable under The Controlled Substance, Drug, Device and Cosmetic Act for Possession with Intent to Deliver Heroin is fifteen years. 35 P.S. § 780-113(f)(1).

> Issues relating to the legality of a sentence are questions of law. [T]herefore, our task is to determine whether the trial court erred as a matter of law and, in doing so, our scope of review is plenary. Additionally, the trial court's application of a statute is a question of law that compels plenary review to determine whether the court committed an error of law.
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> *Lewis, supra* at 55 (citing *Commonwealth v. Williams,* 871 A.2d 254, 262 (Pa. Super. 2005)).

Commonwealth v. Marion, 981 A.2d 230, 241-42 (Pa. Super. 2009).

As indicated above, we applied the mandatory minimum sentence in 42 Pa.C.S. § 9712.1, which provides in pertinent part as follows:

> **§ 9712.1. Sentences for certain drug offenses committed with firearms**
>
> **(a) Mandatory sentence.**--Any person who is convicted of a violation of section 13(a)(30) of the act of April 14, 1972 (P.L. 233, No. 64), known as 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.
>
> **(b) Limitation on aggregate sentences.**--Where a defendant is subject to a mandatory minimum sentence under 18 Pa.C.S. § 7508(a) (relating to drug trafficking sentencing and penalties) and is also subject to an additional penalty under subsection (a) and where the court elects to aggregate these penalties, the combined minimum sentence may not exceed the statutory maximum sentence of imprisonment allowable under The Controlled Substance, Drug, Device and Cosmetic Act.
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> **(c) Proof at sentencing.**--Provisions of this section shall not be an element of the crime, and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.
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> * * *

> **(f) Definition.**--As used in this section, the term "firearm" shall have the same meaning as that given to it in section 9712 (relating to sentences for offenses committed with firearms).

42 Pa.C.S. § 9712.1.

During the sentencing hearing, although the appellant initially appeared to concede that the firearm was located in close proximity of the heroin, *see* Notes of Sentencing, 12-2-12, at 5, he eventually argued that the Commonwealth did not prove by a preponderance of the evidence that he possessed the firearm or that the firearm was in close proximity of the heroin. [*See id.* at 20-21.] To the extent that the appellant was arguing that the Commonwealth had to prove both that he possessed the firearm and that the firearm was located within a close proximity to the heroin, there appears to be conflicting appellate case law as to whether the Commonwealth must prove by a preponderance of the evidence both that the defendant possessed a firearm and that the firearm was in close proximity to narcotics.

By way of background, the Superior Court first addressed the applicability of section 9712.1(a) in *Commonwealth v. Sanes*, 955 A.2d 369 (Pa. Super. 2008). In *Sanes*, the court agreed with the trial court that the Commonwealth introduced sufficient evidence that the appellant constructively possessed two firearms to sustain his convictions for two counts of Persons Not to Possess Firearms. 955 A.2d at 374. The court then addressed the appellant's contention that the Commonwealth failed to prove by a preponderance of the evidence that either of the firearms were in close proximity to the controlled substance at issue so as to warrant the trial court sentencing him to the five-year mandatory minimum pursuant to section 9712.1. *Id.* at 374-75.

After setting forth the language of section 9712.1, the court pointed out that the evidence showed that the appellant neither physically possessed a firearm, nor was a firearm within reach of the appellant. *Id.* at 375. As such, the court determined that "for Section 9712.1 to apply, the

Commonwealth had to demonstrate that one or both of the firearms was in 'close proximity' to the controlled substance." *Id.*

The court explained that the issue of whether a firearm was in "close proximity" to narcotics was an issue of first impression in the Commonwealth of Pennsylvania. *Id.* Thus, the court considered case law interpreting the identical term in the Controlled Substances Forfeiture Act, 42 Pa.C.S. § 6801, and case law interpreting the term "present" in federal cases examining Section 2D1.1(b)(1) of the federal sentencing guidelines. *Id.* at 375-76.[24] After reviewing the aforementioned cases, the court determined that the Commonwealth proved by a preponderance of the evidence that at least one of the recovered firearms was in close proximity to cocaine. *Id.* at 376. In particular, the court observed that the cocaine was found in a sandwich baggie on top of a dresser in the bedroom, and the police recovered a .9mm handgun in a closet located approximately six to eight feet from the dresser. *Id.*

In *Commonwealth v. Person*, 39 A.3d 302 (Pa. Super. 2012), the court concluded that a trial court may not impose the five-year mandatory minimum pursuant to section 9712.1(a) unless the Commonwealth "prove[d], by a preponderance of the evidence, *both* that [the defendant] possessed a firearm, and that [the defendant] did so within close proximity to narcotics." 39 A.3d at 305 (emphasis in original). In doing so, the court appeared to reach this conclusion at least in part by relying on the *Sanes* court having addressed whether the firearms was in close proximity to the controlled substance only after already concluding that the Commonwealth had established the appellant's constructive possession of the firearms. *Id.* (citing *Sanes*, 955 A.2d at 374).

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[24] Section 2D1.1(b)(1) of the federal sentencing guidelines provided "for an upward adjustment in a defendant's sentence where the defendant possessed a firearm or other dangerous weapon during the commission of the offense. The guidelines state that the enhancement should be applied where the weapon is 'present,' unless it is clearly improbable that the weapon was connected with the offense." *Sanes*, 955 A.2d at 376 (citing USSG, § 2D1.1, 18 U.S.C.A.).

Despite the holding in *Person*, the Superior Court published two opinions subsequent to that case that appear to not require the Commonwealth to show possession and close proximity to narcotics. In *Commonwealth v. Stein*, 39 A.3d 365 (Pa. Super. 2012), the court addressed an appellant's contention that section 9712.1 was inapplicable because he had a license to possess the firearm at issue. *Id.* at 367-68. The appellant also asserted that the Commonwealth had to prove by a preponderance of the evidence that the firearm was used in the commission of the drug offense. *Id.* at 369.

In discussing section 9712.1, the court stated in pertinent part as follows:

> [Section 9712.1] is clear and unambiguous. It requires that a minimum sentence of five years of imprisonment be applied if (1) the defendant is convicted of 35 P.S. 780–113(a)(30) and (2) either the defendant or his accomplice was in possession or control of a firearm, the firearm was within the defendant's or his accomplice's reach, *or* a firearm was in close proximity to the drugs in question. As indicated above, a firearm is "any weapon," not only an illegally possessed weapon. It does not matter if the individual possesses a license to carry the firearm—the possession of a firearm without a license is a separate offense and is separately punishable under the law. *See* 18 Pa.C.S.A. § 6106(a).
>
> Furthermore, the statute expressly does not require that the firearm actually be used in the commission of the drug offense. ***It need only be on the defendant's or his accomplice's person or in the defendant's or his accomplice's control, within the defendant's or his accomplice's reach, or in close proximity to the drugs.*** *See* 42 Pa.C.S.A. § 9712.1(a). Stein argues that the title of the statute "must be considered when construing the statute," and the title of section 9712.1 requiring that the drug offense be committed "with firearms" means there must be "some sort of nexus established between the drug trafficking activity and the firearm found." Stein's Brief at 20. First, although section 1924 permits consideration of the title of the statute when construing the meaning of a statute, it is by no means required. *See* 1 Pa.C.S.A. § 1924. As we have previously stated: "[T]he title is always a part of a statute or ordinance and, as such, may be considered in construing the enactment, but it is in no sense conclusive, particularly when there is no ambiguity in the body of the statute or ordinance itself." *Commonwealth v. Campbell*, 758 A.2d 1231, 1237 (Pa. Super. 2000).
>
> Moreover, we disagree with Stein's interpretation of the title of section 9712.1. The phrase "with firearms" in the title of the statute does not necessarily mean that the firearms were used in the commission of the offense. Rather, we interpret it to mean that the drug offense was committed with a firearm present—an interpretation that is fully supported by the plain language of the statute itself,

> ***as it merely requires that there be a firearm on or near a person involved in the commission of the crime or in close proximity to the drugs in question.*** *See Commonwealth v. Sanes*, 955 A.2d 369, 377 (Pa. Super. 2008) (concluding that a defendant was subject to the mandatory minimum sentence in section 9712.1 where the gun was located inside a closet on a shelf in the defendant's bedroom located six to eight feet from dresser that contained a bag of cocaine), *appeal denied*, 601 Pa. 696, 972 A.2d 521 (2009); *Commonwealth v. McKibben*, 977 A.2d 1188, 1195 (Pa. Super. 2009) (finding no merit to the defendant's argument that because the informant did not see the firearms, the informant was only in the apartment for a brief period of time, and the firearms were secured in the back bedroom of the apartment, the mandatory sentencing provision of section 9712.1 does not apply).

Id. at 368-69 (emphasis added and internal footnotes omitted).

Although the *Stein* court does not expressly reject (or otherwise reference) the holding in *Person*, it appears to acknowledge that the Commonwealth may satisfy its burden of proof for application of the mandatory minimum of section 9712.1(a) if the Commonwealth demonstrates that the firearm was on or near the individual involved in the commission of the crime *or* in close proximity to the drugs in question. *Id.* Although not expressly addressing this issue (or again, citing to *Person*), the Superior Court recently indicated that the Commonwealth needs to only prove by a preponderance of the evidence that a firearm was located in close proximity to the narcotics.

In *Commonwealth v. Hawkins*, -- A.3d --, 2012 WL 1202042 (Pa. Super. Apr. 11, 2012), the Superior Court addressed an appellant's contention that the trial court improperly sentenced him to the mandatory minimum pursuant to section 9712.1 because the Commonwealth failed to present evidence that the appellant was in actual physical control of the firearm or that it was within reach. *Id.* at *6. The Superior Court rejected the appellant's argument because the evidence demonstrated that the firearm was located in close proximity to the narcotics. *Id.* at *7.

In analyzing the appellant's argument, the court explained that "this Court has construed the 'close proximity' language found in section 9712.1(a) broadly and, as such, has held the

presence of both a controlled substance and a firearm together in the same residence satisfies the statutory requirement." *Id.* at *6 (citing *Sanes*, 955 A.2d at 374-75 and *Commonwealth v. Zortman*, 985 A.2d 238, 244 (Pa. Super. 2009), *affirmed*, 23 A.3d 519 (Pa. 2011), *cert. denied*, *Zortman v. Pennsylvania*, 132 S.Ct. 1634 (U.S. 2012)). The court then pointed out that the record supported the trial court's conclusion that the firearm was in close proximity to the narcotics because the "evidence demonstrated Appellant could access the basement [where the police recovered the gun] from his apartment within 10 to 15 seconds; therefore, the gun in the basement was in close proximity to the drugs in Appellant's bedroom." *Id.* at *7.

Based on the foregoing, there appears to be conflicting case law concerning what the Commonwealth must prove to satisfy section 9712.1.[25] Nonetheless, we respectfully submit that regardless of whether the Commonwealth had to show both that the appellant possessed the firearm ***and*** that the firearm was located in close proximity to the heroin recovered, the Commonwealth satisfied both constructive possession and close proximity by a preponderance of the evidence.

In this regard, even though the appellant did not have the firearm in his actual possession at the time the police entered his apartment, the evidence showed by a preponderance of the

[25] It appears that the Supreme Court of Pennsylvania may resolve this conflict in the near future. On August 30, 2011, the Court granted allocator in *Commonwealth v. Hanson*, 29 A.3d 366 (2011). The Court defined the issues for consideration in that case as follows:

> 1. Whether, as a matter of statutory construction, the Superior Court properly construed 42 Pa.C.S. § 9712.1(a), and specifically:
>
> (a) What is the meaning of the term control of a firearm, as used in Section 9712.1(a)?
>
> (b) Whether, under Section 9712.1(a), the Commonwealth demonstrates that a defendant was in physical possession or control of a firearm by merely proving that the firearm was visible, concealed about the person . . . or within the actor's . . . reach or in close proximity to the controlled substance?
>
> (c) What is the meaning of the term in close proximity, as used in Section 9712.1(a)?
>
> 2. Whether the Superior Court correctly determined that Section 9712.1(a) was applicable to Petitioner's case?

Id.

evidence that the appellant constructively possessed the firearm. Concerning constructive possession,

> [w]hen contraband is not found on the defendant's person, the Commonwealth must establish constructive possession....' *Commonwealth v. Haskins,* 450 Pa.Super. 540, 677 A.2d 328, 330 (1996), *appeal denied,* 547 Pa. 751, 692 A.2d 563 (1997). 'Constructive possession is the ability to exercise conscious control or dominion over the illegal substance and the intent to exercise that control.' *Commonwealth v. Kirkland,* 831 A.2d 607, 610 (Pa.Super.2003), *appeal denied,* 577 Pa. 712, 847 A.2d 1280 (2004) (citing *Commonwealth v. Macolino,* 503 Pa. 201, 469 A.2d 132 (1983)). '[T]wo actors may have joint control and equal access and thus both may constructively possess the contraband.' *Haskins, supra* at 330. 'The intent to exercise conscious dominion can be inferred from the totality of the circumstances.' *Kirkland, supra* at 610.

Commonwealth v. Jones, 874 A.2d 108, 121 (Pa.Super.2005).

Commonwealth v. Sanes, 955 A.3d 369, 373 (Pa. Super. 2008).

During the sentencing hearing, the appellant attempted to argue that his testimony along with that of his alleged roommate, Tyisha Brokenbough ("Brokenbough") showed that he did not constructively possess the firearm in the drawer. In this regard, the appellant testified, *inter alia*, that (1) he lived in the apartment at 1401 Lehigh Street with Brokenbough at the time of his arrest, (2) he and Brokenbough shared the only bed in the apartment, (3) he never informed Officer Anthony Arredondo of the City of Easton Police Department that he owned the handgun, and (4) Brokenbough never informed him that she had purchased a gun and placed the gun inside of his apartment at all, much less his dresser drawer, prior to the appellant's arrest in this case. [Day Two Tr. at 36, 43, 60, 67-69, 87.][26] In addition, Brokenbough corroborated much of the appellant's testimony insofar as she testified that (1) she resided at the apartment with the appellant and shared the only bed with him, (2) she and the appellant shared the expenses for the

[26] Although we did not mention this testimony in our recitation in the facts presented during the trial in this matter, Officer Arredondo testified that the appellant had told him that he bought and owned the firearm. [Day Two Tr. at 27.]

apartment, (3) she purchased the firearm in her name (and had a corresponding purchase receipt) for her protection after the apartment was burglarized in October 2010, (4) she never told the appellant that she had purchased the gun and stored it by a couch in the living room of the apartment, (5) on the day prior to the appellant's arrest, she had moved the gun into the appellant's dresser drawer because his two-year-old son was visiting and she did not want him to find the gun case, and (6) neither she nor the appellant owned the backpack found in the bedroom. [*Id.* at 108, 109, 110, 113, 121-23, 126-29.]

With the exception of the testimony concerning the October 2010 burglary at the apartment and Brokenbough's actual purchase of the handgun, we found the remainder of their testimony regarding the handgun and even their residency at the apartment to lack credibility. In particular, other than their testimony, there was no evidence produced that Brokenbough even lived at the apartment. Brokenbough's driver's license contained her mother's address as her home address, and she did not list the apartment as her address when she purchased the handgun. Additionally, the appellant testified that his name was the only name on the lease for the apartment and there was no evidence that the police located any rent receipts with Brokenbough's name. Further, when the police arrived, Brokenbough was not in the apartment and there was no evidence that she stored items there. In fact, the one item where she could have possibly stored some items, the hamper she allegedly had in the apartment, she claimed to have removed from the apartment that day so that she could do laundry at her parents' residence. [Day Two Tr. at 124.] Brokenbough did not even know that the appellant had purchased the clock safe. [*Id.* at 129.]

In addition, we find the testimony of Brokenbough and the appellant incredible insofar as they claim that Brokenbough did not inform the appellant that she had purchased a gun and was keeping it at the apartment. Brokenbough admitted to moving the gun on the day before the

appellant's arrest because she was understandably concerned about the appellant's two-year-old son finding the gun while he was visiting. Despite this concern, Brokenbough testified that she did not tell the appellant that there was a gun in the apartment for approximately one month prior to the arrest. Moreover, we find the presence of the ammunition that the police recovered around the bed to be additional evidence that the appellant was well aware of the gun in the apartment. Brokenbough did not testify that she also hid a box of ammunition around the bed.

Therefore, we did not find that the aforementioned testimony from the appellant and Brokenbough somehow prevented the Commonwealth from demonstrating that the appellant constructively possessed the loaded handgun found in his dresser drawer.[27] In addition to the foregoing discussion, we submit that the following evidence presented during the trial supports our conclusion that the appellant constructively possessed the handgun. First, the appellant admitted that he resided inside the apartment at 1401 Lehigh Street and the police located rental receipts in the living room indicating that he was paying rent for the apartment. [Day One Tr. at 85-87; Day Two Tr. at 36, 40.] Second, the appellant also admitted that he was the only one that signed the lease for the apartment. [Day Two Tr. at 40.] Third, when the police entered the apartment to execute the search warrant, they discovered the appellant and a sixteen-year-old juvenile female inside the appellant's bedroom. [Day One Tr. at 52.] Fourth, the firearm at issue was discovered loaded with ammunition inside a drawer in the appellant's dresser underneath a pair of the appellant's jeans, and the appellant admitted that Brokenbough did not store items in that dresser. [Day One Tr. at 77-84; Day Two Tr. at 81.] Finally, the police recovered additional ammunition in that dresser drawer and in the corner of the appellant's bed between the mattress and the box spring. [Day One Tr. at 80-81.] Based on this evidence, we respectfully submit that

[27] Our conclusion that the appellant constructively possessed the handgun found in the dresser drawer would not change even if we believed that Brokenbough lived in the apartment with the appellant.

the Commonwealth proved by a preponderance of the evidence that the appellant constructively possessed the firearm found in the dresser drawer as he had the power and intent to control the firearm in his dresser drawer. *See, e.g., Commonwealth v. Gutierrez*, 969 A.2d 584, 590-91 (Pa. Super. 2009) (concluding that Commonwealth introduced sufficient evidence to prove appellant constructively possessed shotgun beyond reasonable doubt where (1) appellant had keys to residence in his pocket, (2) police recovered letters, bills, and documents addressed to appellant inside residence, (3) appellant answered door and permitted officers to enter residence, (4) appellant was sole adult present at time police executed warrant, (5) appellant had secreted significant amount of cocaine in his buttocks, and (6) police recovered other indicia of drug-dealing activities at residence, including finding another firearm).

As indicated above, we submit that the Commonwealth also clearly established that the handgun in the dresser was in close proximity to the 267 packets of heroin found in the hamper. The testimony presented at trial demonstrated that the police recovered the handgun in the dresser drawer and the heroin in the hamper. Both items were found the appellant's bedroom. In addition, Officer Beiser testified at the sentencing hearing that (1) the appellant's bedroom was "relatively small" in size and approximated the size at approximately 10 x 12 feet, (2) the hamper containing the backpack with the heroin was approximately 3 feet away from the bed, and (3) the dresser was approximately six feet away from the hamper. [*Id.* at 7-8.] We submit that this evidence was sufficient to show that the firearm was in close proximity to the heroin recovered in the hamper.

III. Conclusion

For the reasons stated herein, we respectfully submit that the appellant's allegations of error are without merit and the judgment of sentence entered on December 2, 2011, should properly be affirmed.

BY THE COURT:

EDWARD G. SMITH, J.

Date: May 17, 2012