

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
ALBERT THEODORE GREELEY, III,	:	
	:	
Appellant	:	No. 410 WDA 2012

Appeal from the Judgment of Sentence entered on October 31, 2011
in the Court of Common Pleas of Fayette County,
Criminal Division, No. CP-26-CR-0000133-2009

BEFORE: STEVENS, P.J., MUSMANNO and ALLEN, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: February 21, 2013

Albert Theodore Greeley, III, (“Greeley”) appeals from the judgment of sentence imposed following his convictions of possession with intent to deliver a controlled substance and possession of a small amount of marijuana. **See** 35 P.S. § 780-113(a)(30), (31). Greeley also pled guilty to a summary offense of drivers required to be licensed. **See** 75 Pa.C.S.A. § 1501(a). We affirm.

The trial court has set forth the relevant underlying facts, which we adopt for the purpose of this appeal. **See** Trial Court Opinion, 6/5/12, at 1-

5.¹

On appeal, Greeley raises the following questions for our review:

1. Did the Commonwealth present insufficient evidence to support the intent to deliver and possession of a controlled substance charges; in that the Commonwealth failed to establish [that Greeley] was aware there were drugs in the vehicle, and the drugs were in [Greeley's] possession and control as the vehicle was not owned by [Greeley]?
2. Did the Commonwealth present insufficient evidence to support the intent to delive[r] charge, in that there was no indicia that [Greeley] had sold drugs or the quantity was not enough to support the charge?
3. Did the trial court err when the court denied the request for a mistrial based on the testimony presented by the officer related to funds forfeited, when at the previous trial[,] a mistrial was granted for the same testimony?

Brief for Appellant at 4 (capitalization omitted, issues re-ordered).

In his first claim, Greeley contends that the evidence was insufficient to support his convictions. *Id.* at 6. Greeley argues that the Commonwealth did not show that he had constructive possession of the cocaine found in a bag in a car that was owned by a third party. *Id.* at 8. Greeley asserts that there was no evidence that he knew or had reason to know about the drugs. *Id.* In his second claim, Greeley further contends

¹ We note that Greeley, in his Statement of the Case, indicates that this Court affirmed his judgment of sentence in 2009, and that the Supreme Court of Pennsylvania denied allowance of appeal in 2010. Brief for Appellant at 3. Greeley further states that he filed a petition for relief pursuant to the Post Conviction Relief Act, which was denied. *Id.* However, a review of the docket does not support this recitation. Indeed, Greeley was not sentenced in this case until October 31, 2011. We further note that Greeley's initial trial, in August 2010, resulted in a mistrial.

that there was no evidence that he sold drugs or that the quantity of drugs found demonstrates he had an intent to deliver the drugs. *Id.* at 6.²

The trial court has set forth the relevant law, addressed Greeley's claims and determined that they are without merit. *See* Trial Court Opinion, 6/5/12, at 7-14; *see also Commonwealth v. Kirkland*, 831 A.2d 607, 610 (Pa. Super. 2003) (rejecting appellant's argument that he did not constructively possess drugs found in a vehicle that he did not own because the evidence established that appellant drove the vehicle in question, possessed the keys to the vehicle, and the drugs were found in the vehicle). Accordingly, we adopt the sound reasoning of the trial court for the purpose of this appeal. *See* Trial Court Opinion, 6/5/12, at 7-14.

In his third claim, Greeley contends that the trial court erred in denying his request for a mistrial based upon the testimony of Trooper Charles Morrison. Brief for Appellant at 9. Greeley argues that Trooper Morrison's testimony that the money seized in the case had been forfeited suggested that Greeley had the money for an illegal purpose. *Id.* Greeley points out that the Commonwealth sought a curative instruction following this testimony, but that the instruction was insufficient to eliminate the prejudice of the testimony. *Id.* Greeley admits that a motion for a mistrial was never made by counsel. *Id.*

² Greeley has not set forth any pertinent analysis or citation to case law to support this claim. *See* Pa.R.A.P. 2119(a). Indeed, Greeley's only argument consists of a restatement of his Statement of Questions Presented.

Here, the trial court has addressed this claim and determined that Greeley failed to raise a motion for a mistrial. **See** Trial Court Opinion, 6/5/12, at 6-7; **see also Commonwealth v. Strunk**, 953 A.2d 577, 579 (Pa. Super. 2008) (stating that failure to request a mistrial is sufficient to constitute waiver of the claim). We adopt the sound reasoning of the trial court for the purpose of this appeal and conclude that Greeley's claim is waived on appeal. **See** Trial Court Opinion, 6/5/12, at 6-7.

Judgment of sentence affirmed.

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA

CRIMINAL ACTION

COMMONWEALTH OF PENNSYLVANIA, :

Vs. :

ALBERT THEODORE GREELEY III, :

Defendant. : NO. 133 of 2009

OPINION

WARMAN, J.

Following a trial by jury, the defendant, Albert Theodore Greeley III, was found guilty of a violation of the Controlled Substance, Drug, Device and Cosmetic Act involving Possession of a Controlled Substance, Cocaine, With Intent to Deliver¹ and Possession of a Controlled Substance, Marijuana². The defendant elected to enter a guilty plea to the summary motor vehicle violation, Drivers Required to be Licensed³.

Prior to the imposition of sentence the Commonwealth filed a notice of intention to seek the mandatory minimum sentence in accordance with the sentencing provisions of 18 Pa.C.S.A. §7508(a)(3)(iii) calling for a minimum mandatory sentence of no less than seven years and a fine of not less than \$50,000.00. The conviction was for a quantity of

¹ 35 P.S. §780-113(a)(30).

² Id. §780-113(a)(31).

³ 75 Pa. C.S.A. §1501(a).

cocaine exceeding 100 grams and defendant had prior convictions for drug trafficking offenses

The defendant was sentenced on the conviction for Possession With Intent to Deliver to a term of incarceration of not less than seven years nor more than 20 years, said sentence to run concurrently with prior sentences imposed in Fayette County and Allegheny County.

No timely post-sentence motion or appeal was filed by the defendant.

Following the filing of a Petition under the Post Conviction Relief Act the Court, on February 27, 2012, entered an order granting the defendant the right to file an appeal nunc pro tunc. On March 1, 2012, defendant filed a Notice of Appeal with the Superior Court. This Opinion is in support of the judgment of sentence imposed by this Court.

FACTS

On October 30, 2008, at or about 1:00 P.M. Trooper James Pierce of the Pennsylvania State Police, who was driving an unmarked police vehicle, was stopped at the intersection of Braddock Street and Coolspring Street in North Union Township, Fayette County, Pennsylvania. (N.T. 11) While stopped at the intersection Trooper Pierce observed the defendant, Albert Greeley, pass through the intersection operating a gray Ford Expedition. Defendant was the driver and sole occupant of the vehicle. (N.T. 12) Officer Pierce was personally familiar with the defendant

and knew that the defendant did not possess a valid license to operate a motor vehicle in Pennsylvania. (N.T. 13)

Trooper Pierce followed the vehicle operated by defendant approximately one-quarter mile from Bierer Avenue onto Liberty Street and into the driveway of House 83 Varndell Street, Uniontown, Pa. (N.T. 13) Pierce pulled into the driveway behind the Expedition, put his window down and called to defendant. (N.T. 15) Defendant approached the officer's vehicle. Officer Pierce asked defendant why he was operating a vehicle and defendant indicated that he was on his way to pick up his daughter at school. When asked about the ownership of the Expedition, defendant, accompanied by the officer, walked to the passenger side of the Expedition and opened the passenger side door. Trooper Pierce immediately smelled a strong odor of burnt marijuana coming from the vehicle. (N.T. 15)

Upon observing the strong odor of marijuana, Pierce asked defendant if he had been smoking marijuana. Defendant indicated that he had just finished a joint. (N.T. 16) When the officer asked if he had any marijuana on his person, defendant denied the possession of marijuana and consented to a pat-down search of his person. During the pat-down search the officer located a baggie of marijuana and defendant was placed under arrest. (N.T. 16)

Darniece and Dennis Sykes, defendant's in-laws, approached

the scene from the location of the house. (N.T. 17) Darniece walked up to defendant and embraced him. Trooper Pierce immediately separated defendant from Darniece and observed that defendant had a wad of currency in his hand which he attempted to pass to Darniece. (N.T. 18) The money was seized by Trooper Pierce. The wad of currency recovered from defendant was encircled with a rubber band which, when removed, revealed six individual bundles containing \$1,000.00 each. (N.T. 38) Pierce recovered an additional \$181.00 from the defendant's right pants pocket. (N.T. 20)

The wife of the owner of the Expedition appeared at the scene and consented to a search of the vehicle. (N.T. 19) Pierce recovered from the console of the vehicle adjacent to the driver's seat, a plastic baggie containing a white powder suspected to be cocaine. (N.T. 20)

The baggie of vegetable matter recovered from the defendant's pants pocket and the baggie of white powder recovered from the console of the Expedition were transported to the state crime lab for testing.. (N.T. 51)

A stipulation was placed in the record that the substances were analyzed at the Pennsylvania State Police Crime Laboratory in Greensburg by Lisa Moore, an expert in the field of chemistry and the analysis of controlled substances. Commonwealth's Exhibit #1 was tested and determined to be 9.5 grams of marijuana, a Schedule 1 controlled

substance. Commonwealth's Exhibit #3 was found to weigh 124 grams and determined to contain cocaine, a Schedule II controlled substance. (N.T. 45, 46)

Corporal Dennis Ulery of the Pennsylvania State Police was duly qualified as an expert in the field of narcotics investigations. (N.T. 48-50) Corporal Ulery provided an expert opinion based on his experience and training that the cocaine was possessed by the defendant with intent to deliver and not for personal use. (N.T. 52, 53)

DISCUSSION

In his Concise Statement of Issues Complained of on Appeal, the defendant raised the following:

1. The Trial Court erred when the Court denied the request for a mistrial based on the testimony presented by the officer related funds previously forfeited, when at the previous trial, when the same testimony was introduced a mistrial was granted.
2. The Commonwealth presented insufficient evidence to support the Intent to Deliver and Possession of a Controlled Substance charges; in that, the Commonwealth failed to establish that the Appellant was aware there were drugs

in the vehicle, and that the drugs were in the Defendant's possession and control as the vehicle was not owned by the Appellant.

3. The Commonwealth presented insufficient evidence to support the Intent to Deliver charge, in that there was not enough drugs found, nor was there any indicia that the Appellant had sold drugs.

The defendant first contends that the Court erred when it denied the defendant's request for a mistrial based on testimony concerning to the forfeiture of funds.

An examination of the trial transcript reveals that during his cross-examination of Trooper Charles Morrison, defense counsel was inquiring about the extent of the Commonwealth's attempts to identify persons who had come into contact with the drugs and money. Defense counsel asked Trooper Morrison whether the cash, which Trooper Pierce identified as removed from the defendant's hand, was submitted for DNA analysis. In response Morrison replied "That actually went to, that's a forfeiture. Forfeiture would have to answer that question for you." (N.T. 44) Counsel requested that a curative instruction be given to the jury that submission for forfeiture is not evidence of guilt. (N.T. 44)

No motion was made by defense counsel seeking the grant of

a mistrial. The Court did, in response to counsel's request, provide a curative instruction to the jury as follows: "Ladies and gentlemen of the jury, the fact that the currency would have been submitted to asset forfeiture has no bearing upon this case. It has no bearing upon the guilt or innocence of the defendant." Upon inquiry by the Court, defense counsel indicated his approval of the curative instruction provided by the Court. (N.T. 44)

Since no motion for a mistrial was made by defense counsel, no error was committed by the Court in refusing to grant a mistrial.

The remaining issues raised by defendant concern the sufficiency of the Commonwealth's evidence to support the verdict entered by the jury. In considering whether the Commonwealth presented sufficient evidence to prove the defendant guilty of Possession and Possession With Intent to Deliver, we are guided by the standards provided by our appellate courts. In Commonwealth v. Zingarelli, 839 A.2d 1064 (Pa. Super 2003), *appeal denied* 579 Pa. 692, 856 A.2d 834 (2004), the Superior Court indicated:

The standard we apply in reviewing the sufficiency of the evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for that of the fact-finder. In addition, we note that the facts

and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of the witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Zingarelli, 839 A.2d at 1069.

Since the two remaining issues are related we will consider them together.

Defendant contends that the Commonwealth presented insufficient evidence to support the finding that the defendant possessed the drugs with intent to deliver in that it failed to establish that defendant was aware that the drugs were in the vehicle, or that they were in the defendant's possession since the vehicle was not owned by the defendant.

Defendant also contends that there was not a sufficient quantity of drugs to support a finding of intent to deliver nor was there any indicia that the drugs were possessed with intent to deliver.

The crime of Possession of a Controlled Substance With Intent to Deliver is set forth in 35 P.S. §780-113(a)(30) which provides, in pertinent

part:

The following acts and the causing thereof within the Commonwealth are hereby prohibited:

...

(30) Except as authorized by this Act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this Act, or a practitioner not registered or licensed by the appropriate state board, or knowingly creating, delivering or possessing with intent to deliver a counterfeit controlled substance.

35 P.S. §780-113(a)(30).

In order to be convicted for a violation of the Drug Act under 35 P.S. §780-113(a)(30) of Possession With Intent to Deliver, the Commonwealth must prove that the defendant "both possessed the controlled substance and had the intent to deliver that substance." Commonwealth v. Parsons, 391 Pa. Super. 273, 283, 570 A.2d 1328, 1334 (1990); Commonwealth v. Lee, 956 A.2d 1024 (Pa. Super. 2008).

Where the contraband is not found on the defendant's person, the Commonwealth must prove that the defendant had constructive possession of the contraband, which has been defined as the "ability and intent to exercise control or dominion over the substance." Commonwealth v. Hutchinson, 947 A.2d 800, 806 (Pa. Super. 2008). The Commonwealth may establish constructive possession through the totality of the circumstances. Commonwealth v. Muniz, 5 A.3d 345, 349 (Pa. Super.

2010). Every element of the crime may be proven beyond a reasonable doubt by means of wholly circumstantial evidence. Commonwealth v. Conaway, 791 A.2d 359 (Pa. Super. 2002); Commonwealth v. Aguado, 760 a.2d 1181, 1185 (Pa. Super. 2000; Commonwealth v. Torres, 421 Pa. Super. 233, 617 A.2d 812, 814 (1992).

The evidence in this case established that the cocaine was recovered by the police from the console located in the front of the vehicle adjacent to the driver's seat. The evidence further established that during the period of time the vehicle was observed by Trooper Pierce, the defendant was in sole possession and control of the vehicle. Defendant was observed to be the driver and only occupant of the vehicle which was followed by Officer Pierce for a distance of approximately one quarter of a mile. As the driver of the vehicle, the defendant was in the immediate vicinity, adjacent to the center console where the drugs were found, and the only person observed by Trooper Pierce to have immediate access to the drugs.

As noted by the court in Commonwealth v. Rippey, 732 A.2d 1216 (Pa. Super. 1999), possession of a controlled substance can be proven by showing that the defendant actually possessed the drug through direct evidence, such as finding the controlled substance on the defendant's person, or it can be proven by showing that the defendant constructively possessed a controlled substance. The doctrine of constructive possession

has been explained as follows:

Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as "conscious dominion." We subsequently defined "conscious dominion" as "the power to control the contraband and the intent to exercise that control." To aid application, we have held that constructive possession may be established by the totality of the circumstances." (citations omitted)

Commonwealth v. Thompson, 779 A.2d 1195 (Pa. Super. 2001).

This Court is convinced that the evidence introduced by the Commonwealth was sufficient to prove the defendant not only had the power to control the cocaine but also had the intent to exercise that control. Accordingly, we conclude that the evidence was sufficient to prove beyond a reasonable doubt that the defendant constructively possessed the drugs found in the console of the Ford Expedition. No evidence was introduced which would in any way negate such a finding.

The Commonwealth presented evidence to show that the defendant had in his possession a large quantity of U.S. currency, the majority of which was rolled into a wad encircled with a rubber band. When the rubber band was removed there was displayed six individually banded bundles of currency, ten \$100.00 bills in each bundle for a total of \$6,000.00.

According to the expert witness, Corporal Dennis Ulery, it is common practice for persons who are in the business of dealing drugs to package their money in \$1,000.00 increments, which in street slang is called a stack.

Corporal Ulery also testified that one gram of cocaine has a street value of approximately \$100.00 and, therefore, the cocaine recovered had a street value of \$12,400.00, if sold in quantities of one gram each.

The Commonwealth may establish the elements of the crime of Possession With Intent to Deliver entirely by circumstantial evidence. Commonwealth v. Ramos, 392 Pa. Super. 583, 573 A.2d 1027 (1990). All facts and circumstances surrounding the possession of drugs or narcotics are relevant in making a determination of whether contraband is possessed with the intent to deliver. Commonwealth v. Fisher, 316 Pa. Super 311, 462 A.2d 1366 (1983). In addition to the quantity of the drugs possessed, in determining whether there was an intent to deliver, the courts have also considered the presence of such things as inordinately large sums of cash and the presence or absence of paraphernalia. Commonwealth v. Davis, 331 Pa. Super. 285, 480 A.2d 1035 (1984).

The Commonwealth also presented the expert opinion of Corporal Dennis Ulery, who was duly qualified as an expert in the field of drug investigations. Ulery testified that in his opinion based on the quantity

of the cocaine recovered and the large sum of U.S. currency recovered from the defendant separated into individual \$1,000 stacks that the drugs were possessed not for the purpose of personal consumption but with the intent to deliver.

The testimony of a police officer – expert witness may be accepted by the jury in determining whether the Commonwealth has proven the intent to deliver element of the crime charged. Commonwealth v. Robinson, 399 Pa. Super. 199, 582 A.2d 14, 17 (1990); Commonwealth v. Brown, 408 Pa. Super. 246, 596 A.2d 840 (1991); Commonwealth v. Ratsamy, 594 Pa. 176, 934 A.2d 1233 (2007). As stated by the Supreme Court in Ratsamy:

...

Expert testimony is important in drug cases where the other evidence may not conclusively establish that the drugs were intended for distribution. Such testimony is admissible to aid in determining whether the facts surrounding the possession of controlled substances are consistent with intent to deliver. (citations omitted)

Commonwealth v. Ratsamy, 934 A.2d at 1236-37.

This Court is convinced that the evidence was sufficient to prove that the defendant had the power to control the drugs and the intent to exercise that control and that the drugs were possessed with intent to deliver.

Upon review of the evidence presented in the light most

favorable to the Commonwealth as the verdict winner and drawing all proper inferences favorable to the Commonwealth as we must, we find that the trier of fact could reasonably have concluded that the elements of Possession of a Controlled Substance and Possession With Intent to Deliver were established beyond a reasonable doubt. Defendant's request for a new trial based on the insufficiency of the evidence should, therefore, be DENIED.

BY THE COURT:

ATTEST:


RALPH C. WARMAN, JUDGE


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