NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. SHIMEL LOCKMAN Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 545 EDA 2012

Appeal from the Judgment of Sentence February 3, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0011043-2011

BEFORE: BOWES, J., GANTMAN, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, J.: Filed: March 20, 2013

Appellant, Shimel Lockman, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas, following his bench trial convictions for possession with intent to deliver, possession of a controlled substance, and possession of drug paraphernalia.[1]

In its opinion, the trial court fully and correctly sets forth the relevant facts and procedural history of this case. Therefore, we have no reason to restate them. We add only that on February 13, 2012, Appellant timely filed a notice of appeal. The trial court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant complied.

---

[1] 35 P.S. § 780-113(a)(30), (a)(16), and (a)(32), respectively.

Appellant raises the following issues for our review:

> WHETHER THE [SUPPRESSION] COURT ERRED IN DENYING [APPELLANT'S] MOTION TO SUPPRESS WHERE THE POLICE DID NOT HAVE PROBABLE CAUSE, REASONABLE SUSPICION, OR ANY OTHER REASON TO CONDUCT AN INVESTIGATION OF THE CONTENTS OF THE VEHICLE?
>
> WHETHER THE COMMONWEALTH DID NOT PROVE ALL THE ELEMENTS OF THE CRIMES CHARGED AS A MATTER OF LAW WHERE THE COMMONWEALTH DID NOT PROVE THAT [APPELLANT] HAD CONSTRUCTIVE POSSESSION OVER THE DRUGS?

(Appellant's Brief at 5).

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable Diana Anhalt, we conclude Appellant's issues merit no relief. (***See*** Trial Court Opinion, filed August 1, 2012, at 3-10) (finding: (1) Appellant failed to present evidence he drove rental vehicle with permission of lessee; thus, he could not demonstrate legitimate expectation of privacy in rental vehicle;[2]

---

[2] At this point, we make one change to the trial court's analysis at page 5, where it indicated Appellant was unable to establish "standing" to support a motion to suppress. As a general rule, defendants charged with possessory crimes have automatic "standing" to challenge a search in Pennsylvania. ***See Commonwealth v. Perea***, 791 A.2d 427, 429 (Pa.Super. 2002), *appeal denied*, 568 Pa. 736, 798 A.2d 1288 (2002) (stating, "[U]under Pennsylvania law, a defendant charged with a possessory offense has standing to challenge a search"). A defendant accused of a possessory crime, however, must also establish the requisite expectation of privacy in the area searched to prevail on a challenge to the constitutionality of the search. ***Commonwealth v. Strickland***, 707 A.2d 531, 534 (Pa.Super. 1998), *appeal denied*, 556 Pa. 675, 727 A.2d 130 (1998).

therefore, Appellant was unable to satisfy initial burden for constitutional challenge to police investigation of vehicle contents; moreover, Officer Marcellino stopped Appellant for motor vehicle code violation, approached vehicle parked on public street after stop, and properly asked Appellant to step out of vehicle; Officer Marcellino used flashlight to look inside vehicle, observed drugs in plain view from lawful vantage point, immediately recognized numerous packets of chalky white substance sticking out of center console as crack cocaine, and seized drugs in vehicle; therefore, Officer Marcellino properly seized evidence; (2) Officer Marcellino discovered crack inside vehicle Appellant was driving alone, in center console, easily and visibly accessible to Appellant; therefore, Commonwealth established Appellant's constructive possession of drugs in vehicle). Accordingly, we affirm on the basis of the trial court's opinion.

Judgment of sentence affirmed.

FILED
AUG 0 1 2012
Criminal Appeals Unit
First Judicial District of PA

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NO.: CP-51-CR-0011043-2011
v.	:	
	:	Superior Court No.:
SHIMEL LOCKMAN	:	545 EDA 2012

OPINION

ANHALT, J.

Appellant in the above-captioned matter has appealed this Court's denial of his Motion to Suppress and conviction for Possession of a Controlled Substance with Intent to Deliver (PWID), Possession of a Controlled Substance (K/I), and Possession of Drug Paraphernalia. The Court submits the following Opinion in accordance with the requirements of Pa.R.A.P. 1925. For the reasons set forth herein, the Court holds that the underlying judgment should be affirmed.

PROCEDURAL HISTORY

On July 20, 2011, Appellant, Shimel Lockman, was arrested and subsequently charged with Possession of a Controlled Substance with Intent to Deliver (PWID), Possession of a Controlled Substance (K/I), and Possession of Drug Paraphernalia. At his hearing on February 3, 2012, Appellant brought a Motion to Suppress physical evidence before this Court. After hearing the evidence presented, this Court denied the Motion to Suppress and ultimately found Appellant guilty of the above charges and sentenced him to 3-6 years confinement followed by 1 year of reporting probation.

Appellant filed this timely appeal of the Court's decision on February 22, 2012. On

CP-51-CR-0011043-2011 Comm. v. Lockman, Shimel
Opinion

February 23, 2012, this Court ordered Appellant pursuant to Pa.R.A.P. 1925(b) to file with the Court a Concise Statement of Matters Complained of on Appeal. Counsel for Appellant subsequently filed a Motion to Withdraw as Counsel which was granted. New counsel was appointed for Appellant pursuant to this appeal on May 22, 2012. On June 14, 2012, this Court again ordered Appellant pursuant to Pa.R.A.P. 1925(b) to file with the Court a Concise Statement of Matters Complained of on Appeal. Appellant finally filed his 1925(b) Statement with the Court on June 25, 2012.

FACTUAL HISTORY

At the hearing on Appellant's Motion to Suppress, Police Officer David Marcellino testified that on July 20, 2011, at approximately 10:10 p.m., his tour of duty took him to the area of 6000 Woodland Avenue in the city and county of Philadelphia. (N.T., 2/3/12, pg. 6). Officer Marcellino testified that he came in contact with the Appellant during a vehicle investigation after the officer had stopped Appellant's vehicle due to Appellant failing to use a turn signal at a traffic light. (N.T., 2/3/12, pg. 7). After the Appellant had pulled over his vehicle, Officer Marcellino and his partner approached the vehicle, Officer Marcellino on the driver's side and his partner on the passenger side. (N.T., 2/3/12, pgs. 7-8). The officer testified that Appellant was in the vehicle by himself and that he asked Appellant for his license, insurance, and registration to the vehicle and Appellant provided him with his license and an Enterprise Rent-A-Car form. (N.T., 2/3/12, pg. 8). The name on the Rent-A-Car form for the authorized driver of the vehicle was not the Appellant's name but rather the name Crystal Alexander. (N.T., 2/3/12, pg. 8, 18). The officer did not remember whether or not he asked the Appellant whether he had permission to drive the vehicle. (N.T., 2/3/12, pg. 19). At that point, the officer asked Appellant

to step out of the vehicle and when Appellant got out, Officer Marcellino passed him over to his partner and they went to the rear of the vehicle. (N.T., 2/3/12, pg. 9). Officer Marcellino testified that after passing Appellant off to his partner, he then returned back to the front driver's side of the vehicle where the door was still open and looked inside the vehicle with his flashlight. (N.T., 2/3/12, pg. 9, 20). The officer was standing out in front of the vehicle in between where the door was opened with his feet planted on the ground when he observed something sticking out from the center console in the vehicle. When asked what he saw when he looked into Appellant's vehicle with the flashlight, Officer Marcellino testified, "with the aid of my flashlight, where the plastic housing [center console] was ajar, I could see a plastic bag that contained numerous purple tinted Ziploc packets... and inside that was a chunky white substance." (N.T., 2/3/12, pg. 10). The officer went on to testify that he believed that the substance was crack. (N.T., 2/3/12, pg. 10). His belief was based on the fact that he had seen that type of substance numerous times before and is familiar with the way crack is packaged due to his 13 years of experience as a police officer. (N.T., 2/3/12, pg. 10).

After making this observation, Officer Marcellino arrested the Appellant and recovered one clear baggie containing 26 purple tinted Ziploc packets and two clear packets all containing crack cocaine and another clear plastic baggie containing 71 purple tinted Ziploc packets and three clear Ziploc packets all containing crack as well as a clear plastic Ziploc bag containing numerous unused Ziploc packets. (N.T., 2/3/12, pg. 11). The officer also issued Appellant a traffic citation for the traffic violation. (N.T., 2/3/12, pg. 12).

DISCUSSION

Appellant contends that the Court erred in denying his Motion to Suppress and ultimately

finding him guilty of Possession of a Controlled Substance with Intent to Deliver (PWID), Possession of a Controlled Substance (K/I), and Possession of Drug Paraphernalia.

1). **Appellant's first argument on appeal is that his Motion to Suppress should have been granted because there was no probable cause, reasonable suspicion, or any other reason to conduct an investigation of the contents of the vehicle.**

When a defendant appeals a motion to suppress evidence, "an appellate court must consider only the evidence of the prosecution and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted." Commonwealth v. Cortez, 507 Pa. 529, 532 (Pa. 1985). "Assuming there is support in the record, an appellate court is bound by the facts as are found and it may reverse the suppression court only if the legal conclusions drawn from those facts are in error." Id.

A defendant moving to suppress evidence has the preliminary burden of establishing standing and a legitimate expectation of privacy. Standing requires a defendant to demonstrate one of the following: (1) his presence on the premises at the time of the search and seizure; (2) a possessory interest in the evidence improperly seized; (3) that the offense charged includes as an essential element the element of possession; or (4) a proprietary or possessory interest in the searched premises. A defendant must separately establish a legitimate expectation of privacy in the area searched or thing seized. Commonwealth v. Hawkins, 718 A.2d 265, 267 (Pa. 1998); *see also* Commonwealth v. Black, 758 A.2d 1253, 1256–1258 (Pa.Super.2000). In Commonwealth v. Jones, 874 A.2d 108 (Pa. Super. 2005), the Superior Court was faced with a similar factual situation as the present case and held that an operator of a rental car did not have standing to challenge constitutionality of a vehicle search when he was not the named lessee, was not an authorized driver, the named lessee was not present in the vehicle, Appellant offered no

explanation of his connection to the named lessee, and the return date for the rental car had passed. Id. at 112. Here, similarly the Appellant was not able to establish that he had standing and a reasonable expectation of privacy in the vehicle as the Rent-A-Car form for the authorized driver of the vehicle was not the Appellant's name but rather the name Crystal Alexander. And neither Appellant nor Ms. Alexander presented any evidence that he had permission to be driving the vehicle or what his connection is Ms. Alexander. Therefore, the Appellant did not meet his preliminary burden to challenge the constitutionality of the investigation of the contents of the vehicle.

Even if Appellant could establish that he had standing and a reasonable expectation of privacy in the vehicle, the investigation of the contents of the vehicle was still permissible. Since the United States Supreme Court's holding in Pennsylvania vs. Mimms, 434 U.S. 106 (1977), the Courts in this Commonwealth subsequently have held that where an officer effectuates a valid traffic stop, he or she may order the driver to exit the vehicle despite the lack of an articulable basis to believe that criminal activity is afoot or that the driver is armed and dangerous. *See* Commonwealth v. Lopez, 609 A.2d 177, 181 (Pa. Super 1992), appeal denied, A.2d 1273 (Pa. 1992). *See also* Commonwealth v. Elliott, 546 A.2d 654, 660 (Pa. Super. 1988), appeal denied, 557 A.2d 721 (Pa. 1989) (Mimms makes it clear that the officer need not articulate any reason for ordering the driver from the vehicle when the vehicle is lawfully detained for a traffic violation). Therefore, initially it was entirely proper for Officer Marcellino to ask Appellant to step out of the vehicle after he had stopped the vehicle due to Appellant failing to use a turn signal at a traffic light.

The next question is whether the officer could investigate the contents of the vehicle. Pennsylvania Courts have held that while police officers might be prohibited from searching a vehicle once the occupants have been removed, the officers are not prohibited from seizing contraband observed in plain view inside the vehicle after a lawful stop. Commonwealth v. Petroll, 558 Pa. 565, 738 A.2d 993 (1999); Commonwealth v. Colon, 777 A.2d 1097 (Pa.Super.2001). Both the United States Constitution and Pennsylvania Constitution prohibit unreasonable searches and seizures. Generally, a search is reasonable when it is conducted pursuant to a warrant supported by probable cause. Commonwealth v. Ariondo, 580 A.2d 341 (Pa. Super. 1990), *citing* Commonwealth v. Holzer, 389 A.2d 101 (Pa. 1978). One of the exceptions to the rule regarding warrantless searches arises where the contraband is in plain view. Horton v. California, 496 U.S. 128 (1990); Commonwealth v. Milyak, 493 A.2d 1346 (Pa. 1985). In Commonwealth v. Guzman, 44 A.2d 688 (Pa. Super. 2012), the Court held that the plain view doctrine allows warrantless seizure of items when: (1) police observe item from lawful vantage point; (2) incriminating nature of item is immediately apparent; and (3) police have lawful right of access to object. Id. at 691.

Applying the three-part test of the plain view doctrine to the present case, the Court found that all three elements were met. First, the record supports the conclusion that Officer Marcellino observed the drugs in Appellant's vehicle from a lawful vantage point. Officer Marcellino lawfully approached the driver's side of the Appellant's vehicle where it was parked on a public street after being stopped due to Appellant failing to use a turn signal at a traffic light.

Turning to the second element, the record establishes that the incriminating nature of the

object seen by Officer Marcellino was immediately apparent. Officer Marcellino testified that he immediately knew that the substance in the packets in the plastic bags was crack because of his 13 years of experience where he had seen that substance numerous times before and is very familiar with the way crack is packaged.

Finally, turning to the third element, Officer Marcellino had a lawful right of access to the objects in the vehicle. Officer Marcellino testified that he did not initially see the plastic bag containing numerous purple tinted Ziploc packets with a chunky white substance when Appellant exited vehicle. It was only when he used his flashlight to look inside the vehicle was he able to see the plastic bag. Pennsylvania Courts have held that the use of a flashlight to enhance viewing does not invade a protected interest during a search of a car, Commonwealth v. Merkt, 600 A.2d 1297 (Pa. Super. 1992); Commonwealth v. Rosa, 734 A.2d 412 (Pa.Super. 1999). In Milyak, our Supreme Court held officers who observed stolen items through the windows of a van with the aid of a flashlight were justified in seizing the items. In Commonwealth v. Bentley, 419 A.2d 85 (Pa. Super 1980), when an officer arrived at the scene of an accident, the defendant quickly locked his car and fled with friends in another car. The officer subsequently looked in the window of the station wagon with the aid of a flashlight and observed the barrel of a gun on the floor in front of the driver's seat. The court held that the fact that the officer required illumination from a flashlight to see into the darkened interior of the vehicle did not prevent the gun from being in plain view or render the policeman's conduct unreasonable. Therefore, Office Marcellino using his flashlight to look into Appellant's vehicle did not invade any of Appellant's rights and the plastic bag containing numerous purple tinted Ziploc packets with a chunky white substance was in plain view sticking out of the center console of the vehicle.

Furthermore, questions of witness credibility and the weight to be afforded the evidence are within the sole province of the finder of fact, who is free to believe all, part, or none of the evidence. Commonwealth v. Woods, 432 Pa. Super. 428, 638 A.2d 1013, 1015 (1994); Commonwealth v. Mayfield, 401 Pa. Super. 560, 585 A.2d 1069 (1991). Here, there is nothing in the record to conclude that Officer Marcellino's testimony was anything but entirely reasonable and credible. Therefore, Appellant's Motion to Suppress the drugs found in the vehicle was properly denied.

2). Appellant's second argument on appeal is that the Commonwealth did not prove all the elements of the crimes charged as a matter of law where the Commonwealth did not prove that Defendant had constructive possession over the drugs.

In considering a challenge to the sufficiency of the evidence, the reviewing court must determine whether, viewing all the evidence at trial and the reasonable inferences therefrom in the light most favorable to the Commonwealth, the trier of fact could have found that each element of the offense charged was proven beyond a reasonable doubt. Commonwealth v. Marinelli, 547 Pa. 294, 690 A.2d 203 (1997); Commonwealth v. Gaskins, 692 A.2d 224, 227 (Pa. Super. 1997). This standard is applicable whether the evidence presented is circumstantial or direct, provided the evidence links the accused to the crime beyond a reasonable doubt. Commonwealth v. Morales, 669 A.2d 1003, 1005 (Pa. Super. 1996). The Commonwealth may sustain its burden of proof by means of wholly circumstantial evidence. Commonwealth v. George, 705 A.2d 916 (Pa. Super. 1998). Questions of witness credibility and the weight to be afforded the evidence are within the sole province of the finder of fact, who is free to believe all, part, or none of the evidence. Commonwealth v. Woods, 432 Pa. Super. 428, 638 A.2d 1013, 1015 (1994); Commonwealth v. Mayfield, 401 Pa. Super. 560, 585 A.2d 1069 (1991). The facts

and circumstances need not preclude every possibility of innocence, and any doubts regarding defendant's guilt may be resolved by the fact-finder unless the evidence is so inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. Commonwealth v. Bricker, 882 A.2d 1008 (Pa. Super. 2005).

Constructive Possession is the ability to exercise conscious control or dominion over the illegal substance and the intent to exercise that control. Commonwealth v. Macolino, 469 A.2d 132 (Pa. 1983). The intent to exercise conscious dominion can be inferred from the totality of the circumstances. Id.; *see also* Commonwealth v. Aviles, 615 A.2d 398 (Pa. Super. 1992). On appeal these inferences must be viewed in the light most favorable to the Commonwealth. Commonwealth v. Krause, 799 A.2d 835 (Pa. Super. 2002).

The circumstances present in the instant case are substantially similar to the circumstances present in Commonwealth v. Kirkland, 831 A.2d 607 (Pa. Super. 2003). In Kirkland, the Court found that the defendant had constructively possessed cocaine which was located in the back seat of a vehicle, even though the defendant did not own the vehicle, the vehicle was unlocked and the windows were down. Id. The Court, looking at the totality of the circumstances, including the facts that the defendant had arrived in the vehicle and possessed the keys to vehicle, found that the defendant had constructively possessed the cocaine. Id.

A similar result should occur in the instant case. Here, Officer Marcellino testified that when he looked into Appellant's vehicle with the aid of his flashlight, he could see the center console was ajar with a plastic bag sticking out that contained numerous purple tinted Ziploc packets with a chunky white substance. The center console in the vehicle was located next to the driver lined up around the driver's hip area. Based on the totality of these circumstances, the fact

that the crack was removed from an area inside the vehicle that was easily visibly and accessible to the Appellant combined with the fact that Appellant, though not the owner, had the keys to the vehicle and was driving the vehicle by himself, it can be inferred that the Appellant had the intent to exercise conscious control over the crack found in the vehicle. Therefore, the Court found that the Commonwealth sufficiently proved beyond a reasonable doubt that the Appellant had constructive possession of the crack found in the vehicle.

CONCLUSION

For the foregoing reasons, the Court's decision denying Appellant's Motion to Suppress physical evidence and finding the Appellant guilty of the above charges should be affirmed.

BY THE COURT:

Diana Anhalt, J.

July 31, 2012

PROOF OF SERVICE

I hereby certify that on the date set forth below, I caused an original copy of the Judicial Opinion to be served upon the persons at following locations, which service satisfies the requirements of Pa.R.A.P. 122:

Emily B. Cherniack, Esquire
1500 Walnut Street, Suite 1100
Philadelphia, PA 19102

Hugh Burns, Esquire
Philadelphia District Attorneys Office
Three South Penn Square
Philadelphia, PA 19107

Date: August 1, 2012

By: Diana Anhalt
Diana Anhalt, Judge