

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
EARL J. GREEN,	:	
	:	
Appellant	:	No. 558 WDA 2012

Appeal from the Judgment of Sentence Entered February 27, 2012,
In the Court of Common Pleas of Allegheny County,
Criminal Division, at No. CP-02-CR-0016511-2009.

BEFORE: SHOGAN, OTT and STRASSBURGER*, JJ.

MEMORANDUM BY SHOGAN, J.:

Filed: May 15, 2013

Appellant, Earl J. Green, appeals from the judgment of sentence entered on February 27, 2012 in the Allegheny County Court of Common Pleas. We affirm.

In its opinion, the trial court set forth the relevant factual history of this matter as follows:

A controlled buy of narcotics was completed using a confidential informant in the residence of Maurice Brown located at 420 Antisbury Street, City of Pittsburgh, Allegheny County on April 22, 2009. (T.T. 27-29, 30, 41). Following the surveillance of that controlled buy, Detective Glenn Hairston applied for a search warrant for the residence of Maurice Brown. (T.T. 30, 41).

On April 24, 2009, the search warrant was executed by members of the SWAT team. (T.T. 45). Detective Joseph Lewis covered the back of the house during the execution of the search warrant. (T.T. 45). While at the back door, Detective Lewis could hear running inside the house as the officers knocked and

*Retired Senior Judge assigned to the Superior Court.

announced their presence at the front door. (T.T. 45). Upon making entry into the home, Detective Lewis saw three individuals in the kitchen including Appellant. (T.T. 46). Appellant did not comply with an order to get on the floor, rather he ran into a bathroom that was accessed directly from the kitchen. (T.T. 46, 48). After five to ten seconds in the bathroom Appellant complied with police orders to come out of the bathroom and get on the ground. (T.T. 47). As Appellant came out of the bathroom he made a statement that he "was not in there." (T.T. 51).

A search of the bathroom revealed a baseball cap and a lighter inside the toilet and a pair of glasses on the floor. (T.T. 51). In the small galley style kitchen, police found: (1) a plastic baggie containing crack cocaine on the stove; (2) a black box underneath the kitchen sink which contained four hundred (400) ecstasy pills, four knotted baggies of crack cocaine, a bottle of inositol powder, a digital scale, a Glock .45 magazine and a black Uzi semi-automatic weapon; and (3) three baggies of crack cocaine inside the refrigerator. (T.T. 53, 74-75).

Trial Court Opinion, 9/4/12, at 4-6 (footnote omitted).

The trial court explained the procedural history as follows:

Appellant, Earl J. Green, was charged by criminal information (CC 200916511) with one (1) count each of: Possession with Intent to Deliver (cocaine), Possession with Intent to Deliver (ecstasy)¹, Possession of a Controlled Substance² (cocaine) and Possession of a Controlled Substance (ecstasy), and Criminal Conspiracy³.

¹ 35 [P.S.] §780-113 (a)(30).

² 35 [P.S.] §780-113 (a)(16).

³ 18 Pa.C.S.A. §903 (a)(1).

Appellant filed an Omnibus Pre-Trial Motion in the nature of a Motion to Suppress. On May 26, 2010, a suppression hearing was held and following the presentation of the evidence, the Trial Court denied Appellant's motion.

On February 21, 2012, Appellant proceeded to a jury trial. The jury found Appellant guilty of Possession of a Controlled Substance (cocaine), Possession of a Controlled Substance (ecstasy), Criminal Conspiracy, and not guilty of the remaining charges. Appellant made an oral Motion for Judgment of Acquittal and to Set Aside the Jury Verdict which was denied.

On February 27, 2012, Appellant was sentenced at count 3-Possession of a Controlled Substance (cocaine) to two to four months incarceration; at count 4-Possession of a Controlled Substance (ecstasy) to two to four months incarceration to be served consecutive to the term at count two; and no further penalty at the Criminal Conspiracy count.

Trial Court Opinion, 9/4/12, at 2-3. This timely appeal followed.

On appeal, Appellant raises two questions for this Court's consideration:

- I. WAS THE EVIDENCE SUFFICIENT TO SUPPORT [APPELLANT'S] CONVICTION FOR CRIMINAL CONSPIRACY TO COMMIT POSSESSION OF A CONTROLLED SUBSTANCE, IN VIOLATION OF 18 Pa.C.S.A. §903(a)(1), WHERE THE COMMONWEALTH PRESENTED NO EVIDENCE THAT [APPELLANT] AGREED WITH ANOTHER PERSON TO POSSESS DRUGS?
- II. WAS THE EVIDENCE SUFFICIENT TO ESTABLISH THAT [APPELLANT] CONSTRUCTIVELY POSSESSED ANY OF THE COCAINE OR ECSTASY RECOVERED DURING A SEARCH OF MAURICE BROWN'S HOUSE WHERE THE COMMONWEALTH PRESENTED NO EVIDENCE TO SHOW THAT [APPELLANT] HAD THE ABILITY TO EXERCISE CONSCIOUS DOMINION OVER THE DRUGS?

Appellant's Brief at 4.¹

The standard of review we apply when faced with a challenge to the sufficiency of the evidence is well settled:

¹ For purposes of our discussion, we have renumbered Appellant's issues.

In determining whether the evidence was sufficient to support a conviction, we review the evidence admitted during the trial along with any reasonable inferences that may be drawn from that evidence in the light most favorable to the Commonwealth as the verdict winner. If we conclude, based on that review, that the finder of fact could have found every element of the crime beyond a reasonable doubt, we must sustain the conviction. Additionally, it is the responsibility of the trier of fact to assess the credibility of the witnesses and weigh all of the evidence presented. In doing so, the trier of fact is free to believe all, part, or none of the evidence.

Commonwealth v. James, 46 A.3d 776, 779 (Pa. Super. 2012) (citations and quotation marks omitted).

In his first issue, Appellant claims the evidence was insufficient to convict him of criminal conspiracy. We disagree.

Criminal conspiracy is defined as follows:

§903. Criminal conspiracy

(a) Definition of conspiracy.--A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

- (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
- (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa.C.S.A. § 903(a). Moreover,

[a] conviction for criminal conspiracy requires the trier of fact to find the following: (1) that the defendant intended to commit or aid in the commission of a criminal act; (2) that the defendant entered into an agreement with another, i.e., the co-conspirator,

to engage in a crime; and (3) that the defendant or one or more of the other co-conspirators committed an overt act in furtherance of the agreed upon crime. **See Commonwealth v. Murphy**, 577 Pa. 275, 292, 844 A.2d 1228, 1238 (2004); **see also**, 18 Pa.Cons.Stat. Ann. § 903(a). "The essence of a criminal conspiracy ... is the agreement made between the co-conspirators." **Murphy**, 577 Pa. at 292, 844 A.2d at 1238. The nature of the offense is such that more often than not there is no direct evidence of the defendant's criminal intent or the conspiratorial agreement. **See id.** "Consequently, the defendant's intent as well as the agreement is almost always proven through circumstantial evidence, such as by the relations, conduct or circumstances of the parties or overt acts on the part of the co-conspirators." **Id.** (citation and internal quotation marks omitted); **see also, Commonwealth v. Ruiz**, 819 A.2d 92, 97 (Pa.Super.2003) ("The conduct of the parties and the circumstances surrounding their conduct may create a web of evidence linking the accused to the alleged conspiracy beyond a reasonable doubt.").

Commonwealth v. Little, 879 A.2d 293, 298-299 (Pa. Super. 2005).

In its opinion, the trial court succinctly addressed Appellant's conspiracy issue as follows:

Here, while executing a search warrant on 420 Antisbury Street Appellant: (1) was present in a home with confirmed drug activity; (2) was present with two other persons in the small galley kitchen in the area where [] significant amounts of different drugs were found; (3) ran into the bathroom to dispose of contraband; and, (4) made a statement after coming out of the bathroom that he "was not in there." (T.T. 45-46, 51, 53). A reasonable inference flows from the evidence presented that Appellant flushed contraband down the toilet. (T.T. 51). In addition, the significant amount of drugs found in the kitchen itself would constitute an overt act solidifying the conspiratorial relationship between Appellant and the codefendants. Thus, the evidence of Appellant's part in the conspiracy was proven beyond a reasonable doubt.

Trial Court Opinion, 9/4/12, at 10.

We agree with the trial court. The record reflects that when the police executed the search warrant, Appellant was in the small galley kitchen of the residence with Mr. Brown and Mr. Turner. N.T., 2/21/12 – 2/27/12, at 43-53. Upon entering the residence, the police saw cocaine in plain view in the galley kitchen. *Id.* at 43-53. Appellant ignored commands to lie on the floor and instead fled to the bathroom. *Id.* at 46. When Appellant was directed to exit the bathroom, the water was running as the toilet had been flushed. *Id.* at 50-51. Appellant's hat and glasses were in the bathroom, and a clear baggie was in the toilet. *Id.* at 83, 125.² When he exited the bathroom, Appellant announced that he was not in the bathroom, despite the officer witnessing him enter and exit. *Id.* at 47. Appellant then said that he had only come to the residence 20 minutes before the police executed the warrant (*id.* at 270), but Detective Glenn Hairston testified the residence had been under surveillance for approximately 90 minutes, and no one had entered the residence during that time. *Id.* at 333. Appellant testified that he and Mr. Brown had been friends for 10 years, and he testified that he knew Mr. Brown was a drug dealer. *Id.* at 289. Both Mr.

² The testimony concerning the baggie in the toilet was disputed. While the prosecution elicited testimony regarding the baggie found in the toilet, it is conceded that the baggie was not retrieved and logged as evidence. N.T., 2/21/12 – 2/27/12, at 83. However, the trial court allowed the testimony as to what the officer saw. *Id.*

Brown and Mr. Turner pled guilty to conspiracy (possession of narcotics with the intent to deliver). *Id.* at 291-292.

When considered in totality, there was evidence that drugs were being sold out of the residence. Appellant was untruthful in both his arrival time and his reason for being in the house. Appellant knew Mr. Brown was a drug dealer. Appellant was seen in the kitchen where the drugs were located, and he fled to a bathroom when police arrived despite being ordered to lie on the floor. Once sequestered in the bathroom, an officer heard the toilet flush. The officers found Appellant's hat and glasses in the bathroom, and they found a clear plastic baggie in the toilet. This evidence, coupled with Appellant's inexplicable statement that he was not in the bathroom upon exiting the bathroom, illustrates Appellant's knowledge of the drugs in the house, sale of drugs from the house, and his understanding that the enterprise was illegal. Upon review, we agree with the trial court's determination, and we conclude that the evidence was sufficient to establish criminal conspiracy. Accordingly, Appellant is entitled to no relief on this issue.

In his next issue, Appellant claims the Commonwealth failed to prove constructive possession. Generally, where a defendant is charged with a possessory criminal offense but was not found in actual physical possession of contraband, the Commonwealth must establish constructive possession.

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

Commonwealth v. Brown, 48 A.3d 426, 430 (Pa. Super. 2012) (quotation marks omitted).

However, because the Commonwealth proved criminal conspiracy, it was not necessary to prove constructive possession of the drugs. A defendant is criminally liable for drugs found inside a co-conspirator's residence where the Commonwealth proves the defendant and co-conspirator were involved in a conspiracy to distribute the drugs. Trial Court Opinion, 9/4/12, at 8 (citing ***Commonwealth v. Perez***, 931 A.2d 703, 709 (Pa. Super. 2007)). Accordingly, Appellant's challenge is meritless.

For the reasons set forth above, we conclude that Appellant is entitled to no relief. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered



Deputy Prothonotary

Date: May 15, 2013