NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. GUILLERMO ECHEVARRIA, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 689 EDA 2012

Appeal from the Judgment of Sentence February 2, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0009397-2008

BEFORE: BENDER, BOWES, and STRASSBURGER,* JJ.

MEMORANDUM BY BOWES, J.: **FILED JANUARY 28, 2014**

Appellant, Guillermo Echevarria, appeals from the February 2, 2012 judgment of sentence of three to six years of incarceration imposed after he pled guilty to intentional possession of controlled substances by a person not regulated and was found guilty at a bench trial of possession with intent to deliver ("PWID") and criminal conspiracy.[1] After careful review, we affirm.

Briefly, we summarize the relevant facts and procedural history of this case. These charges stemmed from police surveillance conducted in the 3300 block of North Amber Street on August 24, 2007, after a report of drug activity at that location. Officer Brian Kensey observed a white male on the

* Retired Senior Judge assigned to the Superior Court.

[1] We previously remanded this case for the filing of a Pa.R.A.P. 1925(b) statement, supplementation of the certified record, and issuance of a Pa.R.A.P. 1925(a) opinion, but retained panel jurisdiction.

corner near Ontario Street. A woman approached the man, later identified as Arthur Lex, engaged him in conversation, and handed him money. Arthur Lex then proceeded to a row house at 3325 North Amber Street, entered, remained briefly, and returned to the woman and handed her small items. That woman was arrested a short time later by backup officers and six Xanax pills were recovered.

As the police officers continued to observe that residence, another man approached and attempted to enter through the front door. When the door did not yield, he knocked, and Appellant answered the door and allowed him to enter. After approximately one minute, the man, later identified as David Lex, exited. David Lex subsequently met up with an unidentified white male, conversed briefly, and the man handed him money. David Lex retrieved a white pill bottle, poured items from the bottle into his hand, and then handed those items to the man.

Police officers arrested both Arthur and David Lex when they attempted to leave the area. They recovered nineteen dollars in cash from Arthur; a search of David yielded a white container that contained almost fifty Oxycodone pills and $200 in cash. Lieutenant Brian Dorsey returned to 3325 North Amber Street to secure the premises and locate Appellant, but Appellant was not in the house. While the police officers were speaking to Appellant's wife or girlfriend, Appellant returned. There was a discussion in which the Lieutenant participated, culminating in Appellant's execution of a

consent to search form for the residence. The search of the kitchen yielded substantial quantities of narcotics and $890 in cash.

Following a hearing on July 5, 2011, Appellant's motion to suppress was denied. On July 6, 2011, Appellant waived his right to a jury trial, pled guilty to intentionally possessing a controlled substance for personal use, and was found guilty at a bench trial of the remaining charges. On August 17, 2011, trial counsel was permitted to withdraw, and Attorney Allan Sagot entered his appearance on Appellant's behalf. A post-verdict motion was filed on November 4, 2011, seeking a new trial on sufficiency and weight grounds.[2]

On February 2, 2012, the trial court, without resolution of the pending post-trial motion, sentenced Appellant to three to six years of incarceration. Appellant timely filed a *pro se* notice of appeal and request for transcript. On February 27, 2012, the trial court issued an order pursuant to Pa.R.A.P. 1925(b), directing Appellant to file a concise statement of errors complained of on appeal within twenty-one days. No Pa.R.A.P. 1925(b) statement was filed with the trial court. Trial Court Opinion, 6/8/12, at 1-2. On July 19, 2012, Attorney Sagot's motion to withdraw was granted and Attorney

[2] While the docket indicates that a post-verdict motion was filed, it was not contained in the certified record. Following remand, the trial court located a copy of an unstamped post-verdict motion that it had received via facsimile, and appended it to its Pa.R.A.P. 1925(a) opinion. We proceed on the assumption that this is the post-verdict motion that was filed on November 4, 2011, and that Appellant properly preserved his challenge to the weight of the evidence.

Trevan Borum was appointed to represent Appellant. That same day, the trial court issued a second order pursuant to Pa.R.A.P. 1925(b) directing Appellant to file a concise statement of errors complained of on appeal. Again, no concise statement was filed.

On appeal, this Court initially declined to reach the merits of the appeal due to the lack of Rule 1925(b) statement. While retaining jurisdiction, we invoked Pa.R.A.P. 1925(c)(3), which provides that where the "court is convinced that counsel has been *per se* ineffective, the appellate court shall remand for the filing of a Statement *nunc pro tunc* and for the preparation and filing of an opinion by the judge." Upon remand, a Rule 1925(b) statement was filed, the trial court issued a thorough Rule 1925(a) opinion, and the matter is now ripe for disposition.

Appellant raises two issues for our review:

> I. Is the Defendant entitled to an arrest of judgment on the charge of PWID and all charges as the evidence is insufficient to sustain the verdict and where the verdict was based on nothing more than suspicion, conjecture and surmise?
>
> II. Is the Defendant entitled to a new trial as the verdict is not supported by the greater weight of the evidence with regard to the charge of PWID, as well as any and all charges?

Appellant's brief at 3.

Appellant claims that the evidence was insufficient to support the PWID conviction.

> 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 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 witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Donohue, 62 A.3d 1033 (Pa.Super. 2013) (quoting ***Commonwealth v. Knox***, 50 A.3d 749, 754 (Pa.Super. 2012)).

Appellant contends that since there was no evidence that he actually possessed drugs, the Commonwealth had to prove by a totality of the circumstances that he constructively possessed the contraband. Constructive possession requires that one have conscious dominion over the contraband. Appellant argues that the Commonwealth did not prove that he was supplying either of the Lex brothers with drugs, and the fact that drugs were found in the home Appellant shared with his girlfriend was not enough.

The Commonwealth counters that evidence Appellant was an active participant in two typical street-level drug sales, and that the pills recovered from one buyer matched those seized from Appellant's home, "supported a

reasonable inference that he possessed the drugs [with] his co-conspirators." Commonwealth's brief at 9. The Commonwealth points to evidence that Appellant welcomed David Lex into his home just moments before David handed small items, later confirmed to be narcotics, to someone in exchange for cash. This, together with expert testimony that linked the quantity of drugs, the lack of prescriptions, and the type of packaging, to the sale of drugs was more than sufficient to support the PWID conviction.

In order to sustain a conviction for PWID, the Commonwealth must prove that the defendant possessed a controlled substance with the intent to deliver it to another. 35 P.S. § 780-113(a)(30). Possession may be constructive possession and established by circumstantial evidence. "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." ***Commonwealth v. Brown***, 48 A.3d 426, 430 (Pa.Super. 2012). Appellant challenges the sufficiency of the evidence that he constructively possessed the contraband.

> 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. Muniz, 5 A.3d 345, 348-349 (Pa.Super. 2010) (quoting ***Commonwealth v. Thompson***, 779 A.2d 1195, 1199 (Pa.Super. 2001)) (internal citations and quotations omitted).

Narcotics were found in the home Appellant shared with his girlfriend. Police observed as Arthur Lex, after receiving cash from a woman, entered Appellant's North Amber Street residence, stayed approximately thirty seconds, and then returned to the woman and handed her small items. Police stopped the woman and recovered six blue pills stamped GG 285, which were consistent with pills found in Appellant's home.

Approximately fifteen minutes later, police observed Appellant as he opened the door to David Lex. David remained in Appellant's home for about one minute, and, shortly after exiting, he had a conversation with a man. The man handed him cash, and David retrieved a white pill bottle. He poured out small items into his palm and handed them to the man. Police then apprehended Arthur and David Lex. Money was recovered from both men; a container of thirty oxycodone and nineteen purple oxycodone were recovered from David. During the search of Appellant's home, "numerous vials of pills" and $890 in cash were located in close proximity in a kitchen cabinet. N.T., 7/5/11, at 23.

Appellant admitted that he knew Arthur and David Lex. He was observed opening the door to David Lex. He also knew there were pills in the kitchen cabinet, but claimed that the pills recovered belonged to his

girlfriend. The trial court, the fact finder herein, did not find his testimony credible. Trial Court Opinion, 12/27/13, at unnumbered page 5. Rather, the court noted that these pills were recovered in the same location in Appellant's home as the other narcotics that Appellant admittedly possessed and pled guilty to possessing. The pill containers bore no prescription labels and were found in close proximity to cash and unused ziplock baggies. The pills retrieved from the female buyer were of the same type as those found in the cabinet. The pills found on David Lex also were consistent with pills found in Appellant's home. The court concluded that the evidence was more than sufficient to support the PWID conviction. We agree that the totality of the circumstances established that Appellant had both the ability and the intent to exercise control over the narcotics required for constructive possession. ***Commonwealth v. Estepp***, 17 A.3d 939 (Pa.Super. 2011).

Next, Appellant challenges the sufficiency of the evidence of a conspiracy. He argues that more than mere association among alleged conspirators is required; the Commonwealth must prove shared criminal intent.

Title 18 Pa.C.S. § 903(a) defines 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 the

> 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.

Under this provision, the Commonwealth must prove that "1) the defendant entered into an agreement with another to commit or aid in the commission of a crime; 2) he shared the criminal intent with that other person; and 3) an overt act was committed in furtherance of the conspiracy." ***Commonwealth v. Nypaver***, 69 A.3d 708, 715 (Pa.Super. 2013) (citation omitted). Since a formal or explicit agreement to commit a crime is seldom capable of proof, a conspiracy may be inferred where the evidence demonstrates some relationship among the parties, and the overt acts of the co-conspirators prove a criminal confederation. ***Commonwealth v. Perez***, 931 A.2d 703, 708-09 (Pa.Super. 2007). We utilize four factors "in deciding if a conspiracy existed. Those factors are: '(1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy.'" ***Nypaver***, ***supra*** at 715 (partially quoting ***Commonwealth v. Feliciano***, 67 A.3d 19, 25 (Pa.Super. 2013)).

The evidence established that Appellant, Arthur Lex, and David Lex were present on the date in question in and around Appellant's home. They

knew each other. The Lex brothers each entered Appellant's home just moments before police observed them selling narcotics. Police found hundreds of unprescribed pills, ziplock baggies of the type associated with narcotics sales, and substantial cash in small bills in Appellant's kitchen cabinet. The type of pills found in David Lex's possession as well the pills retrieved from his buyer matched pills seized from Appellant's residence. Appellant took an active role in the object of the conspiracy by transferring the narcotics to the Lex brothers. Thus, all four factors are satisfied herein and support the fact finder's determination that the proof was sufficient beyond a reasonable doubt that Appellant and the Lex brothers conspired to sell drugs. This claim fails.

Appellant argues further that his convictions were against the weight of the evidence. He preserved this challenge in a motion for new trial. Pa.R.Crim.P. 607 ("challenges to the weight of the evidence must be raised with the trial judge in a motion for a new trial orally or written before sentencing, or in a post sentence motion."). A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. ***Commonwealth v. Widmer***, 744 A.2d 745, 751-52 (Pa. 2000). It is the role of the trial judge to determine "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." ***Id***. at 752.

Our standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court.

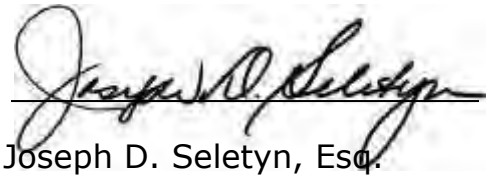
> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Commonwealth v. Clay, 64 A.3d 1049, 1054-1055 (Pa. 2013) (internal citations omitted).

Appellant misapprehends our standard of review. We are not permitted to re-weigh the evidence on the Commonwealth's side of the ledger versus the evidence on the defendant's side of the ledger as he urges this Court to do. Rather, we review the trial court's exercise of discretion with deference to its findings. The trial court was the fact finder in this case. The court stated that it did not find Appellant's testimony credible. Further, it found no merit in Appellant's claim that the verdict was against the weight of the evidence. As we perceive no abuse of discretion, no relief is due.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/28/2014