NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MALIK DAVIS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 742 EDA 2012

Appeal from the Judgment of Sentence of January 6, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0015094-2010

BEFORE: PANELLA, J., LAZARUS, J., and WECHT, J.

MEMORANDUM BY WECHT, J.: Filed: January 7, 2013

Malik Davis ("Appellant") appeals from the January 6, 2012 judgment of sentence entered in the Court of Common Pleas of Philadelphia County. Appellant was convicted of possession of a controlled substance[1] and possession with intent to deliver a controlled substance ("PWID").[2] Appellant was sentenced to the gun and drug mandatory minimum of five years' incarceration pursuant to 42 Pa.C.S. § 9712.1. We affirm.

In its April 26, 2012 Pa.R.A.P. 1925(a) opinion, the trial court provided a thorough factual summary of this case:

---

[1] 35 P.S. § 780-113(a)16.

[2] 35 P.S. § 780-113(a)30.

On August 3, 2010, at approximately 6:30 p.m., police officers accompanied a confidential informant ("C.I.") to 2533 West Montgomery Avenue in Philadelphia. The officers gave the C.I. twenty dollars worth of pre-recorded buy money and instructed him to purchase narcotics. Once at 2533 Montgomery, the C.I. knocked on the front door. The Appellant answered. The Appellant stepped outside and briefly spoke to the C.I. before the C.I. handed the Appellant twenty dollars. The Appellant then re-entered the property for approximately two minutes before exiting and giving the C.I. two red packets of marijuana.

On August 4, 2010, at approximately 7:10 p.m., the police returned to 2533 West Montgomery Avenue with another C.I. This C.I. was also given twenty dollars worth of pre-recorded buy money and instructed to purchase narcotics. A short time later, the C.I. knocked on the front door. Again, the Appellant answered. The Appellant and the C.I. briefly conversed, and the C.I. gave the Appellant the pre-recorded twenty dollars. In response, the Appellant entered the house, quickly returned, and handed the C.I. four red-tinted packets of marijuana.

Ten minutes after the second transaction, the police executed a search warrant. When the police entered the house, they saw the Appellant sitting on a living room couch. Officer John Mouzon arrested the Appellant. Moreover, the police recovered thirty dollars from a seat cushion to the right of where Appellant had been seated on the couch. Twenty of the thirty dollars included the prerecorded buy money from the August 4th C.I. purchase. The police also recovered an Adidas shoebox underneath the couch. This box contained loose marijuana.

Officers recovered more drugs in a living room entertainment center approximately five feet from where the Appellant sat. On top of the entertainment center, officers recovered four red-tinted ziplock packets of marijuana. These packets were the same color and had the same markings as the packets the Appellant gave the two C.I.'s on August 4th and 5th. In addition, the police found on top of the entertainment center one clear ziplock bag with a "red apple" stamped on front of it. Inside that bag were numerous new and unused red tinted ziplock bags. Finally, officers recovered a gun from behind a TV in the entertainment center.

Trial Court Opinion ("T.C.O."), 4/26/12, at 2-3 (record citations and footnotes omitted).

On August 4, 2010, police arrested Appellant and charged him with PWID, possession of a controlled substance, and possession of an instrument of crime ("PIC").[3] After a non-jury trial, the trial court found Appellant guilty of PWID and possession of a controlled substance, and not guilty of PIC. The Commonwealth requested, through a written memorandum, that the court apply the five to ten-year mandatory minimum sentence pursuant to 42 Pa.C.S. § 9712.1(a). Although Appellant filed a response in opposition to the Commonwealth's motion, the court held that § 9712.1(a) applied, and sentenced Appellant to five to ten years' incarceration for PWID. No further sentence was imposed on the possession conviction. Appellant filed a motion for reconsideration on January 17, 2012, which was denied on February 16, 2012. Appellant filed this timely appeal on February 27, 2012.

On March 14, 2012, the trial court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925. On March 28, 2012, Appellant timely filed his concise statement.

Appellant now raises one issue for our review:

> Did the trial court err in applying the mandatory sentence of five years pursuant to 42 Pa. C.S.A. § 9712.1 where the evidence did not establish that appellant had possession or control of a firearm?

---

[3] 18 Pa.C.S. § 907.

Brief for Appellant at 3.

"At the outset we note that a defendant or the Commonwealth may appeal as of right the legality of the sentence." ***Commonwealth v. McKibben***, 977 A.2d 1188, 1191 (Pa. Super. 2009).

> Generally, a challenge to the application of a mandatory minimum sentence is a non-waiveable challenge to the legality of the sentence. Issues relating to the legality of a sentence are questions of law, as are claims raising a court's interpretation of a statute. Our standard of review over such questions is *de novo* and our scope of review is plenary.

Commonwealth v. Zortman, 985 A.2d 238, 240 (Pa. Super. 2009), *aff'd* 23 A.3d 519 (Pa. 2011) (citing ***Commonwealth v. Diamond***, 945 A.2d 252, 256 (Pa. Super. 2008)); ***see McKibben,*** *supra*.

Appellant first challenges the application of the mandatory sentence on the basis that the Commonwealth did not establish actual or constructive possession of the firearm. Appellant claims that, although a firearm was found located near a controlled substance, it was not in his possession or control. Hence, he asserts the mandatory minimum sentence under Section 9712.1 is inapplicable. Brief for Appellant at 10, 12-13. In addition, Appellant argues that the gun was found in a common area, where he and two other individuals were present, demonstrating a lack of possession or control. Brief for Appellant at 13.

The mandatory minimum sentencing provision at issue here provides, in relevant part:

> (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.

42 Pa.C.S. § 9712.1(a).

Possession may be either constructive or actual. ***See, e.g., Commonwealth v. Macolino***, 469 A.2d 132, 134 (Pa. 1983); ***Commonwealth v. Heidler***, 741 A.2d 213, 215 (Pa. Super. 1999). Actual possession occurs when the firearm is found on the offender's person. ***Macolino***, 469 A.2d at 134. If there is no actual possession, the court must determine whether the defendant had constructive possession. "Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not." ***Commonwealth v. Mudrick***, 507 A.2d 1212, 1213 (Pa. 1986).

Constructive possession requires a two-pronged inquiry into power and intent. "Constructive possession has been defined as the ability to exercise a conscious dominion over the illegal substance: the power to control the contraband and the intent to exercise that control." ***Macolino***, 469 A.2d at 134; ***see also Commonwealth v. Chenet***, 373 A.2d 1107, 1109 (Pa. 1977) ("'when the illegal possession of contraband is charged, the evidence must establish that the appellant had a conscious dominion over the contraband"). "[W]e must examine the totality of the circumstances in order

to assess whether constructive possession has been shown. Moreover, it is clear that circumstantial evidence alone can be used to show the requisite circumstances." ***Commonwealth v. Grekis***, 601 A.2d 1275, 1281 (Pa. Super. 1992) (citation omitted). Regardless, "the fact that another person may also have control and access does not eliminate the defendant's constructive possession; two actors may have joint control and equal access and thus both may constructively possess the contraband." ***Commonwealth v. Haskins***, 677 A.2d 328, 330 (Pa. Super. 1996) (citing ***Mudrick***, 507 A.2d at 1213-14).

The circumstances here demonstrate that Appellant had the power to control the firearm and the intent to exercise that control. Appellant was in his home on his couch when the search warrant was executed. The couch is five to six feet from where the gun was located on the entertainment center, where marijuana also was found. T.C.O., 4/26/12, at 6. As officers never witnessed Appellant with the gun, Appellant argues that the gun's location in a common area and the presence of two other people in the living room demonstrate a lack of constructive possession. Brief for Appellant at 13. However, the mere presence of another person in the room does not preclude a finding of constructive possession. ***See, e.g., Macolino***, 469 A.2d at 136 (reversing a ruling that would "provide a privileged sanctuary for the storage of illegal contraband. Simply by storing contraband in a place controlled by more than one party, a spouse, roommate, partner, would render all impervious to prosecution"). Of the three individuals present in

the living room, Appellant was the only one who actually lived in the residence.

Although Appellant did not have actual possession of the firearm, that firearm was easily accessible from both the couch and the door, where Appellant completed his drug transactions in his home. T.C.O., 4/26/12, at 3, 6. When sitting on the couch, Appellant only needed to move five to six feet in order to access the gun. In addition, when Appellant conducted drug sales, including each time a C.I. purchased marijuana, Appellant was standing in the doorway of his residence. Appellant needed only to reach "a couple of feet," to the entertainment center next to him, in order to access the gun. T.C.O., 4/26/12, at 5. This is emblematic of the power to control, as Appellant was clearly capable of accessing the firearm. Intent to exercise control over the firearm also can be inferred, because the gun was placed in the area closest to where the drug transactions occurred. Consequently, under the totality of circumstances, we conclude that Appellant had constructive possession of the gun.

This is not the only basis upon which the Commonwealth established Appellant's eligibility for the mandatory minimum sentence under Section 9712.1. Even had constructive possession not been established, the gun was in "close proximity" to the drugs, Appellant's arguments to the contrary notwithstanding. This being true, Section 9712.1(a) is also applicable on that basis.

This Court has accorded "close proximity" an expansive definition. ***See, e.g., Commonwealth v. Gutierrez***, 969 A.2d 584, 593 (Pa. Super. 2009); ***Commonwealth v. Sanes***, 955 A.2d 369, 376 (Pa. Super. 2008). We repeatedly have held that, when a gun is found near the drugs, and where that gun is easily accessible to the defendant, the requirement of "close proximity" under Section 9712.1 is satisfied. ***See, e.g., Gutierrez***, 969 A.2d at 593-94; ***Sanes***, 955 A.2d at 376. In ***Sanes*****,** the firearm was located in a box in the closet of the room where defendant and his girlfriend were sleeping. 955 A.2d at 374. We stated:

> Turning now to the facts of the case *sub judice*, . . . the cocaine was found in a sandwich baggie on top of the dresser in the bedroom. The closet where the loaded .9mm handgun was located was approximately 6–8 feet from the dresser. We determine, as a matter of law, that this satisfies Section 9712.1's requirement that the firearm be in "close proximity" to the controlled substance. Although the firearm was contained in a box on a shelf in the closet, it was loaded and readily accessible to Appellant. Our decision today also comports with the General Assembly's intent in enacting Section 9712.1, which was to provide a deterrent for those who are dealing in drugs and using firearms. . . . It . . . does not provide for the mandatory minimum if the individual is only possessing drugs. It requires that they be dealing in drugs and in possession of a firearm before the mandatory minimum would apply.

Id. at 376 (internal quotations and citations omitted).

In ***Commonwealth v. McKibben***, we followed suit, concluding that, although the illegal drug sales were completed in a different area of the house, the gun and drugs were discovered in the same room and therefore were in "close proximity" for purposes of Section 9712.1. ***McKibben,*** 977 A.2d at 1196 ("The trial court's concern with whether the drug transactions

were effected in close proximity to the firearms is legally irrelevant as the weapons were loaded and readily accessible to Appellee and found in the same room as the drugs"). In ***Commonwealth v. Zortman***, we interpreted the meaning of "close proximity" even more broadly. 985 A.2d at 244. The firearm was found in the bedroom, and illegal drugs were located in a briefcase in another room, as well as in the kitchen. We held that, even though the gun and drugs were found in separate rooms, they nonetheless were in "close proximity" for the purposes of Section 9712.1. ***Id.*** Appellant was dealing drugs and quickly could have utilized the gun, which is the conduct that Section 9712.1 was designed to target. ***Id.***

Presently, when the two confidential informants purchased drugs from Appellant (separately), they met him at the front door. The entertainment center, where both drugs and the gun were found, was next to the door. T.C.O 4/26/12 at 5. When the police arrived, Appellant was on the couch, which was located only five to six feet from the firearm and drugs in the entertainment center. T.C.O 4/26/12 at 5-6. This placed the gun in close proximity to the illegal drug transactions, which, as in ***McKibben***, ***Zortman***, and ***Sanes***, clearly warrants application of the mandatory minimum statute. Therefore, we conclude that the gun's proximity to the marijuana supported the trial court's application of Section 9712.1.

In summary, we conclude that the court did not err in applying the mandatory minimum sentence under Section 9712.1. Appellant had constructive possession of the firearm, and the gun was in "close proximity"

to the illegal drugs, thus satisfying Section 9712.1 for two independent reasons. Appellant's claim fails.

Judgment of sentence affirmed. Jurisdiction relinquished.