

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
ANTONIO WINTERS,		
Appellant		No. 882 EDA 2012

Appeal from the Judgment of Sentence Entered March 8, 2012  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0006956-2010

BEFORE: BENDER, J., LAZARUS, J., and COLVILLE, J.\*

MEMORANDUM BY BENDER, J.:

Filed: February 26, 2013

Appellant, Antonio Winters, appeals from the judgment of sentence of three to six years' incarceration, imposed after a jury convicted him of possession with intent to deliver a controlled substance (PWID). Appellant challenges the sufficiency of the evidence to sustain his conviction and the trial court's denial of his motion to suppress. For the following reasons, we affirm.

The trial court provided a detailed summary of the evidence presented at Appellant's jury trial, stating:

At trial, the Commonwealth first presented the testimony of Philadelphia Police Officer William McNeil. Officer McNeil testified that, on April 29, 2010, at approximately 7:30 p.m., he was on duty with the Narcotics Strike Force Unit, which is

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\* Retired Senior Judge assigned to the Superior Court.

responsible for policing outdoor sales of narcotics in high crime areas. On this particular date, he and his surveillance team were on assignment in the target area of A and Wishart Streets, specifically to investigate street sales of narcotics. Philadelphia Police Officers White and Gillespie were surveilling the target area from a discreet location. Upon observing multiple suspected drug sales by Appellant, and after the suspected buyers were stopped by police and confirmed to be in possession of narcotics, Officer White directed Officer McNeil to stop Appellant. Officer McNeil converged on Appellant and placed him in handcuffs. He recovered from Appellant's person \$16 in U.S. currency. Officer White then directed [Officer McNeil] to the front passenger tire of an adjacent SUV, where he recovered a clear plastic bag that contained: twelve (12) clear jars with black lids containing a wet substance suspected to be [phencyclidine, also known as] PCP; and six (6) black-tinted Ziploc packets containing a green leafy substance suspected to be marijuana. Officer White then directed Officer McNeil to the sun visor inside the passenger's compartment of the same SUV, where he recovered \$113 in U.S. currency, for a total recovery of \$129.<sup>2</sup> Officer McNeil placed the recovered evidence under property receipts, and submitted the suspected narcotics to the chemistry lab for further analysis.

Philadelphia Police Officer Anthony Jackson testified next for the Commonwealth. Officer Jackson testified that, on April 29, 2010, he was on duty with the Narcotics Strike Force Unit, serving as a back-up officer to Officer White, who was surveilling the target location of A and Wishart Streets. At approximately 7:35 p.m., Officer White directed him to stop a male wearing a black jacket, walking southbound on A Street, who was observed making a suspected drug purchase from Appellant. Officer Jackson spotted the male walking on A Street; the male turned eastbound on Clearfield Street and then southbound on Ellis Street, where he was apprehended by Officer Jackson. Officer Jackson recovered two packets of heroin from the hand of the male, who was later identified as Steven Beaver. Officer Jackson apprehended Mr. Beaver approximately one and one-half blocks from A and Wishart Streets, within two minutes of the observed transaction. He placed the packets of heroin under property receipt, which he submitted to the chemistry lab for further analysis.

The Commonwealth next called Philadelphia Police Officer Joseph Smith to the stand. Officer Smith testified that on April

29, 2010, he was on duty with the Narcotics Strike Force Unit, serving in a back-up capacity to Officer White, who was surveilling the target location of A and Wishart Streets. At approximately 7:35 p.m., Officer White directed him to stop a black male, later identified as Randolph Fair, Jr., who was wearing all black clothing, and riding as a rear passenger in a white Nissan Maxima driving westbound on Lippencott Street. Within two minutes, Officer Smith spotted Mr. Fair and the white Maxima, which he pulled over on the 3000 block of North 2<sup>nd</sup> Street, located four or five blocks from the target location. Officer Smith asked Mr. Fair to step out of the vehicle, and patted him down for weapons, at which time he recovered a clear jar with a black lid, containing an oily substance suspected to be PCP. He also recovered a brown leaf cigar, commonly referred to as a "blunt", containing suspected PCP .... Officer Smith placed the recovered items under property receipt, and submitted them to the chemistry lab for further analysis.

Philadelphia Police Officer James White testified next for the Commonwealth.<sup>3</sup> Officer White testified that, on April 29, 2010, at approximately 7:25 p.m., he and his partner, Officer Gillespie, set up surveillance of A and Wishart Streets, a very high narcotics area. Officers White and Gillespie, who were in plainclothes, set up surveillance from inside an unmarked vehicle parked on the southwest corner of A and Wishart Streets. From that location, Officer White had an unobstructed view of Appellant, who was standing on the northeast corner of the same intersection; Appellant was 14 to 50 feet away from Officer White at any given point during the surveillance. At 7:28 p.m., Officer White observed a male, later identified as Steven Beaver, approach Appellant and hand him U.S. currency. Appellant walked eastbound, out of the officer's viewpoint for a brief period, and returned with small items; Appellant handed the items to Mr. Beaver, who left the area. Officer White radioed flash information of Mr. Beaver's clothing and direction of travel to his back-up team.

Officer White testified that, at 7:30 p.m., Appellant was approached by another male, later identified as George Randall, who handed Appellant U.S. currency. Appellant walked eastbound, briefly out of Officer White's sight, and returned with small items, which he handed to Mr. Randall. Mr. Randall entered a white van and left the area. Officer White radioed flash information to back-up officers; Mr. Randall was stopped a short time later by Officer Cooper.

Officer White testified that at 7:35 p.m., Appellant was approached by another male, later identified as Randolph Fair, Jr. After engaging in brief conversation, Mr. Fair handed Appellant U.S. currency. Appellant once again retreated eastbound on Wishart Street and returned shortly thereafter with small items, which he handed to Mr. Fair. Mr. Fair left the area, and Officer White radioed flash information to his back-up team. Mr. Fair was stopped a short time later by Officer Smith.

At 7:40 p.m., a fourth male, later identified as Andrew Jackson, approached Appellant on the same northeast corner. Mr. Jackson handed Appellant U.S. currency. When Appellant walked eastbound again on Wishart Street, Officer White exited his surveillance vehicle to follow him. Officer White observed Appellant standing at the front passenger's side doorway of a parked, blue SUV. Appellant returned to Mr. Jackson and handed him something. Mr. Jackson then walked northbound toward Allegheny Avenue. Officer White radioed flash information of the direction of travel and physical description of Mr. Jackson, who was stopped moments later by Officer Lopez. Upon observing Appellant engage in four suspected drug transactions over a brief time span, and after identifying the suspected location of his stash, Officer White directed his back-up officers to apprehend Appellant. Moments later, Officer McNeil stopped Appellant at the scene.

The Commonwealth next presented the testimony of Philadelphia Police Officer Tracey Cooper, also assigned to the Narcotics Strike Team Unit. Officer Cooper testified that, on April 29, 2010, she was serving in a back-up capacity to Officer White, who was surveilling A and Wishart Streets for narcotics transactions. Officer White directed her to stop a black male, later identified as George Randall, who was wearing a black tee-shirt and blue jeans, and driving a white Dodge van. Officer Cooper stopped Mr. Randall on the 200 block of Clearfield Street, located two or three blocks from the target location. After informing Mr. Randall why she had stopped him, Officer Cooper asked him to exit the van; on the floor of the van in the front compartment, she recovered a cigar "blunt" containing a green weedy wet substance, suspected to be PCP. Officer Cooper placed the suspected PCP under property receipt and submitted it to the chemistry lab for further testing.

Philadelphia Police Officer Jerimiah Lopez testified next for the Commonwealth. Officer Lopez testified that, on April 29,

2010, he was assigned to the Narcotics Strike Force Unit, serving as back-up to Officer White. At approximately 7:40 p.m., he received flash information directing him to stop Mr. Jackson, described as a black male wearing a red Philadelphia Phillies jersey, blue pants, and red Phillies baseball cap. Officer Lopez stopped Mr. Jackson around the corner from the target location, on the 200 block of Allegheny Avenue. From Mr. Jackson's front pants pocket, Officer Lopez recovered two clear jars with black lids containing a dark, moist vegetable matter suspected to be PCP, in addition to one black-tinted packet of marijuana and one baggie of marijuana tied in a knot. Officer Lopez placed the recovered items under property receipt and submitted them to the chemistry lab for further analysis.

Finally, the Commonwealth introduced via stipulation chemical analysis evidence establishing that each item recovered by police independently tested positive for narcotics.

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<sup>2</sup> The \$129 cash consisted of two \$20 bills, four \$10 bills, four \$5 bills, and twenty-nine \$1 bills.

<sup>3</sup> Although at the time of trial Officer White had become a Special Agent with the United States Department of Justice, Drug Enforcement Agency (DEA), for simplicity's sake, this Court shall refer to him as Officer White.

Trial Court Opinion (T.C.O.), 8/2/12, at 1-6 (citations to the record omitted).

Based on this evidence, the jury found Appellant guilty of PWID. That same day, the court sentenced him to the above-stated term of incarceration. Appellant filed a timely notice of appeal, as well as a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Herein, he raises two issues for our review:

- I. Is [Appellant] entitled to an arrest of judgment with regard to his conviction for [PWID] since the evidence is insufficient to sustain this conviction as the Commonwealth failed to prove [Appellant's] guilt or the essential elements of this crime beyond a reasonable doubt?

- II. Is [Appellant] entitled to a new trial as a result of the pretrial court's denial of [Appellant's] motion to suppress physical evidence?

Appellant's Brief at 4.

In his first issue, Appellant challenges the sufficiency of the evidence to sustain his conviction.

In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense. ***Commonwealth v. Moreno***, 14 A.3d 133 (Pa. Super. 2011). Additionally, we may not reweigh the evidence or substitute our own judgment for that of the fact finder. ***Commonwealth v. Hartzell***, 988 A.2d 141 (Pa. Super. 2009). The evidence may be entirely circumstantial as long as it links the accused to the crime beyond a reasonable doubt. ***Moreno, supra*** at 136.

***Commonwealth v. Koch***, 39 A.3d 996, 1001 (Pa. Super. 2011).

"To convict a person of PWID, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance and did so with the intent to deliver it." ***Commonwealth v. Bricker***, 882 A.2d 1008, 1015 (Pa. Super. 2005) (citation omitted). "In determining whether there is sufficient evidence to support a PWID conviction, all facts and circumstances surrounding the possession are relevant, and the Commonwealth may establish the essential elements of the crime wholly by circumstantial evidence." ***Id.*** (citation omitted). Additionally, because the narcotics were not found on Appellant's person, the Commonwealth was required to demonstrate constructive possession. ***Commonwealth v.***

**Brown**, 48 A.3d 426, 430 (Pa. Super. 2012) (citing **Commonwealth v. Kirkland**, 831 A.2d 607, 611 (Pa. Super. 2003)).

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.

*Id.* (quoting **Commonwealth v. Parker**, 847 A.2d 745, 750 (Pa. Super. 2004) (internal citations omitted)).

Appellant claims that the Commonwealth’s evidence was insufficient to sustain his PWID conviction because it failed to prove that the small items he handed to the four alleged purchasers were narcotics. While Appellant acknowledges that each of the four men were discovered to be in possession of narcotics minutes after interacting with him, he maintains that those “drugs could have been purchased at another time and location and from another person.” Appellant’s Brief at 24.<sup>1</sup>

Appellant’s argument implies that the Commonwealth must *disprove* every possibility of his innocence for his conviction to stand. However, this

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<sup>1</sup> Appellant also devotes a large portion of his sufficiency argument to discussing why the “commercial transactions” of unknown items observed by police officers were inadequate to provide probable cause to arrest him. We will address the quantum of proof to support Appellant’s arrest in his second issue.

Court has repeatedly declared that such a burden does not exist; rather, the Commonwealth is only required to present sufficient evidence to demonstrate a defendant's guilt beyond a reasonable doubt. **See Commonwealth v. Smith**, 904 A.2d 30, 38 (Pa. Super. 2006) (citation omitted). In this case, the Commonwealth presented ample evidence to satisfy this burden of proof. Namely, Officer White testified that within a fifteen-minute time frame, he observed four different individuals approach Appellant and hand him money. Each time, Appellant walked away for a brief period, returned, and handed the men small items, after which the men promptly left. When stopped minutes later by police, each man was found to be in possession of narcotics. Two of those men, Mr. Fair and Mr. Jackson, possessed drugs in packaging that was identical to the narcotics discovered on the front passenger tire of the SUV, *i.e.* clear jars with black lids and black-tinted packets. Officer White testified that he observed Appellant standing near this SUV after accepting money from Mr. Jackson, and before handing Mr. Jackson small items. Clearly, this circumstantial evidence was sufficient to prove beyond a reasonable doubt that Appellant delivered drugs to the four men in exchange for money.

Appellant also contends, however, that his conviction cannot stand because the Commonwealth failed to prove he constructively possessed any drugs. In support of this argument, Appellant presents one sentence: "In this matter, no evidence indicated that [Appellant] intended to control drugs or had the power to control them." Appellant's Brief at 25. Not only is this



argument underdeveloped, but it is also unconvincing. Based on the evidence discussed *supra*, the Commonwealth proffered sufficient evidence demonstrating that Appellant exercised control over the drugs that he delivered to each of the four buyers. Moreover, Officer White testified that during the fourth transaction, he observed Appellant standing outside the SUV before handing Mr. Jackson small items. The drugs discovered on the tire of the SUV were in the same packaging as those found in Mr. Jackson's possession. From this evidence, the jury reasonably could infer that Appellant constructively possessed the drugs found on the tire of the SUV.

In his second issue, Appellant alleges that the trial court erred in denying his pretrial motion to suppress.

In reviewing an order from a suppression court, we consider the Commonwealth's evidence, and only so much of the defendant's evidence as remains uncontradicted. We accept the suppression court's factual findings which are supported by the evidence and reverse only when the court draws erroneous conclusions from those facts.

***Commonwealth v. Hoopes***, 722 A.2d 172, 174-75 (Pa. Super. 1998).

First, Appellant argues that officers lacked probable cause to arrest him without a warrant and, consequently, the court should have suppressed the money found on his person during the search incident to that arrest. In discussing what amounts to probable cause, our Supreme Court has stated,

[p]robable cause is made out when the facts and circumstances which are within the knowledge of the officer at the time of the arrest, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that the suspect has committed or is committing a crime. The question we ask is not whether the officer's belief was

correct or more likely true than false. Rather, we require *only a probability*, and not a *prima facie* showing, of criminal activity. In determining whether probable cause exists, we apply a totality of the circumstances test.

***Commonwealth v. Thompson***, 985 A.2d 928, 931 (Pa. 2009) (citations and internal quotation marks omitted; emphasis in original).

Furthermore, in specifically addressing a police officer's observation of drug trafficking on the street, our Supreme Court held in ***Thompson*** that "a police officer's experience may fairly be regarded as a relevant factor in determining probable cause." ***Id.*** at 935 (citation omitted). The Court cautioned, however, that "the officer must demonstrate a nexus between his experience and the search, arrest, or seizure of evidence." ***Id.*** (citation omitted). Other relevant factors to consider include the time, street location, the use of a street for commercial transactions, the number of transactions, the place where the small items were kept by the seller, and the movements and manners of the parties. ***Id.*** at 932 (quoting ***Commonwealth v. Lawson***, 309 A.2d 391, 394 (Pa. 1973)).

Here, the totality of the circumstances, including the ***Lawson*** factors, viewed through the eyes of an officer experienced in narcotics trafficking, support a conclusion that police had probable cause to arrest Appellant. Namely, at the hearing on Appellant's motion to suppress, Officer White testified that he has "basic training in packaging and sales of narcotics and [he has] been involved in hundreds of narcotics arrests." N.T. Suppression Hearing, 2/2/11, at 8. Officer White stated that the area in which Appellant was arrested was a high crime area where he had made previous narcotics

arrests. *Id.* at 8-9. On the evening of April 29, 2010, Officer White observed Appellant standing on the street corner at approximately 7:30 p.m. *Id.* at 4. Within a short time period, the officer saw four individuals approach Appellant, engage him in brief conversation, and hand Appellant money. *Id.* at 4-7. During three of these interactions, Appellant walked out of the officer's view, quickly returned, and gave small items to each man in "a hand-over-hand" exchange, which led Officer White to conclude, based on his experience, that he was witnessing drug transactions. *Id.* at 4-7, 10-11. When Appellant walked out of Officer White's view during the fourth transaction, the officer exited his vehicle and followed Appellant, observing him "at the side of a blue SUV truck." *Id.* at 7. Each of the four men who interacted with Appellant were stopped by police and found to be in possession of narcotics. *Id.* at 4-7. The totality of these circumstances provided Officer White with probable cause to arrest Appellant. **See *Thompson***, 985 A.2d at 930 (officer had probable cause to arrest appellant where, based on officer's experience and prior drug arrests, he believed appellant was involved in a drug transaction after witnessing appellant, standing on the street in a high crime area known for drug trafficking, hand another man money and accept a small object from the man in return).

Finally, Appellant argues that "at the time that the police seized items from inside and outside the [SUV], they did not possess a search warrant or probable cause to conduct a search." Appellant's Brief at 37. Thus, he

contends that “the contraband seized from the SUV should also have been suppressed.” *Id.* at 35. For the following reasons, we disagree.

First, the testimony at the suppression hearing indicated that the narcotics discovered on the tire of the SUV were in plain view and, therefore, officers did not need a warrant to seize them. *Commonwealth v. Anderson*, 40 A.3d 1245, 1248-1249 (Pa. Super. 2012) (citation omitted) (“plain view doctrine provides that evidence in plain view of the police can be seized without a warrant”). The plain view exception to the warrant requirement applies if:

- 1) police did not violate the Fourth Amendment during the course of their arrival at the location where they viewed the item in question;
- 2) the item was not obscured and could be seen plainly from that location;
- 3) the incriminating nature of the item was readily apparent;
- and 4) police had the lawful right to access the item.

*Commonwealth v. Anderson*, 40 A.3d 1245, 1248-1249 (Pa. Super. 2012) (citation omitted).

Instantly, Officer McNeil testified at the suppression hearing that immediately upon approaching Appellant to arrest him, the officer observed a “clear plastic sandwich bag” on top of the front, passenger side tire of the SUV. N.T. Suppression Hearing, 2/2/11, at 31-32. The officer stated that he “[c]ould see what was in the bag” and identified the contents as drugs. *Id.* at 32. The officer made this determination based on his eight years of experience as a narcotics officer, and fifteen total years of service as a police officer. *Id.* When asked if he “had [] ever seen those types of vials for PCP

before," Officer McNeil responded that he had observed similar packaging "at least 15 to 20 times in that area alone" and "around 50" times overall. *Id.* at 33-34. He also stated that the packaging of the marijuana in the dark-tinted packets was "very common everywhere," and he had seen similar packaging approximately "one hundred" times before. *Id.* at 33. Based on this testimony, we conclude that Officer McNeil was in a lawful vantage point when he viewed the clear plastic bag on the tire of the SUV, which contained items that were immediately apparent to him as drugs. As such, Appellant's motion to suppress this evidence was properly denied.

In regard to the money discovered inside the SUV, the trial court denied Appellant's motion to suppress on the basis that Appellant failed to demonstrate a legitimate expectation of privacy in the SUV. We agree. "A defendant moving to suppress evidence has the preliminary burden of establishing standing and a legitimate expectation of privacy."

***Commonwealth v. Burton***, 973 A.2d 428, 435 (Pa. Super. 2009).

An expectation of privacy is present when the individual, by his conduct, exhibits an actual (subjective) expectation of privacy and that the subjective expectation is one that society is prepared to recognize as reasonable. The constitutional legitimacy of an expectation of privacy is not dependent on the subjective intent of the individual asserting the right but on whether the expectation is reasonable in light of all the surrounding circumstances.

*Id.* (citation omitted).

Presently, Appellant's sole argument to demonstrate that he had an expectation of privacy in the SUV is that his "access to the vehicle ..., in and

of itself, bestow[ed] upon [Appellant] a legitimate expectation of privacy.” Appellant’s Brief at 37. This assertion is insufficient and unconvincing. We have held that a defendant did not have a reasonable expectation of privacy in a vehicle even where the defendant was *driving* the car. **See Commonwealth v. Burton**, 973 A.2d 428, 436 (Pa. Super. 2009) (appellant driving vehicle not registered to him did not have reasonable expectation of privacy in that vehicle where he offered no evidence that he was using it with the authorization or permission of registered owner, or otherwise explain his connection to the vehicle or owner); **Commonwealth v. Jones**, 874 A.2d 108 (Pa. Super. 2005) (holding that operator of rental car did not have privacy interest therein when he was not the named lessee, the named lessee was not in vehicle, appellant was not authorized to drive the car, the rental agreement had expired, and appellant offered no explanation for his connection to the authorized lessee of the vehicle). Furthermore, while Officer White did testify that he saw Appellant standing at the open passenger-side door of the SUV, Appellant offered no evidence to indicate that his “accessing” the SUV was legitimate, *i.e.* that he knew the owner of the vehicle and had permission to use it. In sum, Appellant did not present any testimony or other evidence at the suppression hearing demonstrating what, if any, connection he had to the SUV. Therefore, we agree with the trial court that Appellant failed to prove he had a legitimate expectation of privacy in the vehicle. Consequently, there was no basis

upon which the court could have ordered the suppression of the money recovered therein.

Judgment of sentence affirmed.