

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

STEVEN EDWARD BUNDRIDGE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1260 WDA 2012

Appeal from the Judgment of Sentence Entered April 20, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0000085-2010

BEFORE: BENDER, J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY BENDER, J.:

FILED: July 10, 2013

Appellant, Steven Edward Bundridge, appeals *nunc pro tunc* from the judgment of sentence of five to ten years' incarceration, imposed after he was convicted of carrying a firearm without a license and persons not to possess a firearm. Appellant challenges the sufficiency of the evidence to sustain his convictions, as well as discretionary aspects of his sentence. We affirm.

At Appellant's jury trial commencing on October 7, 2010, the Commonwealth produced evidence that Appellant possessed a firearm discovered inside a vehicle he was driving. Appellant did not have a license to carry that gun, and was also prohibited from doing so based on his prior criminal convictions. At the conclusion of Appellant's trial, the jury found him guilty of carrying a firearm without a license. The court then convicted

Appellant of persons not to possess a firearm. On April 20, 2011, Appellant was sentenced to 5 to 10 years' incarceration for the persons not to possess a firearm conviction. No further penalty was imposed for Appellant's other firearm offense.

Appellant did not file post-sentence motions or a timely notice of appeal. However, he subsequently filed a petition for relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546, and the court reinstated his right to file a post-sentence motion and a direct appeal. Thereafter, Appellant filed a post-sentence motion and, after it was denied, he filed the instant *nunc pro tunc* appeal. Herein, he raises two issues for our review:

- I. Was the evidence sufficient to support the guilty verdict as there was no proof beyond a reasonable doubt that [Appellant], who was merely present at the scene, possessed the gun found in the car?
- II. In the alternative, is the sentence imposed manifestly excessive, unreasonable, and an abuse of discretion in that the lower court failed to fully consider all the necessary factors of 42 Pa.C.S. § 9721?

Appellant's Brief at 5.

In his first issue, Appellant attacks the sufficiency of the evidence. We begin by noting our standard of review:

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).

Appellant challenges his conviction of carrying a firearm without a license, which is defined as follows:

(a) Offense defined.--

(1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

18 Pa.C.S. § 6106(a)(1). Where, as here, contraband is not discovered on the defendant's person, the Commonwealth is required to prove 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), *appeal denied*, 63 A.3d 1243 (Pa. 2013) (citation omitted).

Instantly, Appellant concedes that a firearm was found in the car he was driving, and that he had no license to carry a gun. **See** Appellant's Brief

at 11. However, he maintains that the Commonwealth's evidence did not prove that he constructively possessed the firearm.

We begin our assessment of this claim by setting forth the evidence proffered at Appellant's trial. Pittsburgh Police Officer Aaron Loughran testified that on July 26, 2009, he responded to a report of shots fired on Balfour Street. N.T. Trial, 10/7/10, at 28. The report provided a description and partial license plate number of a vehicle involved in the shooting. **Id.** Officer Loughran quickly arrived in the area of the shooting and spotted a vehicle matching the report. **Id.** at 38, 43. The car was parked about three blocks away from the shooting, and when the officer came upon it, its engine was still running. **Id.** at 31, 47. Officer Loughran pulled up beside the vehicle, which was occupied by three individuals including Appellant, who was sitting in the driver's seat. **Id.** at 46. Officer Loughran acknowledged that he did not see Appellant make any furtive movements. **Id.**

As Officer Loughran exited his police car, Appellant and the two other individuals also got out of their vehicle. **Id.** at 38. Officer Loughran testified:

[Officer Loughran]: ... [Appellant] turned his back to me. Kept his back to me, kept walking. I kept saying[, "H]old on, hold on.["] As soon as he hit the car he started running up the street and I ran around the corner, but he was gone.

Id. at 38-39. Officer Loughran stated that the two other occupants of the car "both stopped on the sidewalk." **Id.** After identifying those individuals, the officer permitted them to leave the scene. **Id.** at 43, 45. Officer

Loughran testified that he then searched the vehicle, discovering a Pennsylvania identification card belonging to Appellant in the center console. **Id.** at 39. The officer also found an empty magazine for a firearm on the driver's side floor of the vehicle. **Id.** at 41-42.

Pittsburgh Police Officer David Syska took the stand next and testified that when he arrived at the scene of the vehicle stop, he observed through the open driver's side door, "a firearm sticking out from under the driver's seat." **Id.** at 73. The firearm and magazine were subsequently tested for fingerprints, but none were obtained from those items. **Id.** at 50, 83. Additionally, spent shell casings recovered from the scene of the shooting on Balfour Street also were tested for fingerprints to no avail. However, ballistics testing confirmed that the spent shell casings had been discharged from the gun found in the vehicle that Appellant was driving. **Id.** at 93.

Appellant avers that this evidence did not prove that he knew of the gun's presence in the vehicle, or that he intended to exercise control of that weapon. He maintains that there were two other individuals in the car with him who could have placed the firearm under his seat. Appellant also emphasizes that he was "not seen making any furtive movements toward the floor by his seat," and there was no DNA evidence linking him to the gun. Appellant's Brief at 18. Therefore, Appellant contends that the Commonwealth failed to prove that he constructively possessed the gun and, consequently, his conviction must be reversed.

In support of these arguments, Appellant compares his case to ***Commonwealth v. Armstead***, 305 A.2d 1 (Pa. 1973), and ***Commonwealth v. Wisor***, 353 A.2d 817 (Pa. 1976). First, in ***Armstead***, Philadelphia police officers stopped a vehicle in which Armstead was a passenger and, after directing Armstead and the driver to exit the car, the officers discovered a firearm on the front seat. ***Id.*** at 2. On appeal, our Supreme Court reversed Armstead's conviction of unlawfully possessing the gun, reasoning that it was "equally logical" to infer "that the weapon was on the person of the driver during the time [Armstead] was a passenger, and that the driver discarded the weapon as he got out of the car." ***Id.*** Appellant maintains that here, the same inference is applicable, *i.e.* it is just as likely that one of the other two individuals in the vehicle placed the gun under the driver's seat before exiting the car.

Appellant also relies on ***Wisor***. In that case, Wisor was convicted of possessing a controlled substance where a marijuana pipe was discovered beneath the front-right passenger seat of Wisor's car, which he was driving and in which five other passengers were present. ***Wisor***, 353 A.2d at 531. In concluding that Wisor did not constructively possess the pipe, our Supreme Court initially noted that Wisor's ownership of the car did "not support the inference that [he] knew the pipe was under the seat." ***Id.*** at 530. The Court also emphasized that the pipe was not discovered under the seat where Wisor was sitting, but rather under the front-right passenger seat, which was an area that was not within Wisor's "exclusive control." ***Id.***

at 531. Rather, the other individuals in Wisor's vehicle had "ample opportunities to place the pipe" in that location. **Id.** Accordingly, the Court rejected the inference that Wisor possessed the pipe and reversed his conviction. **Id.**

We find **Armstead** and **Wisor** distinguishable from the present circumstances. In both those cases, the contraband was located in an area that was more accessible to the other passengers of the vehicles than in the instant case. Here, the gun was found directly under the seat in which Appellant was sitting, and the handle of the gun was protruding out from under that seat as if placed there by Appellant. While there were two other individuals in the car, neither had as much access to the gun as did Appellant. **See Commonwealth v. Stembridge**, 579 A.2d 901, 905 (Pa. Super. 1990) (finding constructive possession established where the "[a]ppellant's access to and control over the area in which the contraband was found was greater than that of the driver and other passenger").

Furthermore, unlike **Armstead** and **Wisor**, here, Appellant fled the scene while the other two individuals in the vehicle did not. **See** N.T. Trial, 10/7/10, at 38-39. "The fact finder can consider flight indicative of a defendant's consciousness of guilt." **Commonwealth v. Davalos**, 779 A.2d 1190, 1194 (Pa. Super. 2001) (citing **Commonwealth v. Ford**, 715 A.2d 1141, 1144 (Pa. Super. 1998)). Because Appellant fled the scene, while the other passengers remained, the jury could infer that he possessed the firearm.

Additionally, Appellant's knowledge of the gun's presence in the vehicle was circumstantially proven by the Commonwealth's evidence. Namely, shortly after hearing the report of the shooting, Officer Loughran saw Appellant sitting behind the wheel of a vehicle matching the description in the police report, and which was parked a mere three blocks away from the scene of the shooting. The vehicle's engine was still running. The gun found under Appellant's seat was determined to be the same gun that fired the shots on Belfour Street. This evidence, combined with Appellant's flight from the vehicle, was sufficient to permit the jury to infer that Appellant possessed the gun that was placed under the seat of the vehicle he was driving.¹ Therefore, Appellant's conviction for unlawful possession of a firearm must stand.

Next, Appellant argues that the trial court abused its discretion in sentencing him. We review such claims under the following standard:

A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. When challenging the discretionary aspects of the sentence imposed, an appellant

¹ The fact that Officer Loughran did not observe Appellant make any furtive movements does not disprove his constructive possession of the gun. Appellant could have placed the weapon under his seat at any point between the time of the shooting and Officer Loughran's arrival. Moreover, the lack of DNA evidence tying him to the weapon does not negate his constructive possession. **See Commonwealth v. Birson**, 618 A.2d 420, 422 (Pa. Super. 1999) (stating the absence of physical evidence "is not fatal to the Commonwealth's case," but is simply a factor for the jury to consider in assessing the credibility of the witnesses).

must present a substantial question as to the inappropriateness of the sentence. Two requirements must be met before we will review this challenge on its merits. First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code. That is, [that] the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process. We examine an appellant's [Pa.R.A.P.] 2119(f) statement to determine whether a substantial question exists. Our inquiry must focus on the *reasons* for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on the merits.

Commonwealth v. Ahmad, 961 A.2d 884, 886-87 (Pa. Super. 2008)

(citations, quotation marks and footnote omitted; emphasis in original).

Here, in Appellant's Rule 2119(f) statement, he contends that the court did not consider all of the factors set forth in 42 Pa.C.S. § 9721(b). We conclude that this claim presents a substantial question for our review.

Commonwealth v. Fullin, 892 A.2d 843, 847 (Pa. Super. 2006).

Appellant's Rule 2119(f) statement also acknowledges that he received a sentence within the standard range of the guidelines. Therefore, in order for this Court to vacate Appellant's sentence, we must conclude that the sentencing court imposed a term of incarceration that was "clearly unreasonable." 42 Pa.C.S. § 9781(c)(2) (directing that we "shall vacate" a sentence where the "court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable"). Moreover, we are mindful that,

[t]he standard employed when reviewing the discretionary aspects of sentencing is very narrow. We may reverse only if the sentencing court abused its discretion or committed an error of law. We must accord the sentencing court's decision great weight because it was in the best position to review the defendant's character, defiance or indifference, and the overall effect and nature of the crime.

Commonwealth v. Marts, 889 A.2d 608, 613 (Pa. Super. 2005) (citations omitted).

In the present case, Appellant avers that the sentencing court abused its discretion and imposed a clearly unreasonable sentence by failing to take into account his "rehabilitative needs" and "the gravity of the offense as it relates to the impact on the life of the victim and the community." 42 Pa.C.S. § 9721(b). First, in regard to his rehabilitative needs, Appellant concedes that the court acknowledged his mental health issues and substance abuse problems. However, he challenges the court's determination that "the best place for [Appellant] to get help at this point in time is at the State [prison]." N.T. Sentencing Hearing, 4/20/11, at 13. Appellant, citing a law review article, maintains that inmates with mental health issues receive inadequate treatment in prison, and claims that incarceration typically exacerbates mental illness. **See** Appellant's Brief at 26.

However, as the Commonwealth points out, Appellant did not present this argument, or the law review article in support thereof, to the sentencing court. Instead, he actually made statements to the court indicating that being imprisoned assisted him in treating his mental illness, at least by

structuring his medication for those issues. For instance, Appellant claimed, “when I’m incarcerated, I get my medicine; but I don’t have, like, medicine when I’m out there.” N.T. Sentencing Hearing, 4/20/11, at 12. Appellant also indicated that he resorts to illegal drugs “to take away all the pain” when he is not incarcerated. ***Id.***

Moreover, the court noted that it was familiar with Appellant’s mental health issues from its involvement with Appellant’s juvenile adjudications. ***Id.*** at 11; ***See also*** T.C.O. at 7 n. 3 (“This Court is familiar with Appellant from his Juvenile Court days as well.”). The court acknowledged that Appellant’s mental illness is “potentially serious,” and declared that Appellant has not “shown any indication” that he is willing to deal with his mental health issues. N.T. Sentencing Hearing, 4/20/11, at 11. The court then stated, “in order to be successful in treating a mental health diagnosis, you have to be consistent with treatment,” and Appellant agreed. ***Id.*** Based on all of this, the court concluded that Appellant’s rehabilitative needs would be best served by a lengthier term of incarceration, “where [his] mental health can be monitored, [and his] medication can be managed.” ***Id.*** at 13. We conclude that this assessment of Appellant’s rehabilitative needs satisfied the requirements of section 9721(b).

Additionally, we conclude that the court adequately considered the gravity of the offense. While Appellant argues that the court did not take into account the fact that there were no victims in this case, he did not

present this argument to the sentencing court.² In any event, the sentencing judge, who also presided over Appellant's trial, was obviously cognizant of the circumstances of the case. Furthermore, the court had the benefit of a presentence report and stated that it reviewed that document; thus, we assume the court considered the gravity of the offense as required by section 9721(b). N.T. Sentencing Hearing, 4/20/11, at 3; **See Commonwealth v. Macias**, 968 A.2d 773, 778 (Pa. Super. 2009) (stating that where the court had benefit of presentence report we assume it considered the factors set forth in section 9721(b)). While the court may have placed more weight on Appellant's rehabilitative needs and the protection of the public, that is not violative of section 9721(b), which simply requires the court to consider all the factors set forth therein.

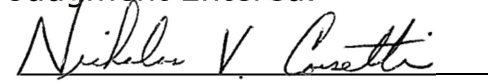
In sum, Appellant's convictions were supported by sufficient evidence, and his sentence was not an abuse of the court's discretion. Consequently, we affirm.

Judgment of sentence affirmed.

Judge Gantman concurs in the result.

² Instead, Appellant's entire argument in support of a lenient sentence was grounded on his mental illness, substance abuse issues, and rough upbringing. **See** N.T. Trial, 4/20/11, at 3-10. He presented no information or argument pertaining to the gravity of the offense.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: July 10, 2013