NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
JOHN D. AU,	:	
	:	
Appellant	:	No. 992 MDA 2013

Appeal from the Judgment of Sentence January 10, 2013
In the Court of Common Pleas of Centre County
Criminal Division No(s).: CP-14-CR-0001363-2007

BEFORE: MUNDY, WECHT, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED APRIL 14, 2014**

Appellant, John D. Au, appeals from the judgment of sentence entered in the Centre County Court of Common Pleas following his conviction of possession of a small amount of marijuana for personal use.[1] Appellant claims the Commonwealth failed to adduce sufficient evidence at trial that he had constructive possession of the marijuana to support his conviction. In the alternative, Appellant argues the guilty verdict was against the weight of the evidence. We affirm.

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* Former Justice specially assigned to the Superior Court.

[1] 35 P.S. § 780-113(a)(31)(i).

At the non-jury trial, the Commonwealth presented the testimony of Sergeant Ryan Hendrick ("Sergeant Hendrick"). Sergeant Hendrick testified that on the night of May 31, 2007, he was working as uniformed patrol in the area of Pine Grove Mills, Ferguson Township, Centre County. N.T. Trial, 11/6/12, at 5. He stated that around 12:29 a.m., while on routine patrol, he drove west from State College toward Pine Grove Mills, past the Watkins Dairette, a local ice cream shop that was closed. ***Id.*** at 5-6. He testified that, at that time, there were no vehicles parked in the parking lot. ***Id.*** at 6. Hendrick then testified that on his return to State College, he observed a two-door Honda Civic with its headlights off backed into a parking spot in the parking lot of Watkins Dairette. ***Id.*** at 6-7, 21. According to Sergeant Hendrick, Watkins Dairette closes each evening between 9:00 p.m. and 11:00 p.m. ***Id.*** at 6. Because Watkins Dairette was closed, Sergeant Hendrick testified he found it odd that a car would be parked in its lot. ***Id.*** Sergeant Hendrick stated that he pulled up beside the car and observed that there were six individuals inside. ***Id.*** at 7, 24. When questioned by Sergeant Hendrick, who was standing outside the vehicle looking in, the individuals indicated they were "hanging out." ***Id.*** at 8.

Sergeant Hendrick thought the darkened vehicle parked in the empty parking lot was suspicious, but there was no indication of the occurrence of any criminal activity. ***Id.*** at 22. He did not, for example, smell or observe any alcohol, marijuana, or marijuana smoke in the car. ***Id.*** at 22-23, 28.

Sergeant Hendrick next testified he asked the front seat passenger, later identified as Appellant, for his identification. ***Id.*** at 8. Appellant immediately, and without any furtive moves or attempt to conceal the contents of the glove box from Sergeant Hendrick, opened the glove box right in front of him and removed his identification. ***Id.*** at 8, 25, 31. Sergeant Hendrick observed two baggies of marijuana inside the glove box. ***Id.*** Sergeant Hendrick initially pretended he did not see the drugs because he was alone, without police back-up. ***Id.*** at 10. Sergeant Hendrick indicated that, at this point, he "asked for another officer to respond out," but that "back up [was] a long way off." ***Id.*** Sergeant Hendrick testified that he did not know when the marijuana had been put in the glove compartment and had no evidence that Appellant knew that it was there. ***Id.*** at 26, 31. He further testified he had no idea when Appellant placed his identification in the glove box. ***Id.*** at 26.

Sergeant Hendrick testified that he then walked to the driver's side of the car. ***Id.*** After Sergeant Hendrick opened the driver's side door, he found a small baggie of marijuana and a smoking device in the side door compartment. ***Id.*** at 10-11. Sergeant Hendrick also found a larger baggie of marijuana beside the driver seat. ***Id.*** at 11, 13.

Sergeant Hendrick testified that after his back-up arrived, the passengers in the car were separated and Appellant and Jason Price ("Price"), the driver and owner of the vehicle, were arrested. ***Id.*** Price

admitted to Sergeant Hendrick that he had purchased the marijuana found in the compartment on the driver's side door earlier that day in Alexandria, Huntingdon County, and that the smoking device was his.[2] ***Id.*** at 28, 32. Price did not, however, admit to owning the baggies of marijuana found in the glove box and "stated he did not know who they belonged to." ***Id.*** at 29.

Appellant admitted to smoking marijuana earlier in the night with Price. ***Id.*** at 12, 42-43. Appellant, at all times, denied ownership of the drugs in the glove box and stated he did not know who owned it. ***Id.*** at 12-13, 29-31, 47.

Appellant testified at trial that he and Price went to Alexandria, Huntington County at around 8:00 or 9:00 in the morning on May 31, 2007. ***Id.*** at 42. At that time, Appellant placed his identification in the glove box of Price's car. ***Id.*** at 42, 44. Appellant testified that at the time he put his identification in the glove box there was no marijuana in it. ***Id.*** at 44. Appellant testified that he did not spend the entire day in Price's vehicle. ***Id.*** at 43. Appellant testified that the first time he saw the marijuana in the glove box was when he opened the glove box to retrieve his identification at Sergeant Hendrick's request, although he did admit that Price had possessed marijuana in the car earlier in the day. ***Id.*** at 45, 47. Appellant stated that

[2] Price was charged, and pled guilty to, unspecified drug charges.

he would not have offered to give Sergeant Hendrick his identification had he known there was marijuana in the glove box. ***Id.***

When asked why Price had parked his car in the Watkins Dairette that night, Appellant testified they were dropping off a friend who lived in Pine Grove. ***Id.*** at 46. He testified that the vehicle had only been parked for a "maybe a minute-and-a-half tops" before they were approached by Sergeant Hendrick. ***Id.*** Appellant testified that after dropping off the other passenger in the Watkins Dairette parking lot, the remaining passengers were all heading home as it was late. ***Id.*** at 47.

On June 11, 2007, Sergeant Hendrick charged Appellant with possession of a small amount of marijuana. A bench trial took place on November 6, 2012.[3] Following the trial, Appellant was found guilty of this

[3] We note that following his arrest, Appellant sought suppression of the drug evidence found in the glove box of Price's vehicle on the basis that Sergeant Hendricks was without legal authority to approach the vehicle and ask for identification from the occupants when there was no evidence of any criminal activity or a violation of the Motor Vehicle Code. After a hearing in October 2007, the trial court suppressed the evidence. This Court affirmed the trial court's order on December 1, 2009. ***See Commonwealth v. Au***, 986 A.2d 864 (Pa. Super. 2009) (*en banc*).

Our Supreme Court then granted the Commonwealth's petition for allowance of appeal limited to the issue of whether asking the occupants of a parked vehicle for identification constitutes an investigative detention for which reasonable suspicion is required. On April 26, 2012, the Supreme Court concluded that Sergeant Hendrick's request for Appellant's identification did not transform the encounter with Appellant into an unconstitutional investigatory detention for which Sergeant Hendrick required reasonable suspicion. ***Commonwealth v. Au***, 42 A.3d 1002, 1009

charge. The trial court sentenced Appellant on January 10, 2013, to thirty days' probation. Appellant timely filed a post-sentence motion on May 6, 2013. Appellant's motion was denied, and this timely appeal followed on June 3, 2013. Appellant filed a court-ordered Pa.R.A.P. 1925(b) statement.

Appellant raises two issues on appeal:

> Did the trial court err in denying [Appellant's] motion in arrest of judgment/motion for a new trial because the evidence produced against him by the Commonwealth at his trial was insufficient to sustain the verdict?
>
> Did the trial court err in denying [Appellant's] motion for a new trial because the verdict was against the weight of the evidence?

Appellant's Brief at 4.

For Appellant's first issue on appeal, he claims the evidence adduced by the Commonwealth was insufficient to sustain a guilty verdict because the Commonwealth failed to establish Appellant's constructive possession of the marijuana found in the glove box and that Appellant intended to exercise control or dominion over the marijuana. ***Id.*** at 15. We find Appellant is not entitled to relief.

This Court has stated:

> 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

(Pa. 2012). Thus, the ***Au*** Court reversed the *en banc* Court and remanded the matter to the trial court for further proceedings. ***Id.*** at 341.

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

Commonwealth v. Muniz, 5 A.3d 345, 348 (Pa. Super. 2010) (citations omitted).

Pursuant to the Pennsylvania Controlled Substance, Drug, Device, and Cosmetic Act, it is a prohibited act to, "possess[] [ ] a small amount of marihuana only for personal use." 35 P.S. § 708-113(a)(31)(i).

If contraband is not found on the defendant's person, the Commonwealth must demonstrate he had constructive possession over the controlled substance.

> 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.

Muniz, 5 A.3d at 348-49.

Instantly, the trial court found that the Commonwealth presented sufficient evidence to support the verdict against Appellant. Applying the principles of constructive possession, the trial court concluded that Appellant's close proximity to the marijuana in the glove box directly in front of Appellant was proof of Appellant's intent to possess the marijuana. Trial Ct. Op., 5/6/13, at 2.

After reviewing the relevant legal principles and the record, we are constrained to agree that the evidence was sufficient to convict Appellant. Instantly, the testimony of both Sergeant Hendricks and Appellant indicated that the marijuana was in the glove box immediately in front of Appellant. Appellant had unfettered access to the glove box and, in fact, had stored his identification inside the glove box. Furthermore, Appellant had admitted that he went to Alexandria earlier in the day with Price, that Price had possessed marijuana in the car, and that he and Price had smoked marijuana earlier in the day. In light of the totality of the circumstances, and viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, it was reasonable for the trial court to conclude that Appellant had the ability and intent to exercise conscious control and dominion over the drugs. ***See Muniz***, 5 A.3d at 348-49.

As an alternative argument, Appellant claims that his conviction was against the weight of the evidence because the evidence did not:

> . . . establish that, [ ] , [Appellant] had constructive possession of the small amount of marijuana found in the

> glove compartment of the vehicle in which he was a passenger or that he knew the purported contraband was located in the glove compartment and intended to exercise control or dominion over the marijuana.

Appellant's Brief at 25.

> 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. . . . However, the exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the evidence is not unfettered. The propriety of the exercise of discretion in such an instance may be assessed by the appellate process when it is apparent that there was an abuse of that discretion. This court summarized the limits of discretion as follows:
>
> > The term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

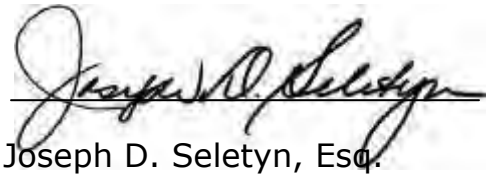
Commonwealth v. Widmer, 744 A.2d 745, 753 (Pa. 2000) (citations omittted).

The trial court found that "the weight of the evidence supported a guilty verdict." Trial Ct. Op. at 4. It noted that, although Appellant disputes the weight and credibility of the testimony presented against him, "such determinations are ultimately left to the finder of fact." ***Id.*** We agree. The

trial court was free to believe all, part, or none of the evidence. ***See Muniz***, 5 A.3d at 348. Thus, we discern no abuse of discretion. ***See Widmer***, 744 A.2d at 753.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/14/2014