

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF  
: PENNSYLVANIA

v.

LEROY EUGENE IRVIN,

Appellant

No. 498 WDA 2018

Appeal from the Judgment of Sentence May 14, 2015  
in the Court of Common Pleas of Allegheny County  
Criminal Division at No(s): CP-02-CR-0003933-2013

BEFORE: GANTMAN, P.J.E., McLAUGHLIN, J., and MUSMANNO, J.

MEMORANDUM BY MUSMANNO, J.:

FILED JUNE 20, 2019

Leroy Eugene Irvin ("Irvin") appeals from the judgment of sentence entered following his conviction of firearms not to be carried without a license, carrying a loaded weapon, and driving while operating privilege is suspended.<sup>1</sup> We affirm.

On December 29, 2012, at around 2:30 a.m., Turtle Creek Police Officer Steven McKain ("Officer McKain") was on patrol in his marked police cruiser in the 300 block of Railroad Street in Turtle Creek, Pennsylvania. Officer McKain observed a Cadillac parked in the middle of the road, with no lights on, and an unidentified person walking away from the vehicle. Officer McKain approached the Cadillac in his police cruiser, and in response, the Cadillac slowly pulled away. Officer McKain followed the Cadillac, and witnessed the

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<sup>1</sup> 18 Pa.C.S.A. §§ 6106(a)(1), 6106.1(a); 75 P.S. § 1543(a).

driver commit several traffic infractions. Officer McKain subsequently initiated a traffic stop of the Cadillac.

After Officer McKain exited his vehicle, he approached the front driver-side window of the Cadillac and observed Irvin in the driver seat, and a second individual, later identified as Devin Smith ("Smith"), in the front passenger seat. Officer McKain asked for Irvin's license and registration. When Irvin responded that he did not possess a driver's license, Officer McKain asked Irvin to step out of the vehicle. Officer McKain assisted Irvin from the vehicle, and placed him in handcuffs for officer safety.

While Officer McKain was speaking with Irvin, Officer Kenneth Nichol ("Officer Nichol") had arrived at the scene and approached Irvin's vehicle. While standing next to the front driver-side door, Officer Nichol observed a handgun on the floor of the car, underneath the driver seat. After determining that Irvin did not have a license to carry a concealed weapon, the officers placed Irvin under arrest.

Following a non-jury trial, Irvin was found guilty of the above-described offenses. The trial court deferred sentencing to allow for a pre-sentence investigation. On May 14, 2015, Irvin was sentenced to an aggregate term of two to four years in prison, followed by two years of probation.

Following a procedural history not relevant to this appeal, on February 23, 2018, the PCRA court reinstated Irvin's rights to file a post-sentence motion and Notice of Appeal, nunc pro tunc. Irvin subsequently filed a nunc pro tunc post-sentence Motion, which the trial court denied. Irvin filed a

timely Notice of Appeal and a court-ordered Pa.R.A.P. 1925(b) Concise Statement of errors complained of on appeal.

On appeal, Irvin raises the following question for our review: “Was the evidence sufficient to convict [Irvin] of [c]arrying a [f]irearm without a [l]icense and [c]arrying a [l]oaded [w]eapon[,] as to the element of whether [Irvin] had both the power to control the firearm and the intent to exercise that control?” Brief for Appellant at 4.

We apply the following standard of review when considering a challenge to the sufficiency of the evidence:

[W]hether[,] 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 finder of fact[,] while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, or part or none of the evidence.

Commonwealth v. Melvin, 103 A.3d 1, 39-40 (Pa. Super. 2014) (citation omitted).

Irvin alleges that the evidence was insufficient to prove that he had constructive possession of the handgun. See Brief for Appellant at 17-24. Specifically, Irvin argues that he did not have the power to control the handgun, or the intent to exercise control. *Id.* Irvin claims that the Commonwealth's only evidence was his presence in the driver seat at the time of the traffic stop. *Id.* at 18, 20, 22-23. According to Irvin, there is no evidence that he was aware that the handgun was under the driver seat. *Id.* at 18, 22-23. Irvin suggests that someone else could have placed the handgun under the seat without Irvin's knowledge. *Id.* Irvin points to evidence that Smith was in the vehicle, that an unidentified individual was standing outside of the driver-side door of the vehicle prior to Officer McKain's observation of the vehicle, and that the car was not registered in Irvin's name. *Id.* Irvin further argues that he did not make any movements towards the handgun, and that there is no fingerprint or DNA evidence connecting him to the handgun. *Id.* at 22-24.

In order to prove that Irvin had possession of the handgun under 18 Pa.C.S.A. §§ 6106(a)(1) and 6106.1, the Commonwealth must prove that Irvin had constructive possession of the handgun. See *Commonwealth v. Parrish*, 191 A.3d 31, 36 (Pa. Super. 2018) (stating that "[w]here a defendant is not in actual possession of the prohibited items, the Commonwealth must establish that the defendant had constructive possession to support the conviction.").

Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. We have defined constructive possession as conscious dominion, meaning that the defendant has 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.

It is well established that, as with any other element of a crime, constructive possession may be proven by circumstantial evidence. In other words, the Commonwealth must establish facts from which the trier of fact can reasonably infer that the defendant exercised dominion and control over the contraband at issue.

*Id.* at 36-37 (citations, quotation marks and brackets omitted). “At the least, the evidence must show that the defendant knew of the existence of the item.” *Commonwealth v. Hamm*, 447 A.2d 960, 962 (Pa. Super. 1982).

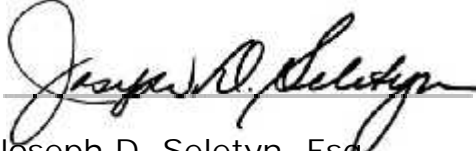
Here, when Officer Nichol announced that he had found a gun, Irvin exclaimed, “you didn’t see that,” two or three times. N.T. (Non-jury Trial), 8/28/14, at 31-32, 33. Further, Officer Nichol testified that the grip of the handgun was sticking out from under the driver seat. *Id.* at 30. Officer Nichol stated that the full width of the magazine and several inches of the grip of the handgun could be seen when standing in the open doorway of the vehicle. *Id.* at 30; see also *id.* at 40 (wherein Officer Nichol testified that the handgun could be seen when “standing outside the driver’s door[,]” “without any difficulty....”).

Viewing the evidence in a light most favorable to the Commonwealth, this evidence was sufficient to establish that Irvin was in constructive possession of the handgun. Irvin’s response to Officer Nichol’s sighting of the

handgun demonstrated that he was aware of the handgun's presence. See Hamm, supra. Moreover, the evidence established that the handgun was located on the floor below Irvin, within arms' reach, and in clear view. See Commonwealth v. Carter, 450 A.2d 142, 144 (Pa. Super. 1982) (stating that the defendant was in constructive possession of a gun where he was the driver of a vehicle, and the gun was located beneath him, on the floor of the vehicle, within arms' reach). Accordingly, Irvin's claim is without merit.

Motion for stipulation granted. Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 6/20/2019