NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JOSE VARGAS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1415 EDA 2012

Appeal from the Judgment of Sentence Entered January 12, 2012
In the Court of Common Pleas of Bucks County
Criminal Division at No(s): CP-09-CR-0001895-2011

BEFORE: BENDER, J., BOWES, J., and LAZARUS, J.

MEMORANDUM BY BENDER, J.: **FILED JULY 08, 2013**

Appellant, Jose Vargas, appeals from the judgment of sentence of five to ten years' incarceration, followed by ten years' probation, imposed after he was convicted of possession with intent to deliver a controlled substance (PWID), criminal conspiracy, possession of a controlled substance, and possession of drug paraphernalia. Appellant challenges the sufficiency of the evidence to sustain his convictions, as well as the legality of his sentence. After careful review, we are compelled to reverse Appellant's judgment of sentence.

Appellant was arrested and charged with the above-stated crimes on November 3, 2010, after police executed a search warrant on a hotel room occupied by Appellant and two other individuals, Francisco Saldana and Raymer Carrasco. Inside that room, officers discovered drug-packaging

paraphernalia. Police also obtained search warrants for Appellant's and Saldana's vehicles, which were parked in the hotel lot. While no contraband was found in Appellant's Honda Accord, police discovered a large quantity of heroin inside Saldana's Chevrolet Impala. Accordingly, Appellant and his cohorts were arrested and searched. Carrasco was found to be in possession of heroin, but Saldana and Appellant had no contraband on their persons.

Appellant proceeded to a non-jury trial on October 17, 2011, and was ultimately convicted of the offenses stated *supra*. On February 6, 2012, Appellant was sentenced to a mandatory minimum term of five to ten years' incarceration for his PWID conviction based on the amount of heroin found in Saldana's vehicle. 18 Pa.C.S. § 7508(a)(7)(iii) (directing that where a PWID conviction involves heroin with an aggregate weight of 50 grams or more, a mandatory five-year term of imprisonment is imposed). Appellant filed a timely post-sentence motion challenging his sentence, which was denied. He then 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, Appellant presents two issues for our review:

> I. Where the evidence at trial established only that [] [A]ppellant was merely present in a hotel room where drug-packaging paraphernalia was recovered, was the evidence insufficient to sustain the verdicts?
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> II. Did the [] [trial] court err by imposing the mandatory minimum [sentence] under 18 Pa.C.S. § 7508 where the controlled substance in question was not in the actual or constructive possession of [] [A]ppellant?

Appellant's Brief at 5.

For the reasons stated *infra*, we need only address Appellant's first issue, in which he alleges that the evidence was insufficient to sustain his convictions. 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).

The evidence presented by the Commonwealth at Appellant's trial established the following facts, which are not in dispute:[1]

> On the evening of November 3, 2010, Officers David Clee and Matthew Tobie of the Bensalem Township Police Department were patrolling the Route 1 corridor in Bensalem Township, Bucks County. Officer Clee is [an eighteen (18)] year member of the Bensalem Police Department who had been assigned to the special investigations unit for [the] past ten [(10)] years.

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[1] Because we are reviewing the sufficiency of the evidence presented at Appellant's trial in the light most favorable to the Commonwealth as the verdict winner, we adopt the Commonwealth's statement of the facts, which cites to the transcript of Appellant's trial. While the trial court also provides a detailed factual recitation in its Pa.R.A.P. 1925(a) opinion, the court cites only to the record of a pretrial hearing on Appellant's motion to suppress, as Appellant challenged the denial of that motion in his Rule 1925(b) statement.

With the special investigations unit, Officer Clee focuses [] on narcotics[]-related crimes. N.T. 10/17/11, pp. 7-9. The Route 1 corridor in Bensalem consists of numerous motels and is recognized as a "high crime area." N.T. 6/6/11, pp. 92-96[;] N.T. 10/17/11, pp. 11-14. The corridor is known to have a high concentration of criminal activity, including issues in particular with narcotics trafficking, robberies and prostitution. ***Id.*** Officer Clee's primary responsibility is to patrol the Route 1 corridor and he has personally received requests from the hotel owners in the area, including the owner of the Sunrise Motel, to provide constant patrol. ***Id.*** In particular, hotel owners have concerns about individuals who are not patrons of the hotels loitering in the hotels and engaging in criminal activity. ***Id.***

Shortly after 10:00 p.m., Officers Clee and Tobie drove into the parking lot of the Sunrise Motel on Route 1 in Bensalem. Upon entering the parking lot, Officer Clee observed a 2000 [Chevrolet] Impala with a New Jersey license plate in the parking lot of the motel. N.T. 6/6/11, p. 96[;] N.T. 10/17/11, p. 15. He immediately noticed that the vehicle had heavily tinted windows – to the degree that he determined the vehicle was in violation of both the Pennsylvania and New Jersey vehicle codes. N.T. 10/17/11, p. 16. Officer Clee also observed that there was an individual in the passenger compartment of the vehicle and that the individual was attempting to move from the passenger seat into the driver's seat. N.T. 10/17/11, p. 15. Officer Clee explained that sitting in a parked vehicle outside of a motel on the Route 1 corridor is consistent with numerous types of criminal activity, including prostitution (a "pimp" waiting for a prostitute inside of a hotel), the ingestion of narcotics, called "doming," and the sale of narcotics. N.T. 6/6/11, p. 100. The use or sale of narcotics in parked cars – or individuals waiting in parked cars while a sale of narcotics is taking place inside a room – is something Officer Clee has seen "hundreds" of times along the Route 1 corridor. ***Id.*** At that point, Officer Clee determined he was going to investigate further. As he was exiting his vehicle and calling in the Impala's license plate to his headquarters, Officer Tobie turned on the police overhead lights. N.T. 6/6/11, p. 97.

When Officer Clee approached the vehicle, he made contact with the individual moving around inside the vehicle, Melvin Torres. Officer Clee immediately noted that Torres was nervous. N.T. 10/17/11, p. 16. Specifically, Torres was sweating, his carotid artery was pulsating and his hands were

visibly shaking. N.T. 6/6/11, pp. 37, 101; N.T. 10/17/11, pp. 63-67. When speaking with Torres, Officer Clee observed a baseball cap with a "large amount of jewelry" on the back seat of the vehicle. N.T. 10/17/11, pp. 17-18. Through his experience with the special investigations unit, Officer Clee knows that it is common for drug dealers to remove valuable personal items, including jewelry, from their person prior to engaging in a drug transaction. … ***Id.*** … During his conversation with Torres, Officer Clee asked numerous times who owned the Impala and why Torres was sitting in the parking lot. N.T. 10/17/11, pp. 16-17. Torres initially did not provide the information requested, saying only that he came to the hotel with his cousin. ***Id.*** After being asked numerous times, Torres advised Officer Clee that the owner of the vehicle was located in Room 161 of the motel. ***Id.***

Upon learning that the owner was in Room 161, Officer Clee went back to his patrol vehicle to turn the overhead lights off. As he did, he looked in the direction of Room 161. He observed someone in Room 161 open the door and "stick his head out." N.T. 10/17/11, pp. 19-20. Officer Clee made eye contact with the individual and the individual then quickly shut the door. ***Id.*** Officer Clee then moved towards Room 161 and knocked on the door. It took the individuals inside the room approximately 45 seconds to open the door and they only did so after Officer Clee knocked on the door "several times," knocking on the window and made an announcement that he was the police and was looking for somebody that owned the Impala. N.T. 10/17/11, pp. 20-21; N.T. 6/6/11, pp[.] 106-107, 140.

Co-defendant Francisco Saldana was the individual who opened the door, while co-defendant[s] Raymer Carasco and Appellant were standing behind him. N.T. 10/17/11, pp. 21-22. Once the door was open, Officer Clee stood in the doorway and asked the three (3) individuals who owned the Impala and who rented the motel room. ***Id.*** Initially, nobody answered [] either question. Eventually, Saldana indicated that the person who actually rented the room was not present. ***Id.***

While standing in the doorway, Officer Clee was able to see inside the room. He noted that the light from the bathroom was illuminated. He also observed a portable lighting system sticking

> out of a large black box as well as a large "apple" bag.[2] N.T. 10/17/11, pp. 23-24, 50. The large apple bag was positioned on the floor of the hotel room between the doorjamb and a trash can. ***Id.*** Through his training and experience, Officer Clee knew that a large "apple" bag when purchased contains hundreds [of] smaller baggies. The smaller bags are almost exclusively used for storing narcotics and packaging them for sale. N.T. 10/17/11, pp. 48-49. In seventeen (17) years as a police officer, Officer Clee had only come into contact with "apple" baggies on one (1) occasion when they were not being used to store narcotics. ***Id.*** … Officer Clee [further] explained that the portable lighting system was significant to him since an enhanced lighting system is necessary for measuring heroin into exact small doses and then placing the heroin inside the smaller "apple" bags. N.T. 6/6/11, p. 181.
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> Based on his observations, including his knowledge that the vehicle had come from Camden, New Jersey[,] and his observations of known drug paraphernalia in plain view inside the hotel room, Officer Clee made the decision to secure the hotel room and apply for a search warrant for the room. He also made application for a search warrant for the Impala. Once that decision was made, Officer Clee entered the room for the purposes of clearing it – assuring that other individuals were not present – and securing it so nothing inside could be tampered with. N.T. 6/6/11, p. 118. He went inside the bathroom to assure no other individuals were attempting to escape out of the bathroom window. In doing so, he observed rubber bands floating in the toilet bowl [and it appeared that the toilet had] just been flushed. N.T. 10/17/11, pp. 26-27; N.T. 6/6/11, pp. 118-119. …
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> Once the room was secured, Bensalem officers detained and transported all four (4) individuals – Appellant, Carrasco, Saldana and Torres – to police headquarters. N.T. 10/17/11, p. 25. The defendants were patted down prior to being detained[.] N.T. 6/6/11, pp. 181-183. During the pat-down, four (4) bags

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[2] The term "apple bag" apparently refers to an Apple Brand, large plastic bag with a zip-lock opening that contains various amounts of smaller zip-lock bags with dimensions of approximately one inch by one inch.

> of heroin were located on the person of Carrasco. N.T. 10/17/11, p. 68. …
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> After securing the hotel room, but prior to submitting the warrant applications, Officer Clee had his narcotics certified canine perform a sniff of the exterior of the Impala. While performing the sniff, the canine gave a positive indication for narcotics inside of the vehicle. N.T. 10/17/11, p. 28-30. The dog also sniffed [the exterior of] another vehicle – a 1999 Honda Accord. [N.T. 10/17/11, p. 29]. The Accord was sniffed because the keys to the vehicle were located on [Appellant] during the pat-down of [his person]. [***Id.***] The sniff of the Accord also resulted in a positive indication for narcotics. ***Id.***
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> …
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> Nothing additional related to narcotics trafficking was found inside the Accord [after a search warrant was issued and executed]. [***Id.*** at p. 30]. Notably, however, [Officer Clee did not recall finding any] luggage or overnight bags [inside the Accord]. [***Id.*** at] p. 31. Inside [a hidden compartment in the dashboard of] the Chevy Impala, police located a bag containing in excess of 370 grams of raw heroin along with a loaded 40 caliber Taurus handgun in a secret compartment under the dashboard. [***Id.*** at] pp. [31]-35, 38, 92.[3] …
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> Located inside the hotel room was [] industrial size trash bags and numerous large blue plastic containers filled with items associated with the packaging and delivery of heroin, including lamps, grinders, rubber stamps, digital scales and thousands of "apple" bags. [***Id.*** at] pp. 43-50; ***see*** Commonwealth's Exhibit 18 (an inventory of items recovered and where they were located). The trash bag and containers were placed on the floor throughout the motel room – they were not hidden at all. Six (6) of the grinders and two (2) of the digital scales contained either cocaine or heroin residue. ***Id.***; ***see*** Commonwealth's Exhibits 15 and 16 (Crime Laboratory Drug Analysis Reports for

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[3] The heroin found inside the Impala was packaged in "condom-like wrappers or balloon-like wrappers." N.T. 10/17/11, p. 34. Officer Clee testified that inside a trash can in the hotel room, officers discovered "empty condom – used wrappers, [that were] extremely similar to the items recovered in the [Impala] that [were] full." ***Id.*** at 47.

> the items recovered in Room 161 and the Impala). … [T]he "street value" of the heroin obtained [in this case] was well over $100,000. N.T. 10/17/11, p. 92.
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> Finally, in the days following the execution of the search warrants, Officer Clee observed surveillance video from the Sunrise Motel for the evening of November 3, 2010. N.T. 10/17/11, pp. 41-42; N.T. 6/6/11, p. 9. The video, which was entered as an exhibit at trial, confirmed that Saldana was the driver of the Chevy Impala and that the Impala arrived at the motel only a couple of minutes prior to the police arrival. N.T. 10/17/11, pp. 41-42; N.T. 6/6/11, pp. 13-18. The video showed that [Saldana] did not carry any of the trash bags or blue containers with drug paraphernalia into the room[. ***Id.***][4] …

Commonwealth's Brief at 3-11 (footnote omitted).

Appellant maintains that the above-stated evidence proved nothing more than his mere presence in the hotel room. He emphasizes that no contraband was found on his person and nothing illegal was recovered from his vehicle. As such, Appellant contends that the evidence was insufficient to prove that he constructively possessed the drug paraphernalia found in the hotel room or the drugs recovered from Saldana's vehicle. Indeed, Appellant states that there was no evidence indicating that he even *knew about* the narcotics hidden in the secret compartment in Saldana's car, let alone that he constructively possessed them. Additionally, Appellant attacks his conspiracy conviction, arguing that "[a]ny conclusion that [he] was engaged in a drug trafficking conspiracy would impermissibly rest on

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[4] The Commonwealth argued that the fact that Saldana arrived at the hotel room "empty-handed" implied "that [] Carrasco and [Appellant were] the two that carried the paraphernalia that was found inside the hotel room into the hotel room." N.T. 6/6/11, p. 15.

speculation and conjecture, which have long been recognized as insufficient grounds on which to rest a conviction." Appellant's Brief at 8.

To buttress his challenge to the adequacy of the evidence, Appellant relies primarily on this Court's decision in ***Commonwealth v. Ocasio***, 619 A.2d 352 (Pa. Super. 1993). There, Philadelphia Police executed a search warrant on Ocasio's residence, discovering five individuals other than Ocasio present inside the home when the search began. ***Id.*** at 353. During their search, the officers heard one individual make the comment, "it's in the trash," after which the officers found bags of crack cocaine hidden in a trash can in the kitchen. ***Id.*** The officers also discovered $5,882 and a "large chunk of crack cocaine" in plain view in a bedroom. ***Id.*** In the basement of the residence, officers discovered drug packaging paraphernalia. ***Id.*** In the midst of the search, Ocasio returned home and was arrested. ***Id.*** When police searched his person, they found that Ocasio possessed $422 in small denominations of cash. ***Id.***

Based on this evidence, Ocasio was charged and convicted by a jury of PWID, possession of drug paraphernalia, and criminal conspiracy. On appeal, Ocasio challenged the sufficiency of the evidence to sustain his convictions. Before assessing that argument, we initially explained:

> Where drugs are not found on a defendant's person, constructive possession can be established by "showing that a defendant had power of control over and intended to exercise such control of such substance." ***Commonwealth v. Davis****,* [] 480 A.2d 1035, 1045 ([Pa. Super.] 1984). An intent to maintain such conscious dominion may be inferentially proven by the totality of the circumstances. ***Commonwealth v. Macolino****,* [] 469 A.2d 132,

134 ([Pa.] 1983); ***Commonwealth v. Parsons****,* 570 A.2d 1328, 1334 ([Pa. Super.] 1990).

Appellant was present at the scene of the crime and, as a resident, had access to the drugs in the house.[FN5] However, "where more than one person has equal access to where drugs are stored, *presence alone* in conjunction with such access will not prove conscious dominion over the contraband." ***Davis***[,] 480 A.2d at 1045.

> FN5. Arguably, all residents of the house had access to the crack cocaine since the drugs were found in the kitchen, a common area, and in open view in an unlocked third floor bedroom.

Since the drugs were accessible to any resident of the house,[FN6] the Commonwealth must introduce evidence demonstrating either appellant's participation in the drug related activity or evidence connecting appellant to the specific room or areas where the drugs were kept. ***See*** [] ***Macolino****,* [] 69 A.2d 132 ([Pa.] 1983) (cocaine and various items of drug paraphernalia found in room occupied by both husband and wife was sufficient to establish husband's constructive possession); ***Commonwealth v. Kitchener****,* [] 506 A.2d 941 ([Pa. Super.] 1986) (evidence showing that drugs were found in a dwelling where both individuals were sole adult residents and the drugs were found in the freezer and under a living room chair, areas peculiarly in the control of the individuals, was sufficient to sustain a finding of joint constructive possession); ***Commonwealth v. Keefer****,* 487 A.2d 915 ([Pa. Super.] 1985) (evidence directly linking defendant to room where drugs were found was sufficient to show that defendant exercised control over the room and, thus, control over the drugs found in the room); ***Davis***[,] 480 A.2d at 1046 ("[A]ppellant's actions in attempting to dispose of the small quantity of heroin, his joint control over the entire row house, and his possession of large sums of money adequately established his control and intention to control at least some of the drugs....").

> FN6. The Commonwealth makes no assertion nor provides any evidence to show that appellant was the sole resident of the house. Since any resident of the house would have had access to the drugs, more than one person had equal access.

Id. at 354 – 355 (emphasis added).

Ultimately, this Court concluded that Ocasio's shared access to the drugs with several other individuals was insufficient to establish that he constructively possessed the drugs or paraphernalia discovered in his home because the Commonwealth had not presented any evidence "linking [Ocasio] to any of the specific areas in the house where the drugs or the drug paraphernalia was found." ***See id.*** at 355-356. Moreover, while we acknowledged that the $422 found in Ocasio's possession "could *suggest* that [Ocasio] was involved in drug sales," we held that without more, such evidence did not *prove* his involvement in the drug-related activity. ***Id.*** at 355 (emphasis added). As such, the Commonwealth failed to prove that Ocasio constructively possessed the contraband found inside his residence.

Similarly, we also concluded in ***Ocasio*** that the evidence could not sustain a conspiracy conviction. First, we set forth the definition of that offense as follows:

> (a) *Definition of conspiracy.*-A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:
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> > (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
> >
> > (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation of such crime.
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> …

> (e) *Overt act.*-No person may be convicted of conspiracy to commit a crime unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

Id. at 354 (quoting 18 Pa.C.S. § 903(a)(a)(1)-(2), (e)). We further emphasized that to be convicted of conspiracy, "it is not required that a defendant be the individual who committed the underlying crime." ***Id.*** at 355. Instead, "[a] showing that the defendant was part of an agreement in furtherance of the criminal activity is sufficient." ***Id.***

> Among the circumstances which are relevant, but not sufficient by themselves, to prove a corrupt confederation are: (1) an association between alleged conspirators; (2) knowledge of the commission of the crime; (3) presence at the scene of the crime; and (4) in some situations, participation in the object of the conspiracy.

Id. (quoting ***Commonwealth v. Lamb***, 455 A.2d 678, 685 (Pa. Super. 1983)).

Applying these legal precepts, we concluded in ***Ocasio*** that "the Commonwealth has established no more than a mere suspicion that [Ocasio] agreed to participate or aid in the drug distribution." ***Id.*** at 355. We highlighted the fact that Ocasio's presence in the house in which he resided was not abnormal, there was no evidence that Ocasio knew about the criminal activity occurring in his house, and nothing connected him to the drugs or drug paraphernalia discovered inside the residence. ***Id.*** at 355. Again, we found that Ocasio's possession of $422 in small denominations "could suggest that [he] was involved in drug sales," but absent any other "direct [or] circumstantial evidence connecting [him] to any drug related

activity, the evidence introduced at trial is insufficient to support [Ocasio's] conviction of criminal conspiracy." ***Id.*** Thus, we reversed each of Ocasio's convictions and vacated his judgment of sentence.

Instantly, Appellant maintains that ***Ocasio*** is analogous to the facts of his case. First, in regard to the drug paraphernalia found inside the hotel room, Appellant concedes that he was inside the room and had access to that contraband. However, Appellant emphasizes that Saldana and Carrasco had equal access to the paraphernalia and, thus, pursuant to ***Ocasio***, the Commonwealth was required to "introduce evidence demonstrating either [A]ppellant's participation in the drug related activity or evidence connecting [him] to the specific room where the drugs were kept." Appellant's Brief at 13 (quoting ***Ocasio***, 619 A.2d at 354-55). Appellant contends that the Commonwealth failed to meet this burden. He emphasizes that nothing illegal was discovered on his person or in his vehicle, thus negating any inference that he was involved in the drug activity occurring in the hotel room. ***Id.*** at 12. Moreover, Appellant stresses that "[t]he hotel room was not in [his] name, and there was no evidence tending to indicate that he was anything other than a brief visitor to the area." ***Id.*** at 14. Therefore, Appellant concludes that as in ***Ocasio***, his mere presence at the scene is insufficient to prove that he constructively possessed the contraband inside the hotel room or in Saldana's vehicle.

The Commonwealth, on the other hand, contends that ***Ocasio*** is distinguishable, focusing on the facts that Ocasio was not home when the

search began, there was a legitimate reason for Ocasio's presence in the house, and there was nothing connecting Ocasio to the bedroom and basement where the contraband was discovered. The Commonwealth claims that to the contrary, in this case, Appellant was present in the room when police arrived, he had no legitimate reason for being there, and the single hotel room was much smaller than the residence in ***Ocasio***, thus connecting Appellant to the contraband therein.

Moreover, the Commonwealth avers that the evidence established Appellant's participation in the drug-packaging operation. For instance, it points to the video tape of Saldana arriving at the hotel room empty-handed, arguing that the only reasonable inference stemming from this evidence is that Appellant and Carrasco brought the drug-packaging paraphernalia to the hotel room. The Commonwealth further claims that the positive canine sniff of Appellant's vehicle bolsters this inference by indicating that Appellant's vehicle "recently" contained narcotics or something with narcotics residue, *i.e.* the packaging paraphernalia. Commonwealth's Brief at 17. Additionally, the Commonwealth contends that the circumstances in their totality prove "that Appellant was part of the active packaging conspiracy that was taking place." ***Id.*** Namely, the Commonwealth focuses on "[t]he fact that items with narcotics residue, including discarded [condom]-like wrappers matching those containing the raw heroin in Saldana's vehicle and a used grinder, were thrown away in the trashcan," concluding that such evidence "clearly demonstrates that the

packaging operation was active and ongoing inside the room" in which Appellant was present. ***Id.*** at 17 (emphasis omitted).

First, we reject the Commonwealth's speculative argument that Appellant must have participated in bringing the packaging paraphernalia to the hotel room simply because Saldana did not.[5] Moreover, even if the drug-packaging operation was underway inside the room, the Commonwealth produced no evidence demonstrating the extent of Appellant's alleged involvement in that operation. For this reason, we find Appellant's case distinguishable from ***Commonwealth v. Tizer***, 580 A.2d 305 (Pa. 1990), on which the Commonwealth relies. In that case, Tizer was present in a home with two other men, when police raided the property. ***Id.*** at 319. Prior to the raid, police "observed three people moving about the house through a window, the other windows of the house were covered with various types of materials." ***Id.*** Additionally, officers noted that "[t]he house emitted a strong odor described as cooking methamphetamine, and the occupants were coming out of the house, including [Tizer], who came out on the balcony, apparently to escape the odors of the cooking drugs." ***Id.*** When police entered the home, they found Tizer in the kitchen where

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[5] It is curious that the Commonwealth was able to obtain video surveillance tape of Saldana arriving at the hotel room, yet produced no video tape of Appellant's ostensibly "recent" entrance of the room with the contraband.

drugs were "cooking on the kitchen stove" and there were "numerous portable camping stoves" on which other narcotics were boiling. ***Id.*** From these facts, the Supreme Court concluded:

> Since the presence of someone was required to monitor the drug cooking process and [Tizer] was in the kitchen, a jury could deduct [*sic*] her participation in the process. *While mere presence is not enough*, presence at a stove with pots bubbling drugs in a house, permeated with the odor not only from the kitchen, but from camp stoves throughout the house, is sufficient to satisfy the Commonwealth's theory that [Tizer] was an active participant. One need not own premises to actively or constructively participate in criminal enterprises therein. The jury could find that a person in a kitchen with cooking drugs, in a house, a veritable cookery of drugs, was involved in their manufacture and was exercising knowledge, control, and dominion over the process.

Id. at 307 (citations omitted; emphasis added).

Clearly, Tizer was not only aware of the drug enterprise, but was actively participating in it when police entered; to the contrary, here, Appellant may have been present in the hotel room containing drug-packaging paraphernalia, but there was nothing verifying that he was engaging in the drug-packaging operation. Thus, ***Tizer*** does not compel us to sustain Appellant's convictions, nor do the Commonwealth's speculative arguments regarding Appellant's involvement in the illegal activity taking place in the hotel room.

We also find this case distinguishable from ***In the Interest of C.C.J.***, 799 A.2d 116 (Pa. Super. 2002), which the trial court relies on to support Appellant's convictions. In ***C.C.J.***, this Court upheld juvenile delinquency

adjudications of criminal conspiracy and PWID because C.C.J. "(1) [was present] in a high drug area with drug packaging materials on his person; (2) [was] standing with a person with drugs on his person packaged in materials identical to those on C.C.J.'s person; and (3) [was] standing with another person with a large quantity of marijuana in a large plastic bag." Unlike ***C.C.J.***, here, Appellant was not found to have anything on his person or in his vehicle that would tie him to the drug-packaging operation or demonstrate that he constructively possessed the drug paraphernalia in the hotel room or contraband in Saldana's car. Consequently, ***C.C.J.*** is not dispositive to the circumstances of this case.

Instead, we agree with Appellant that ***Ocasio*** compels the reversal of his convictions. Indeed, the facts of this case are even weaker than the circumstances indicating guilt in ***Ocasio***. For instance, Ocasio was a resident of the home in which the illegal items were discovered. However, here, Appellant was present in a hotel room that was not in his name and to which he had no established connection other than his mere presence. Moreover, Ocasio had $422 in small denominations in his possession when he was arrested, suggesting that he was participating in the drug-selling operation. In this case, though, Appellant possessed nothing illegal or suggestive of participation in the drug enterprise.

Additionally, no contraband was discovered in Appellant's vehicle. We acknowledge that the positive canine sniff of Appellant's car and the video showing that Saldana did not transport the paraphernalia to the hotel room

may have *suggested* that Appellant's vehicle carried that contraband. Nevertheless, as in ***Ocasio***, the Commonwealth produced no evidence *proving* the truth of that inference beyond a reasonable doubt. Accordingly, Appellant's mere presence in the hotel room and his access to the paraphernalia therein, without more, was insufficient to demonstrate that he constructively possessed that contraband. ***See Ocasio***, 619 A.2d at 354.

Even more tenuous was the Commonwealth's evidence demonstrating that Appellant constructively possessed the narcotics found in Saldana's vehicle. There was no indication that Appellant had any access to those drugs, or that he even knew of their presence in the secret compartment of Saldana's vehicle. The only evidence remotely suggesting that those drugs were known to Appellant was the fact that the "condom-like" wrappers containing the heroin found in Saldana's vehicle were "extremely similar" to wrappers found in the trash can in the hotel room. N.T. 10/17/11, pp. 34, 47. Again, while one could infer from these items that Saldana brought heroin into the hotel room from his vehicle, that alone is insufficient to establish that Appellant constructively possessed the large quantity of narcotics still secreted inside Saldana's Impala.

Finally, our decision in ***Ocasio*** also compels us to conclude that Appellant's conspiracy conviction cannot stand. The evidence failed to prove that Appellant constructively possessed the drug-packaging paraphernalia or narcotics inside Saldana's vehicle. Furthermore, there was no evidence demonstrating the extent of his involvement, if any, in the drug-packaging

operation. The Commonwealth's assertion that "there was no reason for Appellant to be at the hotel room other than to assist with the active heroin packaging operation that was taking place inside" is speculative and unconvincing in the absence of any other evidence confirming this allegation. Commonwealth's Brief at 20.

In sum, Appellant's mere presence in the hotel room and his shared access to drug-packaging paraphernalia was not sufficient proof that he constructively possessed that contraband or the drugs in Saldana's vehicle, and also was inadequate to demonstrate that he conspired to commit PWID. Consequently, we are compelled to reverse Appellant's convictions and vacate his judgment of sentence. In light of this disposition, we need not address Appellant's sentencing issue.

Judgment of sentence reversed.

Judge Bowes files a dissenting memorandum.

Judgment Entered.

Prothonotary

Date: 7/8/2013