

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

LESLIE KELSEY

Appellant

No. 573 EDA 2013

Appeal from the Judgment of Sentence March 18, 2009
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003938-2007

BEFORE: SHOGAN, J., ALLEN, J., and OTT, J.

MEMORANDUM BY OTT, J.:

FILED JULY 23, 2014

Leslie Kelsey appeals from the judgment of sentence imposed on March 18, 2009, in the Court of Common Pleas of Philadelphia County, following his conviction by jury on charges of possession of a controlled substance with intent to deliver (PWID), conspiracy, possession of an instrument of crime and possession of a firearm with manufacturer number altered.¹ Kelsey received an aggregate sentence of four to eight years' incarceration to be followed by three years of probation. In this *nunc pro tunc* appeal, Kelsey argues his sentence is against the weight and sufficiency of the evidence. He also argues that he is entitled to a new trial because of newly discovered evidence that one of the police officers involved in his

¹ 35 P.S. § 780-113(a)(30); 18 Pa.C.S. §§ 903, 907, and 6110.2, respectively.

arrest has been involved in official misconduct. After a thorough review of the submissions by the parties, relevant law, and the certified record, we affirm.

We adopt the comprehensive statement of facts as related by the Honorable Glynnis Hill in his Pa.R.A.P. 1925(a) opinion.

On January 3, 2004, an unnamed source informed Officers Scott Schweizer and Michal Spicer that narcotics were being sold at 601 East Lippincott Street. In response, Schweizer and Spicer began surveillance of 601 on that same day at approximately 3:30 P.M. Schweizer and Spicer were in plain clothes, in an unmarked vehicle, and positioned 55-60 feet from the residence. Six uniformed officers also were located in the vicinity as back up. Using binoculars, Schweizer observed [Kelsey] and Marvin Fitchett conversing on the steps of 601.

At 3:35 P.M., an unidentified female approached 601 East Lippincott. After a brief conversation with [Kelsey] and Fitchett, she handed [Kelsey] money. Fitchett then entered the house, and upon his return, he handed the female a small object. The female then left the area. [Kelsey] and Fitchett then re-entered the house. Backup officers were unable to locate the unidentified female.

Approximately 5 minutes later, an unidentified male approached the house and knocked on the door. [**Kelsey**] stepped outside and had a brief conversation with the male. After the conversation, [Kelsey] and the male walked inside 601 East Lippincott. [Kelsey] then shut the door. After 30-40 seconds, Fitchett opened the door, looked Southbound on E Street and Eastbound on Lippincott Street, stepped onto the threshold, and let the male exit the house. While the man was leaving, Officer Schweizer observed small blue packets in the male's hand. Schweitzer radioed a description of the male to backup officers. However, backup officers were unable to locate him also.

After another five minutes, a man named Henry Barsdale knocked on 601 East Lippincott's front door. Similar to events which transpired with the unidentified male, [**Kelsey**] opened

the door, [Kelsey] and Barsdale had a brief conversation, and Barsdale entered the house. After 30-40 seconds, Fitchett opened the door, looked up and down the streets, and let Barsdale out of the house. Officer Schweitzer radioed a description of Barsdale to his backup officers. Officer Kevin Devlin stopped Barsdale, recovered one blue packet containing crack cocaine, and arrested him.

At approximately 4:30 PM, two women named Denny Meller and Victoria Arcalease walked up to 601 East Lippincott. One woman knocked on the door. As with the unidentified male and Barsdale, Fitchett let them into the house for 30-40 seconds, then opened the door, looked up and down the streets, and escorted them out of the house. Officer Schweizer radioed a description of the two women. In response to the radio description, Officers Medina and Peggy McGrory stopped both women and recovered heroin from them.

Approximately 10 minutes later, another woman named Janet Padilla knocked on the door. [**Kelsey**] greeted her. After a short conversation, [**Kelsey**] **let her into the house for 30-40 seconds, then opened the door, looked up and down the street, and escorted her out.** ^[2] As Padilla was leaving, Schweizer radioed her description to back up officers. Officer McGrory stopped Padilla and recovered crack cocaine.

Approximately 10 minutes later, Fitchett opened the door to a man named Miguel Santiago. Fitchett spoke with Santiago, let him into 601 for a short time, then opened the door, looked up and down the street, and allowed him to leave the house. Officer Medina stopped Santiago and recovered crack cocaine.

Approximately 5 minutes later, a man named Anthony Savoy knocked on the door. [**Kelsey**] greeted Savoy, let him into the house for a brief time, looked up and down the street, and opened the door so Savoy could leave. Sergeant John Przepiorka stopped Savoy and recovered crack cocaine.

At approximately 4:55 P.M., Fitchett left the residence and walked to the corner of "E" and Lippincott Streets. Officer

² Emphasis in original.

Schweizer ordered the backup officers to arrest Fitchett. When Fitchett saw the officers, he fled back into 601 East Lippincott. Officers William Tull and Donna Stewart pursued Fitchett into the house while Lieutenant Schmidt threw a brick through a window as a diversionary tactic. Tull pursued [**Kelsey**] into the middle bedroom. During the pursuit, Tull saw [**Kelsey**] throw money onto the floor. Tull arrested [Kelsey] in the middle bedroom. After searching [**Kelsey**], Tull recovered a set of keys,^[3] a separate car key, and a cell phone. Tull did not find any drugs on [**Kelsey**].

The officers subsequently secured the house but did not search it until Officer Schweizer returned with a search warrant at 10:30 P.M. While executing the search warrant, Schweizer found 17 blue packets of crack cocaine in the front bedroom. In the middle bedroom, Schweizer recovered 62 blue plackets of crack cocaine, a clear sandwich baggie with about 2 grams of uncut crack cocaine, 34 clear ziplock packets of marijuana, and 4 bags totaling 27 grams of marijuana. Furthermore, Schweizer found a loaded .45 caliber semiautomatic handgun on top of the nightstand. Schweizer also found in the middle bedroom: 2 of [Kelsey's] identification cards, including a Pennsylvania identification card; court documents in [Kelsey's] name; a triple beam scale; walkie-talkies; \$139 in small bills; and numerous clear and blue ziplock packets.

Trial Court Opinion, 7/15/2013, at 2-6 (footnotes to notes of testimony omitted).

With these facts in mind, we turn our attention to Kelsey's claims. We may dispose of two of Kelsey's claims summarily.

First, Kelsey claims the verdict was against the weight of the evidence, both generally and specifically, in that Officer Schweizer was disciplined for having racist material in his locker.

³ One of the keys was a front door key to 601 East Lippincott.

“To properly be preserved, a weight of the evidence claim must be raised in a motion prior to sentencing, in an oral motion at sentencing, or a post-sentence motion.” **Commonwealth v. Antidormi**, 84 A.3d 736, 758 n.19 (Pa. Super. 2014) (citation omitted). Here, although Kelsey was granted *nunc pro tunc* relief to file his direct appeal, he did not obtain permission to file, nor did he file, a post-trial motion *nunc pro tunc*. Kelsey did not raise the issue either in a motion or orally prior to sentencing. Therefore, he has waived his claim that the verdict was against the weight of the evidence.⁴

Next, Kelsey has argued that newly discovered evidence demonstrates that Officer Spicer may have been involved in official misconduct, thereby calling his credibility into question. Kelsey cites an October 25, 2013, *Philadelphia Daily News* article reporting that Officer Spicer, along with four other officers, was alleged to have arrested a man without probable cause

⁴ The claim of racism against Officer Schweizer is a serious allegation. We note that the issue was raised before the jury and Officer Schweizer was cross-examined extensively on the issue. The trial court reviewed the weight of the evidence claim, noting Kelsey’s argument regarding Officer Schweizer’s disciplinary problems, and determined the verdict did not shock one’s sense of justice and therefore was not against the weight of the evidence. “We [an appellate court] may not substitute our own judgment for the jury’s, as it is the fact-finder’s province to weigh the evidence, determine the credibility of witnesses, and believe all, part, or none of the evidence submitted.” **Commonwealth v. Sanchez**, 82 A.3d 943, 972 (Pa. 2013). Further, our task in reviewing a weight of the evidence claim is to determine if the trial court abused its discretion in ruling on the claim. **See Commonwealth v. Morales**, 91 A.3d 80, 91 (Pa. 2014). Nothing in the certified record would lead us to find such an abuse of discretion.

and then stolen cash, guns and jewelry from him. Our Supreme Court has recently determined that a newspaper article alone cannot serve as after-discovered evidence supporting the grant of a new trial. **See Commonwealth v. Jose Castro**, ___ A.3d ___ (June 16, 2014).⁵ Accordingly, this claim cannot provide Kelsey relief.

Kelsey's final claim is that the evidence presented at trial was insufficient to support the verdict. Although Kelsey has recited the elements of all the crimes he was convicted of, his only argument is directed toward the conviction for possession with intent to deliver. Specifically, Kelsey argues:

In the instant matter, the Commonwealth did not prove every element of possession with intent to deliver beyond a reasonable doubt. Admittedly, there were drugs, a hand [sic] and a scale and firearms recovered from the Lippincott address. However, there were three other people in the house at the time of the search warrant including two female[s] who were not arrested and Fitchett who was allegedly seen dealing on the street. While there was indicia that showed that [Kelsey] might be involved in distributing cocaine, the Commonwealth's evidence did not prove each and every element beyond a reasonable doubt as required by law.

Kelsey's Brief at 13-14.

Although this statement does not indicate which of the elements of the crime were not proven, reading the brief as a whole, we believe Kelsey's claim is that the Commonwealth provided only speculation that Kelsey

⁵ **Castro** also involved a claim regarding a newspaper article about a "dirty" police officer.

exercised conscious dominion over the drugs found in the house. **See** Kelsey's brief at 13. We disagree.

The certified record is clear that no drugs were found on Kelsey's person at the time of his arrest. The certified record also clearly demonstrates that both cocaine and marijuana were found in the house. Specifically, in the middle upstairs bedroom, where Kelsey fled and was apprehended, the police located 62 packets of crack cocaine, approximately 2 grams of uncut crack cocaine, 34 baggies of marijuana, and 4 other bags of marijuana. In circumstances in which the contraband is not found directly in the possession of a defendant, possession is demonstrated through the legal theory of 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*, ---Pa. ---, 63 A.3d 1243 (2013) (internal quotation marks and citation omitted). Additionally, it is possible for two people to have joint constructive possession of an item of contraband. ***Commonwealth v. Sanes***, 955 A.2d 369, 373 (Pa. Super. 2008), *appeal denied*, 601 Pa. 696, 972 A.2d 521 (2009).

Commonwealth v. Hopkins, 67 A.3d 817, 820-21 (Pa. Super. 2013).

The totality of the circumstances found in the certified record of this matter supports the finding that Kelsey constructively possessed the drugs.

We agree with the trial court's analysis of this issue and quote it, herein:

Some of the circumstantial evidence supporting PWID emerges from what Officers Schweizer and Spicer observed on January 3, 2004 outside of 601 East Lippincott Street. On this day, Schweizer and Spicer observed [Kelsey] and Fitchett conduct 7 drug transactions. Schweizer observed [Kelsey], along with Marcus Fitchett, briefly permit buyers to enter 601 East Lippincott. After the buyers presumptively purchased drugs, [Kelsey] and Fitchett opened the door and acted as a "look out" before buyers left the premises. When the streets were clear, they escorted the buyers out the door.

In addition to circumstantial evidence, there was also direct evidence suggesting [Kelsey] and Fitchett were selling drugs. Officer Schweizer observed a drug transaction between an unidentified female and [Kelsey] and Fitchett outside of 601 East Lippincott. Schweizer saw the female give money to [Kelsey] in exchange for a small object similar to drugs later found inside of 601. Although the police were unable to stop this female, they were able to later stop six other buyers. Four of these buyers possessed crack cocaine while two possessed heroin.

Furthermore, the Commonwealth showed that [Kelsey] not only sold drugs but also constructively possessed the drugs in the house. In the middle bedroom, officers found 2 identification cards and court documents belonging to [Kelsey]. [Kelsey] also possessed the front door key. All of this was evidence that [Kelsey] lived at 601.

With evidence that [Kelsey] lived in 601, the Commonwealth argued that he constructively possessed the drugs in the house. In the house, police recovered large quantities of narcotics. In the middle bedroom, the police recovered 62 blue packets of crack cocaine, a clear sandwich baggie with about 2 grams of uncut crack cocaine, 34 clear ziplock packets of marijuana and 4 bags of marijuana. In the front bedroom, police found 17 blue packets of crack cocaine. In addition to the large quantity of

narcotics confiscated, Schweizer recovered a triple beam scale, walkie-talkies, \$139 in small bills, and ziplock packets.

In summary, the evidence implicated [Kelsey] of PWID. As mentioned, [Kelsey] and Fitchett escorted drug buyers into 601 East Lippincott Street, officers later confirmed that 6 of these buyers had heroin and cocaine, and Schweizer actually observed another drug sale. Based on this evidence, any reasonable jury could infer that [Kelsey] was intentionally distributing.

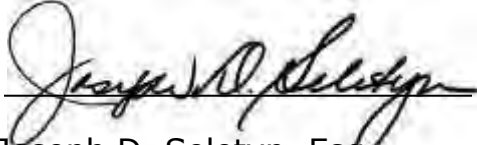
Trial Court Opinion, at 9-10 (footnotes to notes of testimony omitted).

Additionally, we note that while the trial court indicated the similarity between what Officer Schweizer observed being handed to the unidentified female and what was found in the house, it is also noteworthy that the crack cocaine confiscated from the buyers was similarly packaged as the crack cocaine found inside 601 East Lippincott Street. This fact strongly supports the inference that crack cocaine was purchased at the residence and that both Kelsey and Fitchett were actively involved in the sales. Also, the Commonwealth was under no obligation to prove that only Kelsey constructively possessed the drugs the drugs found in the house. As noted above, two people can constructively possess the same contraband. **See Hopkins, supra.**

Accordingly, in light of the foregoing, Kelsey's claim there was insufficient evidence to support his conviction for possession with intent to deliver must fail.

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: 7/23/2014