NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. HARRY D. MITCHELL Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1399 MDA 2013

Appeal from the Judgment of Sentence July 1, 2013
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0000343-2013

BEFORE: PANELLA, J., DONOHUE, J., and MUNDY, J.

MEMORANDUM BY MUNDY, J.: **FILED APRIL 10, 2014**

Appellant, Harry D. Mitchell, appeals from the July 1, 2013 aggregate judgment of sentence of four and one half to nine years' imprisonment imposed following his conviction of two counts of possession with intent to deliver (PWID) and one count each of possession of a controlled substance and driving under suspension.[1] Contemporaneously with this appeal, counsel has requested leave to withdraw in accordance with ***Anders v. California***, 386 U.S. 738 (1967), and its progeny. After careful review, we grant counsel's petition to withdraw and affirm the judgment of sentence.

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[1] 35 P.S. §§ 780-113(a)(30), 780-113(a)(16), and 75 Pa.C.S.A. § 1543(b)(1), respectively.

The relevant factual and procedural history of this case may be summarized as follows. On November 23, 2012, police stopped Appellant while he was operating a vehicle within the City of York. N.T., 5/9/13, at 85-87. Upon running Appellant's name and date of birth through city dispatch, police were notified that two warrants for Appellant's arrest were outstanding. ***Id.*** at 89. As one of these warrants was for driving under suspension and the car was illegally parked during the traffic stop, police requested to tow the car. ***Id.*** at 90. Upon conducting an inventory search of the car prior to towing it, police discovered a large amount of cocaine and marijuana within the car. ***Id.*** at 91-93, 98-105. Specifically, police found bags of the following weights and substances: 96 grams of cocaine; 34.2 grams of cocaine; 23.8 grams of marijuana; 7.5 grams of marijuana; 9.5 grams of marijuana; and 5.2 grams of marijuana. ***Id.*** at 101-105. Police found these drugs in bags located on the passenger side floorboard. ***Id.*** at 122-123, 127-128. Police also found within the car pieces of mail addressed to Appellant and an Ipod Touch. ***Id.*** at 94-95. No items for consuming drugs were found in the car or on Appellant's person. ***Id.*** at 96.

On May 10, 2013, a jury found Appellant guilty of possessing both cocaine and marijuana with intent to deliver and of possessing cocaine. On that date, the trial court also found Appellant guilty of driving under suspension. On July 1, 2013, the trial court sentenced Appellant to an

aggregate term of imprisonment of four and one half to nine years. On July 31, 2013, this timely appeal followed.[2]

In his ***Anders*** brief, counsel raises the following issue on Appellant's behalf.

> I. Whether the Commonwealth presented an insufficient amount of evidence to sustain its burden of convicting Appellant beyond all reasonable doubts of delivery of a controlled substance (cocaine and marijuana)?

Anders Brief at 7.

"When presented with an ***Anders*** brief, this Court may not review the merits of the underlying issues without first passing on the request to withdraw." ***Commonwealth v. Titus***, 816 A.2d 251, 254 (Pa. Super. 2003) (citation omitted). Additionally, an ***Anders*** brief shall comply with the requirements set forth by our Supreme Court in ***Commonwealth v. Santiago***, 978 A.2d 349 (Pa. 2009).

> [W]e hold that in the ***Anders*** brief that accompanies court-appointed counsel's petition to withdraw, counsel must: (1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel's conclusion that the appeal is frivolous; and (4) state counsel's reasons for concluding that the appeal is frivolous. Counsel should articulate the relevant facts of record, controlling case law, and/or statutes on point that

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[2] Appellant and the trial court have complied with Pa.R.A.P. 1925.

> have led to the conclusion that the appeal is frivolous.

Id. at 361. Additionally, counsel must furnish the appellant with a copy of the brief, advise him in writing of his right to retain new counsel or proceed *pro se*, and attach to the ***Anders*** petition a copy of the letter sent to appellant as required under ***Commonwealth v. Millisock***, 873 A.2d 748, 751 (Pa. Super. 2005). ***See Commonwealth v. Daniels***, 999 A.2d 590, 594 (Pa. Super. 2010) (holding that, "[w]hile the Supreme Court in ***Santiago*** set forth the new requirements for an ***Anders*** brief, … the holding did not abrogate the notice requirements set forth in ***Millisock*** that remain binding legal precedent") (footnote omitted). "After counsel has satisfied these requirements, we must conduct our own review of the trial court proceedings and independently determine whether the appeal is wholly frivolous." ***Titus***, ***supra*** (citation omitted).

In the instant matter, we conclude that counsel's ***Anders*** brief complies with the requirements of ***Santiago***. First, counsel has provided a procedural and factual summary of the case with references to the record. Second, counsel advances relevant portions of the record that arguably support Appellant's sufficiency claim on appeal. Third, counsel concluded "an appeal of this matter is frivolous." ***Anders*** Brief at 17. Lastly, counsel has complied with the requirements set forth in ***Millisock***. As a result, we proceed to conduct an independent review to ascertain if the appeal is indeed wholly frivolous.

The sole challenge Appellant raises on appeal is the sufficiency of the evidence supporting his underlying PWID convictions. ***Anders*** Brief at 13. Specifically, Appellant argues the evidence of intent was insufficient because the only evidence received to establish his *mens rea* was "the weight of the substances and the presence of sandwich baggies found in the vehicle[.]" Concise Statement, 9/16/13. Upon review, we conclude Appellant's claim is belied by the certified record.

Our standard for reviewing challenges to the sufficiency of the evidence is well settled.

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

Commonwealth v. Caban, 60 A.3d 120, 132-133 (Pa. Super. 2012), *appeal denied*, 79 A.3d 1097 (Pa. 2013), *quoting* ***Commonwealth v. Quel***, 27 A.3d 1033, 1037-1038 (Pa. Super. 2011).

The Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §§ 780-101–780-144, defines PWID as follows.

> **§ 780-113. Prohibited acts; penalties**
>
> (a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:
>
> …
>
> (30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.
>
> …

35 P.S. § 780-113(a)(30). Marijuana and cocaine are delineated as controlled substances under the Act. ***Id.*** §§ 780-104(1) (marijuana), 780-104(2) (cocaine).

Pursuant to the Act, "[i]n order to prove the offense of [PWID], the Commonwealth must prove beyond a reasonable doubt both that the defendant possessed the controlled substance and had the intent to deliver." ***Commonwealth v. Carpenter***, 955 A.2d 411, 414 (Pa. Super. 2008) (citation omitted). Presently, Appellant does not contest that he possessed

the cocaine and marijuana. ***See*** Concise Statement, 9/16/13. Even if Appellant challenged this finding, such a challenge would be meritless.[3]

Turning to the intent portion of the PWID statute, our Supreme Court has held "possession with intent to deliver can be inferred from the quantity of the drugs possessed and other surrounding circumstances, such as lack of paraphernalia for consumption." ***Commonwealth v. Ratsamy***, 934 A.2d 1233, 1238 (Pa. 2007).

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[3] "Where … the contraband is not found on the accused's person," as is the case here, "the Commonwealth must demonstrate he had constructive possession of the same, or that the individual had the ability and intent to exercise control or dominion over the substance." ***Commonwealth v. Hutchinson***, 947 A.2d 800, 806 (Pa. Super. 2008) (citations omitted), *appeal denied*, 980 A.2d 606 (Pa. 2009).

> 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. Hopkins, 67 A.3d 817, 820 (Pa. Super. 2013) (citation omitted), *appeal denied*, 78 A.3d 1090 (Pa. 2013). Herein, as Appellant was the sole occupier of the car at the time of the traffic stop and as the drugs were within his arms reach on the passenger side floor, we conclude that the Commonwealth presented sufficient evidence to support the jury's conclusion that Appellant constructively possessed the cocaine and marijuana found within the car.

> [When] the quantity of the controlled substance is not dispositive as to the intent, the court may look to other factors … [including] the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and larges [sic] sums of cash found in possession of the defendant. The final factor to be considered is expert testimony. Expert opinion testimony is admissible concerning whether the facts surrounding the possession of controlled substances are consistent with an intent to deliver rather than with an intent to possess it for personal use.

Commonwealth v. Taylor, 33 A.3d 1283, 1288 (Pa. Super. 2011) (citation omitted), *appeal denied*, 47 A.3d 847 (Pa. 2012), *citing* ***Ratsamy***, ***supra*** at 1237-1238.

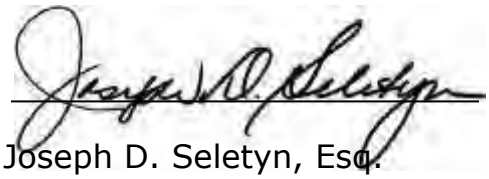
Upon our review of the evidence, in the light most favorable to the Commonwealth, we conclude that the Commonwealth presented sufficient evidence to support the jury's conclusion that Appellant possessed the cocaine and marijuana with an intent to deliver. Herein, police confiscated 130.2 grams of cocaine and 46 grams of marijuana from the car Appellant was driving. N.T., 5/9/13, at 101-105. Detective Shaffer testified that these drugs have a street value of $13,000.00 and $200.00, respectively, and could be sold for $26,000.00 and $460.00, respectively. ***Id.*** at 143-145. These drugs were packaged into individual plastic baggies. ***Id.*** at 128-131. Specifically, Detective Shaffer testified that the cocaine was packaged into amounts known to be eight balls. ***Id.*** at 145. Police also found a box of these plastic baggies on the front passenger seat of the car Appellant was operating. ***Id.*** at 132. Lastly, police found no ingestion paraphernalia

within the vehicle. ***Id.*** at 96. Based upon the totality of this evidence, Detective Shaffer testified that within his expert opinion Appellant possessed the cocaine and marijuana with intent to deliver, and the jury so convicted Appellant on these charges. Therefore, looking at the totality of the circumstances, we conclude the Commonwealth presented sufficient evidence to sustain Appellant's convictions for PWID.

Based upon our own independent review of the record, we conclude no issues of merit exist within this matter. ***See Titus***, ***supra***. Accordingly, we agree with counsel's assessment that Appellant's direct appeal is "wholly frivolous." ***Id.*** Therefore, we grant counsel's petition to withdraw and affirm the trial court's July 1, 2013 judgment of sentence.

Judgment of sentence affirmed. Petition to withdraw granted.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/10/2014