

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

Appellee

v.

DAVID A. LERMA

Appellant

No. 2831 EDA 2014

Appeal from the Judgment of Sentence September 9, 2014  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0003912-2013

BEFORE: SHOGAN, J., MUNDY, J., and FITZGERALD, J.\*

MEMORANDUM BY MUNDY, J.:

**FILED JULY 31, 2015**

Appellant, David A. Lerma, appeals from the September 9, 2014 aggregate judgment of sentence of 11½ to 23 months' imprisonment, followed by five years' probation, imposed after the trial court found Appellant guilty of carrying firearms on public streets or public property in Philadelphia and firearms not to be carried without a license.<sup>1</sup> After careful review, we affirm in part, reverse in part, vacate Appellant's judgment of sentence, and remand for resentencing.

The trial court has summarized the relevant factual and procedural background of this case as follows.

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 18 Pa.C.S.A. §§ 6108 and 6106, respectively.

While on patrol in Philadelphia on January 16 2013[,] around 6:30 [p].[m]., Philadelphia Police Officer Charles Grebloski and his partner Officer Taylor pulled over a white Honda coupe occupied by three individuals, one of whom was Appellant, sitting in the front seat passenger side. Upon activating their lights and sirens, Officer Grebloski observed both the rear passenger and Appellant bend over in their seats, obscuring their torsos. Upon approaching the passenger side of the vehicle, Officer Grebloski saw both Appellant and the driver shaking and visibly nervous. At that time, Officer Ronald Evancho, a Pennsylvania Conservation officer, arrived on the scene to provide backup.

For the safety of the officers, Officer Grebloski ordered the rear passenger and Appellant out of the vehicle. Both individuals were subjected to a **Terry**<sup>[2]</sup> frisk with negative results. Appellant and the passenger were moved to the rear of the vehicle under the care of Officer Evancho.

Illuminating the floor[]board of the front passenger seat where Appellant had been sitting, Officer Grebloski observed a black glove on top of what was immediately apparent to the officer as an ivory-gripped firearm. The officer immediately told his fellow officer of his discovery, at which point Appellant took off running. Officer Evancho and Officer Taylor chased after Appellant and eventually caught him. The other occupants of the vehicle did not attempt to flee at anytime.

The loaded firearm was placed on a property receipt and there was a stipulation by and between counsels that the firearm was operable.

Appellant waived his right to a jury and was found guilty of [the aforementioned] charges at the conclusion of a bench trial held on July 3, 2014.

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<sup>2</sup> **Terry v. Ohio**, 392 U.S. 1 (1968).

Following a pre-sentence investigation, [A]ppellant was sentenced to 11½ to 23 months['] incarceration plus five years of probation on September 9, 2014.<sup>[3]</sup>

Trial Court Opinion, 12/1/14, at 1-2. Appellant did not file post-sentence motions. Appellant filed a timely notice of appeal on October 8, 2014.<sup>4</sup>

On appeal, Appellant raises the following two issues for our review.

[I.] Was the evidence insufficient to support the charges because the Commonwealth failed to prove that Appellant possessed the firearm underlying his convictions in actuality or constructively[ ] given that other persons were inside [the] car and had access to the weapon?

[II.] Was the evidence insufficient to support the charge of carrying a firearm without a license because the Commonwealth produced no evidence whatsoever of non-licensure, a necessary and critical element of the crime?

Appellant's Brief at 3.

In both of Appellant's issues, he challenges the sufficiency of the Commonwealth's evidence. Our standard of review over such claims is well established. "In reviewing the sufficiency of the evidence, we consider whether the evidence presented at trial, and all reasonable inferences drawn

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<sup>3</sup> Specifically, the trial court sentenced Appellant to 11½ to 23 months' imprisonment for firearms not to be carried without a license and five years' probation for his conviction for carrying firearms on public streets or public property in Philadelphia, consecutive to his term of imprisonment. Sentencing Order, 9/9/14.

<sup>4</sup> Appellant and the trial court have complied with Pennsylvania Rule of Appellate Procedure 1925.

therefrom, viewed in a light most favorable to the Commonwealth as the verdict winner, support the jury's verdict beyond a reasonable doubt." **Commonwealth v. Patterson**, 91 A.3d 55, 66 (Pa. 2014) (citation omitted), *cert. denied*, **Patterson v. Pennsylvania**, 135 S. Ct. 1400 (2015). "The Commonwealth can meet its burden by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." **Commonwealth v. Watley**, 81 A.3d 108, 113 (Pa. Super. 2013) (*en banc*) (internal quotation marks and citation omitted), *appeal denied*, 95 A.3d 277 (Pa. 2014). As an appellate court, we must review "the entire record ... and all evidence actually received[.]" **Id.** (internal quotation marks and citation omitted). "[T]he 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. Orié**, 88 A.3d 983, 1014 (Pa. Super. 2014) (citation omitted), *appeal denied*, 99 A.3d 925 (Pa. 2014). "Because evidentiary sufficiency is a question of law, our standard of review is *de novo* and our scope of review is plenary." **Commonwealth v. Diamond**, 83 A.3d 119, 126 (Pa. 2013) (citation omitted), *cert. denied*, **Diamond v. Pennsylvania**, 135 S. Ct. 145 (2014). A successful sufficiency of the evidence challenge warrants discharge.

***Commonwealth v. Brown***, 52 A.3d 320, 323 (Pa. Super. 2012) (citation omitted).

Mindful of these principles, we turn to Appellant's claims of error in the instant case. Appellant first argues the Commonwealth's "evidence was insufficient to support his weapons conviction because the evidence failed to establish beyond a reasonable doubt that he constructively possessed the gun police found hidden in the vehicle in which [A]ppellant was a passenger that had two other persons in it and were present at the time the weapon was uncovered." Appellant's Brief at 9. For the reasons that follow, we conclude Appellant is not entitled to relief on this basis.

Carrying firearms on public streets in Philadelphia is codified as follows.

**§ 6108. Carrying firearms on public streets or public property in Philadelphia**

No person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless:

(1) such person is licensed to carry a firearm;  
or

(2) such person is exempt from licensing under section 6106(b) of this title (relating to firearms not to be carried without a license).

18 Pa.C.S.A. § 6108. However, the Commonwealth need not prove the absence of a license, as it is not an element of the offense.

***Commonwealth v. Hopkins***, 747 A.2d 910, 917 (Pa. Super. 2000).

Appellant correctly reasons that because the evidence does not demonstrate actual possession of the firearm, the Commonwealth had the burden of proving Appellant constructively possessed the weapon. Appellant's Brief at 12, 18. We have explained the concept of constructive possession as follows.

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 in 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), *appeal denied*, 78 A.3d 1090 (Pa. 2013) (citation omitted).

At trial, Officer Grebloski testified that when his partner activated the police sirens, Appellant's "torso[] went forward[] towards the floor[]board directly in front of [him]." N.T., 7/3/14, at 5. He further testified that upon approaching Appellant, who was seated in the front, passenger seat of the vehicle, Appellant was "shaking and visibly nervous." ***Id.*** After Appellant stepped out of the vehicle, Officer Grebloski illuminated his flashlight on "the floor board of the front passenger's seat where [Appellant] [had been] seated." ***Id.*** at 8. Officer Grebloski then observed a glove partially covering what was "immediately apparent" to him to be a firearm. ***Id.*** He further

clarified that this firearm was not hidden under the seat; rather, it was located on the floorboard in front of where Appellant had been seated. **Id.** Upon communicating this discovery to the other officers present, Appellant fled. **Id.** at 8-9. Officer Evancho also testified that he was standing at the rear of the vehicle with Appellant and another passenger when Officer Grebloski informed him that there was a “gun in the car” and advised him to secure both Appellant and the other passenger, at which point, Appellant “took off running”. **Id.** at 20.

Viewing all the evidence at trial, together with all reasonable inferences drawn therefrom, in a light most favorable to the Commonwealth, we conclude there is sufficient evidence to prove Appellant constructively possessed the firearm. **See Patterson, supra.** Appellant’s argument that “the gun ... was under a glove on the floor of a dark vehicle hidden from [A]ppellant’s view and there was no evidence that he had ever seen it or knew of its existence[,]” is unavailing, as his characterization of the evidence is contrary to our standard of review and fails to consider the totality of the circumstances. **See** Appellant’s Brief at 17.

Appellant cites to this Court’s decision in **Commonwealth v. Hamm**, 447 A.2d 960 (Pa. Super. 1982) in support of his argument. **Id.** at 16. In **Hamm**, the appellant was operating a vehicle with one passenger in the front seat and one passenger in the back seat. **Hamm, supra** at 961. The officers observed the back seat passenger pass an object to the front seat

passenger. **Id.** at 961-962. The officers then witnessed the front seat passenger bend down “placing something on the floor in front of him.” **Id.** at 962. After the vehicle voluntarily pulled over, the police officers observed a revolver on the floor of the front, passenger side; however, the police testimony demonstrated that the “weapon could not have been visible to the driver[, the appellant].” **Id.** A search uncovered a second weapon underneath the front seat. **Id.** In finding that there was insufficient evidence to prove constructive possession of the firearm discovered under the seat, this Court noted, “we may not infer that appellant knew of the weapon’s existence simply from the fact that it was hidden in the automobile.” **Id.** (citations omitted). The **Hamm** Court similarly concluded there was insufficient evidence of the appellant’s constructive possession of the firearm found on the floor, noting, “[t]he analysis is the same whether a weapon is hidden in an automobile ... or hidden on someone’s person[.]” **Id.** Here, however, there was no testimony that the firearm was hidden from Appellant’s view. Indeed, the reasonable inference drawn from the evidence indicates the opposite. The firearm was located on the floorboard where Appellant was seated and, though partially covered by a glove, it was readily identifiable as a firearm. Moreover, Appellant exhibited nervous and evasive behavior, and upon hearing of the firearm’s discovery by Officer Grebloski,



Appellant fled.<sup>5</sup> Unlike the appellant in *Hamm*, it is reasonable to infer Appellant knew of the existence of the firearm located at his feet and had the power and intent to exercise control over the weapon. *See Hopkins*, 67 A.3d at 820. Accordingly, under the totality of the circumstances, the Commonwealth proved constructive possession of the firearm by Appellant. *See id.*

Next, Appellant argues that there is insufficient evidence to support his conviction for firearms not to be carried without a license<sup>6</sup> “because the Commonwealth presented no evidence of non-licensure, an essential element of the crime.” Appellant’s Brief at 31. The Commonwealth agrees

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<sup>5</sup> We note that “evidence of flight is generally admissible to support an inference of consciousness of guilt[.]” *Commonwealth v. Johnson*, 910 A.2d 60, 66 (Pa. Super. 2006), *appeal denied* 923 A.2d 1173 (Pa. 2007) (citation omitted).

<sup>6</sup> Firearms not to be carried without a license is codified, in relevant part, as follows.

**§ 6106. Firearms not to be carried without a license**

**(a) Offense defined.—**

(1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

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19 Pa.C.S.A. § 6206(a)(1).

with Appellant that the evidence was insufficient to support his conviction under Section 6106. "Here, the Commonwealth did not produce any evidence at trial that [Appellant] was not licensed to carry the firearm recovered in his possession. Accordingly, the Commonwealth respectfully requests that this Court vacate [Appellant's] conviction under § 6106." Commonwealth Brief at 10. Likewise, the trial court responds to this allegation of error as follows. "A review of the record in this case reveals that the Commonwealth failed to prove beyond a reasonable doubt that Appellant did not have a license to carry a concealed firearm." Trial Court Opinion, 12/1/14, at 4.

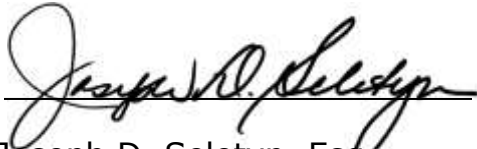
Our review of the entire record and all evidence received confirms that the Commonwealth has failed to meet its burden with respect to Appellant's non-licensure. **See Watley, supra.** The only evidence at trial was the testimony of Officers Grebloski and Evancho regarding their encounter with Appellant and a stipulation that the firearm recovered was operable. **See N.T., 7/3/14, 2-22.** Therefore, the Commonwealth failed to establish that Appellant was not licensed to carry a firearm, and his conviction for said crime must be reversed. **See Brown, supra.**

Based on the foregoing discussion, we affirm Appellant's conviction for carrying firearms on public streets or public property in Philadelphia and reverse Appellant's conviction for firearms not to be carried without a

license. We further vacate Appellant's judgment of sentence and remand for resentencing.<sup>7</sup>

Conviction affirmed in part and reversed in part. Judgment of sentence vacated. Case remanded for resentencing. Jurisdiction relinquished.

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: 7/31/2015

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<sup>7</sup> Our disposition disturbs the trial court's overall sentence scheme. Therefore, we remand for resentencing. ***See Commonwealth v. Tanner***, 61 A.3d 1043, 1048 (Pa. Super. 2013) (suggesting that when the trial court's sentencing scheme is upset, this Court should remand for resentencing).