

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

EVAN HILL,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1776 EDA 2012

Appeal from the Judgment of Sentence May 15, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003866-2010

BEFORE: BOWES, MUNDY, and FITZGERALD,* JJ.

MEMORANDUM BY BOWES, J.:

FILED SEPTEMBER 17, 2013

Evan Hill appeals from the judgment of sentence of one and one-half to three years imprisonment imposed after his conviction at a nonjury trial of possession of a controlled substance and possession with intent to deliver ("PWID"). We affirm.

The trial court succinctly summarized the evidence adduced during the nonjury trial as follows:

On December 8, 2009 around 1:30 a.m. Police Officer James Crown was working in the area of 2116 Birch Street. N.T. 1/25/12 at 10. Since Officer Crown noticed some "activities" in the area; he exited his car and proceeded to an abandon[ed] lot on the south side of Birch Street in order to investigate. ***Id.*** At that time, he watched Appellant exit a house on the south side of the same street. From forty feet away, Officer Crown

* Former Justice specially assigned to the Superior Court.

[observed as] Appellant "picked up a white object [near a stoop], picked at it, met with a black male and did a quick hand to hand" transaction. **Id.** at 11. Appellant received "something" from the black male and "[extended] his hand out and gave something to the black male." **Id.** at 12. As the Officer was calling for back-up, Appellant met with another black male wearing a white jacket and engaged in a similar transaction. **Id.** The unidentified black males were never arrested. Appellant started to run westbound but was immediately stopped by back up officers[, including Police Officer Coal,¹] as they moved in his direction. **Id.**[at 11]. Officer Coal and Crown retrieved a stash near the stoop where Appellant was seen picking up the "white object." The stash was a cigarette pack; inside, there was "fourteen blue Ziploc tinted packets, each with an off-white chunky substance." **Id.** at 11. These items were later tested positive for the presence of cocaine. **Id.** at 32. Appellant also had \$175 on his person. **Id.** at 11.

Trial Court Opinion, 11/27,12, at 2.

The trial court convicted Appellant of the above-referenced offenses, and on May 15, 2012, it imposed one and one-half to three years imprisonment for PWID and no further penalties on the possession offense. Appellant did not file a post sentence motion. This timely appeal followed. Appellant complied with the trial court's directive to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), wherein he leveled challenges to the sufficiency and weight of the evidence.

Appellant raises the following questions for our review.

1. Is the defendant entitled to an arrest of judgment where the Commonwealth did not prove guilt beyond a reasonable doubt and where the verdict is not supported by sufficient evidence on both charges?

¹ The certified record does not identify Officer Coal's first name.

2. Is the defendant entitled to a new trial as the verdict is not supported by the greater weight of the evidence with regard to either charge, being PWID and Possession of a Controlled Substance?

Appellant's brief at 3.

Appellant's first issue challenges the sufficiency of the evidence that the Commonwealth adduced at trial to sustain the PWID conviction. Specifically, Appellant asserts that the Commonwealth did not establish his constructive possession of the contraband discovered in the cigarette box.

Our standard of review is as follows:

We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.

The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met 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. Mobley, 14 A.3d 887, 889–890 (Pa.Super. 2011). Additionally, “in applying the above test, the entire record must be evaluated and all evidence actually received must be considered.” ***Commonwealth v. Coleman***, 19 A.3d 1111, 1117 (Pa.Super. 2011).

Commonwealth v. Stokes, 38 A.3d 846, 853-854 (Pa.Super. 2011).

In order to sustain a conviction for PWID, the Commonwealth must establish that Appellant knowingly or intentionally possessed a controlled substance without being properly registered to do so and with the intent to manufacture, distribute, or deliver it. ***See Commonwealth v. Brown***, 48 A.3d 426, 430 (Pa.Super. 2012); 35 P.S. § 780-113(a)(30). “In determining whether there is sufficient evidence to support a PWID conviction, all facts and circumstances surrounding the possession are relevant, and the Commonwealth may establish the essential elements of the crime wholly by circumstantial evidence.” ***Commonwealth v. Bricker***, 882 A.2d 1008, 1015 (Pa.Super. 2005).

Since Officer Crown did not discover Appellant in actual possession of the controlled substances, the Commonwealth must establish that Appellant constructively possessed the contraband. This Court 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 application, we have held that constructive possession may be established by the totality of the circumstances.

Brown, supra at 430 (quoting **Commonwealth v. Parker**, 847 A.2d 745, 750 (Pa.Super. 2004)). “Constructive possession by its nature is not amenable to ‘bright line’ tests.” **Commonwealth v. Carroll**, 507 A.2d 819, 821 (Pa. 1986). When reviewing the totality of the circumstances, the “circumstantial evidence is reviewed by the same standard as direct evidence—a decision by the trial court will be affirmed ‘so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt.’” **Bricker, supra** at 1014 (quoting **Commonwealth v. Johnson**, 818 A.2d 514, 516 (Pa.Super. 2003)).

Herein, Appellant contends that the Commonwealth did not establish that he constructively possessed the controlled substances that were recovered from the pack of cigarettes sitting on the sidewalk near the steps of the home on Birch Street. Specifically, relying upon several cases with negligible relevance to the fact pattern in the case at bar, Appellant argues that since the police did not find him near the contraband located on a public street or connect him with cigarette pack, there was “an astounding lack of evidence” to establish a nexus between him and the pack of cigarettes. Thus, he concludes that the Commonwealth failed to prove beyond a reasonable doubt that he “exercised conscious dominion over that cigarette package.” Appellant’s brief at 8.

Appellant necessarily acknowledges Officer Crowns’s testimony during the bench trial that the officer observed Appellant twice lift the package from

the ground, manipulate it, and engage in hand-to-hand transactions involving small objects. However, Appellant attempts to negate that testimony based upon the police officer's alleged failure to identify the package's distinctive color scheme. ***Id.*** Thus, Appellant concludes that since the Commonwealth failed to positively identify the package containing the cocaine, it could not connect him with the drugs, and therefore, failed to establish constructive possession. Hence, he opines that the convictions for possession and PWID were based upon "suspicion, conjecture and surmise." ***Id.*** at 9. For the following reasons, we disagree.

First, Appellant's argument that Officer Crown's alleged misidentification of the brand of cigarettes or the package's color scheme effectively disproves the remainder of the officer's testimony ignores our standard of review, which requires that we view the evidence adduced during trial and all reasonable inferences therefrom in the light most favorable to the Commonwealth as the verdict winner. ***Commonwealth v. Nypaver***, 2013 PA Super 144, *5 (filed June 18, 2013). Moreover, this assertion challenges the weight of the Commonwealth's evidence rather than the sufficiency of the evidence. Thus, this aspect of Appellant's argument is misplaced.

Second, notwithstanding Appellant's protestations to the contrary, the totality of the circumstances presented in the case at bar demonstrates that Appellant possessed the power and intent to exercise control of the package

of cigarettes and the contraband discovered inside it. Indeed, the Commonwealth adduced competent testimony from Officer Crown that Appellant twice picked up the package from the sidewalk, handled it, and engaged in hand-to-hand transactions of small objects. **See** N.T., 1/25/12, at 10-11, 12. Moreover, Officer Crown described how responding police officers subsequently recovered the package in the precise area of Birch Street where he observed Appellant handling it. **Id.** at 11. The logical inferences derived from these facts and circumstances establish beyond a reasonable doubt that Appellant constructively possessed the cigarette package containing cocaine. **See Bicker, supra** at 1015 (“all facts and circumstances surrounding the possession are relevant, and the Commonwealth may establish the essential elements of the crime wholly by circumstantial evidence”). Accordingly, we find that the evidence sustains the nonjury verdict convicting Appellant of possession and PWID.

Finally, we observe that Appellant’s challenge to the weight of the evidence is waived because he did not raise the claim pursuant to Pa.R.Crim.P. 607.² Accordingly, even though Appellant raised this issue in

² Rule 607 provides in relevant part as follows:

(A) A claim that the verdict was against the weight of the evidence shall be raised with the trial judge in a motion for a new trial:

(1) orally, on the record, at any time before sentencing;
(Footnote Continued Next Page)

his Rule 1925(b) statement, we normally would not address the merits of the claim herein. **See Commonwealth v. Mack**, 850 A.2d 690, 694 (Pa.Super. 2004); **Commonwealth v. Washington**, 825 A.2d 1264, 1266 (Pa.Super. 2003). However, mindful that the trial court addressed the merits of Appellant's contention in its Rule 1925(a) opinion and rejected Appellant's assertion, we confront this issue in an abundance of caution.

Siting *en banc* in **Commonwealth v. Brown**, 23 A.3d 544, 557-558 (Pa.Super. 2011), we reiterated the relevant standard of review as follows.

For this Court to reverse the jury's verdict on weight of the evidence grounds, we must determine that the verdict is so contrary to the evidence as to 'shock one's sense of justice.'" **Commonwealth v. Johnson**, 910 A.2d 60, 64 (Pa.Super. 2006) (citing **Commonwealth v. Spatz**, 552 Pa. 499, 507, 716 A.2d 580, 583 (1998), *appeal denied*, 600 Pa. 774, 968 A.2d 1280 (2009), *cert. denied*, 526 U.S. 1070, 119 S.Ct. 1466, 143 L.Ed.2d 551 (1999); **Commonwealth v. Lloyd**, 878 A.2d 867, 872 (Pa.Super. 2005), *appeal denied*, 585 Pa. 687, 887 A.2d 1240 (2005)).

Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that

(Footnote Continued) _____

(2) by written motion at any time before sentencing; or

(3) in a post-sentence motion.

the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Id. (quoting ***Commonwealth v. Widmer***, 744 A.2d 745, 753 (Pa. 2000)).

The crux of Appellant's challenge is that the greater weight of the evidence supports the finding that Appellant did not engage in any drug transactions and that anyone on the public sidewalk could have dropped the cigarette pack containing cocaine. We disagree. Herein, the trial court found Officer Crown's testimony to be credible and found no other evidence in the record to cast a doubt on its determination. Hence, it concluded Appellant's convictions do not shock one's sense of justice. Trial Court Opinion, 11/27/12, at 9. Our review of the trial court's determination does not indicate that the trial court abused its discretion in disposing of Appellant's weight claim. Officer Crown testified that he twice observed Appellant handle the cigarette package containing cocaine prior to engaging in hand-to-hand transactions on the public street. As the trial court accepted Officer Crown's testimony as true, it is essentially unassailable in light of our highly deferential standard of review. Hence, Appellant's weight of the evidence claim fails.

Judgment of sentence affirmed.

J-S43015-13

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 9/17/2013