

**[J-63-2012] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 55 EAP 2011

Appellee

v.

CARL P. HANSON,

Appellant

:
: Appeal from the Judgment of Superior
: entered on 07/15/2010 at No. 3225 EDA
: 2008, affirming the Judgment of Sentence
: entered on 07/29/2008 in the Court of
: Common Pleas, Philadelphia County,
: Criminal Division at No.
: CP-51-CR-0011477-2007
:
: ARGUED: May 8, 2012

DISSENTING OPINION

MR. JUSTICE EAKIN

DECIDED: December 27, 2013

The imprecise wording of this statute muddies the legislature’s purpose, but I read § 9712.1(a) to require a finding of “physical possession or control” of the firearm, under one of the four enumerated circumstances. The concept of “physical possession or control” is not new or unusual, and the evidence here is sufficient to establish that portion of the proof. It is not just possession of a firearm that triggers the added penalty, however — the crime after all is a drug crime, not a firearm crime. It is undoubtedly proof of a connection, beyond possession or control, between the possessed firearm and the drug crime that makes the statute applicable, a connection established by one of the enumerated circumstances.

The applicable circumstance here is “close proximity,” a redundant and tautologically imprecise measurement. If the legislature recognized that the connection between firearms and drugs is not established by specific linear measure, such

imprecision is understandable. The legislature could easily have said “ten feet” or “20 yards,” but it did not — ten feet might show a disconnect in one situation, while 20 yards might be quite proximate in another. The proof required is enough to allow a reasonable fact-finder to say this firearm was in close proximity to these drugs.

As the facts of each case affect that determination, I would not attempt to further define the phrase as does the majority, and I respectfully cannot agree with reading “close proximity” to necessarily mean “very near.” See Majority Slip Op., at 22. Neither do I agree with the attendant disapproval of Commonwealth v. Sanes, 955 A.2d 369, 377 (Pa. Super. 2008), and its progeny. See Majority Slip Op., at 23. I would instead attach a general, totality of the circumstances analysis to the “close proximity” inquiry, which would allow trial courts to consider all factors made relevant by the circumstances, rather than deeming some unspecified but insufficient linear distance to preclude further consideration.

Actual distance is of course relevant, but it should not be preclusive of other factors that may be more relevant in a given case. In cosmic terms, we may say the earth is very near the moon. In a large warehouse processing mass quantities of drugs, an arsenal of firearms used by the dealers but stored in a locker one hundred yards away may be closely proximate, while a matter of a few yards in a house with many occupants might disconnect a firearm from the drugs under the circumstances. If a person from out-of-town phoned appellant from half a mile away to confirm he was on the way to make a buy, could he say he was very near? If he asked if appellant had a firearm, appellant could honestly answer that he did, and it was very near. The concept of nearness depends on the situation, and I find the words in the statute reflect the need for such

flexibility. For analytical purposes, the issue is not determined by physical distance alone.

In the present case, I find the evidence of record regarding the specifics of the residence and location of the drugs and firearm, coupled with other evidence of appellant's exclusive use of the residence to sell drugs and admission to possessing all the drugs located therein, sufficient to find control and close proximity. Thus, I would affirm and not remand; however, understanding that remand has been ordered, I believe the directed inquiry should be whether the drugs and the firearm were in "close proximity," not whether "[a]ppellant was in constructive control of the firearm[.]" Id., at 25.

For the above reasons, I respectfully dissent.