

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
DAVID ALSTON	:	
	:	
	:	
Appellant	:	No. 3060 EDA 2022

Appeal from the Judgment of Sentence Entered July 22, 2022
In the Court of Common Pleas of Philadelphia County Criminal Division at
No(s): CP-51-CR-0007105-2019

BEFORE: BOWES, J., NICHOLS, J., and KING, J.

MEMORANDUM BY NICHOLS, J.:

FILED JANUARY 18, 2024

Appellant David Alston appeals from the judgment of sentence imposed following his convictions for possession of firearm prohibited, firearms not to be carried without a license, carrying firearms in public in Philadelphia, and possession of a firearm with the manufacturer number altered.¹ Appellant raises challenges to the sufficiency of the evidence, the weight of the evidence, and the discretionary aspects of sentence. We affirm.

The trial court summarized the underlying facts of this matter as follows:

[T]estimonial evidence was presented to the jurors tending to establish [Appellant's] constructive possession of [a] firearm. Specifically, responding officers testified that they received reports that three men were in a specific area of the [City of Philadelphia], all were armed, and reporters heard about 30 gunshots. When police responded to the area roughly three minutes later, they found three men who matched the physical

¹ 18 Pa.C.S. §§ 6105(a)(1), 6106(a)(1), 6108, and 6110.2(a), respectively.

descriptions contained in the reports. Police approached the three men and found [Appellant] pushing the wheelchair of one of the other men. A black [bag] was hanging on the back of the wheelchair directly in front of [Appellant], within which was an operable and loaded nine-millimeter firearm with its handle pointed upwards towards [Appellant]. Additionally, the t-shirt recovered from [Appellant's] person underwent forensic testing and was found to be carrying gunshot residue. . . . The jury received an instruction regarding constructive possession and returned guilty verdicts on each of the challenged offenses.

Trial Ct. Ltr., 12/15/22, at 1 (unpaginated).

At sentencing, the trial court imposed an aggregate sentence of seven to fourteen years' incarceration. Appellant timely filed post-sentence motions, which the trial court denied by operation of law on December 2, 2022.

Appellant filed a timely notice of appeal and a court-ordered Pa.R.A.P. 1925(b) statement. In lieu of a Rule 1925(a) opinion, the trial court wrote a letter to this Court addressing Appellant's sufficiency claim.²

On appeal, Appellant raises the following claims for review:

1. The jury's verdict of guilty on the charges of carrying a firearm without a license, pursuant to 18 Pa.C.S. § 6106, carrying a firearm on the streets of Philadelphia, 18 Pa.C.S. § 6108, carrying a firearm with an altered serial number, 18 Pa.C.S. § 6110.2, was insufficient as a matter of law as there was no testimony that defendant: (a) was in actual possession of a firearm, (b) the firearm was concealed or (c) that defendant

² We note that Hon. Mia Roberts Perez presided over Appellant's jury trial and imposed the instant judgment of sentence. While this appeal was pending, Judge Perez resigned from the Court of Common Pleas of Philadelphia County following her appointment to the United States District Court for the Eastern District of Pennsylvania. Prior to her resignation from the Philadelphia County Court of Common Pleas, Judge Perez sent a letter to this Court addressing the claims raised in Appellant's Rule 1925(b) statement.

was in constructive possession of the firearm on the date of the alleged offense.

2. The jury's verdict of guilty on the charges of carrying a firearm without a license, pursuant to 18 Pa.C.S. § 6106, carrying a firearm on the streets of Philadelphia, 18 Pa.C.S. § 6108, carrying a firearm with an altered serial number, 18 Pa.C.S. § 6110.2 and possession of a firearm prohibited, was against the weight of the evidence as there was no evidence presented to the jury that [Appellant] committed the possessory offense of being in possession of a firearm on the date of the alleged offense as [Appellant] was pushing a wheelchair which ostensibly had a shopping bag on the back which was never produced at trial.
3. The trial court abused its discretion in sentencing [Appellant] in the aggravated range to outside of the guideline range of the Pennsylvania Sentencing Guidelines by sentencing [Appellant] to seven (7) to fourteen (14) years of state incarceration on the lead charge of possession of a firearm prohibited, pursuant to 18 Pa.C.S. [§] 6105 and failed to articulate the reasons necessitating the sentence which was ultimately imposed.

Appellant's Brief at 6-7 (some formatting altered).

Sufficiency of the Evidence

In his first claim, Appellant challenges the sufficiency of the evidence supporting his convictions for violations of the Uniform Firearms Act (VUFA). Appellant's Brief at 15-26. Specifically, Appellant argues that the Commonwealth failed to demonstrate that he possessed the firearm in question. **Id.** at 18-19. In support, Appellant contends that there was no witness testimony establishing that Appellant "ever touched the firearm or was in actual possession of the firearm." **Id.** at 19. Further, Appellant contends that there was insufficient evidence of constructive possession

because “the firearm was in a bag in which it was never testified that he had access to[.]” ***Id.***

In reviewing a challenge to the sufficiency of the evidence, our standard of review is as follows:

Because a determination of evidentiary sufficiency presents a question of law, our standard of review is *de novo* and our scope of review is plenary. In reviewing the sufficiency of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth as verdict winner, were sufficient to prove every element of the offense beyond a reasonable doubt. The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. It is within the province of the fact-finder to determine the weight to be accorded to each witness’s testimony and to believe all, part, or none of the evidence. The Commonwealth may sustain its burden of proving every element of the crime by means of wholly circumstantial evidence. Moreover, as an appellate court, we may not re-weigh the evidence and substitute our judgment for that of the factfinder.

Commonwealth v. Palmer, 192 A.3d 85, 89 (Pa. Super. 2018) (citation omitted and some formatting altered).

As noted previously, Appellant was charged with three VUFA offenses, all of which required the Commonwealth to prove that he possessed a firearm. ***See*** 18 Pa.C.S. §§ 6106(a)(1), 6108, and 6110.2, respectively. Possession can be established “by proving actual possession, constructive possession, or joint constructive possession.” ***Commonwealth v. Parrish***, 191 A.3d 31, 36 (Pa. Super. 2018) (citation omitted). “Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely

than not.” ***Commonwealth v. McClellan***, 178 A.3d 874, 878 (Pa. Super. 2018) (citation omitted).

This Court has explained:

Where a defendant is not in actual possession of the prohibited items, the Commonwealth must establish that the defendant had constructive possession to support the conviction. Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. We have defined constructive possession as conscious dominion, meaning that the defendant has 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.

It is well established that, as with any other element of a crime, constructive possession may be proven by circumstantial evidence. In other words, the Commonwealth must establish facts from which the trier of fact can reasonably infer that the defendant exercised dominion and control over the contraband at issue.

Parrish, 191 A.3d at 36-37 (citations omitted and formatting altered).

Here, the trial court addressed Appellant’s claims as follows:

At trial, extensive testimonial evidence was presented to the jurors tending to establish [Appellant’s] constructive possession of the firearm. Specifically, responding officers testified that they received reports that three men were in a specific area of the city, all were armed, and reporters heard about 30 gunshots. When police responded to the area roughly three minutes later, they found three men who matched the physical descriptions contained in the reports. Police approached the three men and found [Appellant] pushing the wheelchair of one of the other men. A black [bag] was hanging on the back of the wheelchair directly in front of [Appellant], within which was an operable and loaded nine-millimeter firearm with its handle pointed upwards towards [Appellant]. Additionally, the t-shirt recovered from [Appellant’s] person underwent forensic testing and was found to be carrying gunshot residue.

Trial Ct. Ltr. at 1.

Following our review of the record, and in viewing this evidence in the light most favorable to the Commonwealth, we conclude that there was sufficient evidence demonstrating that Appellant possessed the firearm. **See Palmer**, 192 A.3d at 89. The evidence reflects that the firearm at issue was located in such a location where Appellant had the ability and intent to exercise dominion and control over the firearm, which is sufficient to prove constructive possession. **See Commonwealth v. Peters**, 218 A.3d 1206, 1209 (Pa. 2019) (stating that “[d]ominion and control means the defendant had the ability to reduce the item to actual possession immediately, . . . or was otherwise able to govern its use or disposition as if in physical possession” (citations omitted)); **Commonwealth v. Vargas**, 108 A.3d 858, 868 (Pa. Super. 2014) (*en banc*) (providing that “intent to maintain a conscious dominion may be inferred from the totality of the circumstances[.]” (citation omitted)). Accordingly, Appellant is not entitled to relief on this claim.

Appellant also challenges the sufficiency of the evidence proving the concealment element of firearms not to be carried without a license. Appellant’s Brief at 19-21. Specifically, Appellant argues that the firearm was not concealed because “the firearm was sticking out of the bag/pouch and clearly visible to [] Officer [Kenner] upon approaching [Appellant. Officer] Kenner approached [Appellant] and noticed inside that bag that was widely open was a firearm with the handle sticking up.” **Id.** at 20 (citations omitted).

Section 6106 of the Crimes Code prohibits a person from concealing a firearm “on or about his person . . . without a valid and lawfully issued license[.]” 18 Pa.C.S. § 6106(a)(1). Our Supreme Court has explained:

The Courts of this Commonwealth have never adopted the view that absolute concealment of the firearm is required to establish a violation of Section 6106. This interpretation would be unreasonable as it would allow the defendant to avoid prosecution for carrying an unlicensed concealed weapon if he were to leave the smallest portion of the firearm exposed to view. The prohibition on carrying an unlicensed concealed weapon serves to apprise citizens of the fact that an individual is carrying deadly force, thereby lessening the chance that such [an] individual could take his adversary, or anyone else, at a fatal disadvantage. Allowing unlicensed individuals to circumvent the concealment proscription by revealing a small portion of the gun that would go unnoticed by ordinary observation would thwart the very transparency that the statute promotes. Accordingly, we hold that one “carries a firearm concealed on or about his person” pursuant to Section 6106 when, viewed in the totality of the circumstances, he or she carries the firearm in such a manner as to hide the firearm from ordinary observation; absolute invisibility to others is not required.

Commonwealth v. Montgomery, 234 A.3d 523, 536 (Pa. 2020) (footnote omitted).³

Here, the record reflects that although Officer Kenner observed the black bag attached to the back of the wheelchair, he did not notice the firearm until he approached Appellant. **See** N.T. Trial at 36-37. During cross-examination, Officer Kenner testified that the bag on the back of the wheelchair was “big enough, wide enough that **when you walked right up to it, you could see**

³ We note that the ***Montgomery*** Court was reviewing a case at the preliminary hearing stage. ***Id.*** at 537.

the firearm.” *Id.* at 88 (emphasis added). Even though the handle of the firearm was visible, the Commonwealth established that Appellant took a step to hide the firearm from ordinary observation by placing the firearm in the black recyclable grocery bag on the back of the wheelchair. Therefore, we conclude that the Commonwealth presented sufficient evidence demonstrating that Appellant concealed the firearm. ***See Montgomery***, 234 A.3d at 536. Accordingly, Appellant is not entitled to relief.⁴

Weight of the Evidence

In his second issue, Appellant raises a weight of the evidence challenge. Specifically, Appellant argues that “the firearm was not concealed and [Officer] Kenner never purported to say it was concealed” and that “the great weight of the evidence tends to indicate that [Appellant] did not possess the firearm which was contained in the backpack. Appellant’s Brief at 28.

When reviewing the denial of a motion for a new trial based on weight of the evidence, we are governed by the following standard of review:

A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts

⁴ We note that in his brief, Appellant also argues that the Commonwealth presented insufficient evidence that Appellant “acted with the requisite guilty knowledge or criminal intent” relating to his conviction of possession of a firearm with an altered serial number. Appellant’s Brief at 23. However, Appellant did not raise this issue in his Rule 1925(b) statement. Therefore, that claim is waived. ***See Commonwealth v. McFarland***, 278 A.3d 369, 381 (Pa. Super. 2022) (reiterating that to preserve a sufficiency claim, an appellant “must specify the element or elements upon which the evidence was insufficient” (citation omitted)), *appeal denied*, 291 A.3d 863 (Pa. 2023).

would have arrived at a different conclusion. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court. 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.

Commonwealth v. Windslowe, 158 A.3d 698, 712 (Pa. Super. 2017)

(citations omitted). As this Court has repeatedly stated,

The weight of the evidence is exclusively for the finder of fact, who is free to believe all, none, or some of the evidence and to determine the credibility of the witnesses. Resolving contradictory testimony and questions of credibility are matters for the finder of fact. It is well-settled that we cannot substitute our judgment for that of the trier of fact.

* * *

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 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.

Furthermore, in order for a defendant to prevail on a challenge to the weight of the evidence, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court.

Commonwealth v. Spence, 290 A.3d 301, 311 (Pa. Super. 2023) (citations omitted and formatting altered).

In its letter to this Court, the trial court did not address Appellant's weight-of-the-evidence claim.⁵ However, based on our review of the record, we discern no abuse of discretion in the denial of Appellant's weight-of-the-evidence claim. **See *Windslowe***, 158 A.3d at 712. Moreover, Appellant failed to make an argument that comports with our standard of review. **See *Commonwealth v. Morales***, 91 A.3d 80, 92 (Pa. 2014) (noting that the defendant "has not argued, much less demonstrated, that the trial court committed a palpable abuse of discretion by rejecting [his] request for a new trial based on the weight of the evidence[,] therefore, the defendant "failed to make an argument that comports with the appropriate standard of review.""). Therefore, Appellant is not entitled to relief.

Discretionary Aspects of Sentence

In his final issue, Appellant raises a challenge to the discretionary aspects of his sentence with regard to his conviction for possession of firearm prohibited. Appellant's Brief at 36. Specifically, Appellant argues that by sentencing Appellant within the aggravated guideline range, the trial court "imposed a manifestly excessive and unreasonable sentence contrary to the fundamental norms which underlie the sentencing process." ***Id.*** at 28-29.

⁵ We also note that the trial court denied Appellant's post-sentence motions by operation of law. Because this case involved a jury trial and "all credibility determinations have been made by the jury and not by the trial judge, we are not precluded from addressing [the defendant's] weight claim." ***Commonwealth v. Upshur***, 764 A.2d 69, 73 (Pa. Super. 2000) (*en banc*) (citation and footnote omitted). "[T]he effect of the denial operates in the same manner as if the court had denied the motion itself." ***Id.***

"[C]hallenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right." **Commonwealth v. Derry**, 150 A.3d 987, 991 (Pa. Super. 2016) (citations omitted). Before reaching the merits of such claims, we must determine:

(1) whether the appeal is timely; (2) whether Appellant preserved his issues; (3) whether Appellant's brief includes a [Pa.R.A.P. 2119(f)] concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is inappropriate under the sentencing code.

Commonwealth v. Corley, 31 A.3d 293, 296 (Pa. Super. 2011) (citations omitted).

"To preserve an attack on the discretionary aspects of sentence, an appellant must raise his issues at sentencing or in a post-sentence motion. Issues not presented to the sentencing court are waived and cannot be raised for the first time on appeal." **Commonwealth v. Malovich**, 903 A.2d 1247, 1251 (Pa. Super. 2006) (citations omitted); **see also** Pa.R.A.P. 302(a).

"The determination of what constitutes a substantial question must be evaluated on a case-by-case basis." **Commonwealth v. Battles**, 169 A.3d 1086, 1090 (Pa. Super. 2017) (citation omitted). "A substantial question exists only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms

which underlie the sentencing process.” ***Commonwealth v. Grays***, 167 A.3d 793, 816 (Pa. Super. 2017) (citation omitted).

Here, the record confirms that Appellant preserved his sentencing claims in a post-sentence motion, filed a timely notice of appeal, and included the issues in his Rule 1925(b) statement. Appellant has also included a Rule 2119(f) statement in his brief. Additionally, we conclude that Appellant has raised a substantial question for review. ***See Commonwealth v. Kurtz***, 294 A.3d 509, 535-36 (Pa. Super. 2023) (finding a substantial question for review where the defendant “pair[ed] an excessive sentence claim with an assertion that the [trial] court failed to consider mitigating evidence” (citation omitted)), *appeal granted on other grounds*, --- A.3d ---, 2023 WL 7123941 (Pa. filed Oct. 30, 2023).

Our well-settled standard of review is as follows:

Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Additionally, our review of the discretionary aspects of a sentence is confined by the statutory mandates of 42 Pa.C.S. § 9781(c) and (d). Subsection 9781(c) provides:

The appellate court shall vacate the sentence and remand the case to the sentencing court with instructions if it finds:

- (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;

(2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or

(3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.

In all other cases the appellate court shall affirm the sentence imposed by the sentencing court.

42 Pa.C.S. § 9781(c).

In reviewing the record, we consider:

(1) The nature and circumstances of the offense and the history and characteristics of the defendant.

(2) The opportunity of the sentencing court to observe the defendant, including any presentence investigation [(PSI)].

(3) The findings upon which the sentence was based.

(4) The guidelines promulgated by the commission.

42 Pa.C.S. § 9781(d).

Commonwealth v. Raven, 97 A.3d 1244, 1253-54 (Pa. Super. 2014) (some citations omitted and some formatting altered).

“When imposing a sentence, the sentencing court must consider the factors set out in 42 Pa.C.S. § 9721(b), [including] the protection of the public, [the] gravity of [the] offense in relation to [the] impact on [the] victim and [the] community, and [the] rehabilitative needs of the defendant.”

Commonwealth v. Fullin, 892 A.2d 843, 847 (Pa. Super. 2006) (citation omitted and formatting altered). Additionally, the trial court “must consider the sentencing guidelines.” ***Id.*** at 848 (citation omitted). Where a PSI report exists, this Court will “presume that the sentencing judge was aware of

relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors." **Commonwealth v. Watson**, 228 A.3d 928, 936 (Pa. Super. 2020) (citation omitted).

"Generally, Pennsylvania law affords the sentencing court discretion to impose its sentence concurrently or consecutively to other sentences being imposed at the same time or to sentences already imposed. [An a]ppellant is not entitled to a 'volume discount' on his multiple convictions by the imposition of concurrent sentences." **Commonwealth v. Brown**, 249 A.3d 1206, 1216 (Pa. Super. 2021) (citations omitted and formatting altered).

Here, at sentencing, the trial court stated:

In fashioning a sentence here today, the [trial court] has taken into account the [PSI report], the mental health reports, the letters of support that were given to [the trial court] on behalf of [Appellant.]

I was also the presiding judge in this jury trial. One of the most striking facts was the circumstances of the initial stop with regards to the multiple rounds, large quantity of rounds that were fired, the types of firearms involved amongst these three individuals who were together.

But it's truly these circumstances that – it's not unusual for [the trial court] to see someone come before [it] with a prior record score of a 5 or [] an offense gravity score of an 11.

But it is the circumstances that led to these particular charges that has [the trial court] the most concerned.

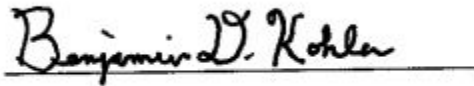
N.T. Sentencing Hr'g, 7/22/22, at 14-15.

Based upon our review of the record, we discern no abuse of discretion by the trial court. **See Raven**, 97 A.3d at 1253-54. The record reflects that

the trial court stated its consideration of the factors from Section 9721, including the protection of the public, the gravity of the offense, and Appellant's rehabilitative needs, and had the benefit of the PSI report. **See Fullin**, 892 A.2d at 847-48; 42 Pa.C.S. § 9721(b). Further, Appellant's sentence of seven to fourteen years' incarceration was within the aggravated guideline range, and we have no basis to conclude that his sentence was unreasonable. **See Raven**, 97 A.3d at 1253-54. Accordingly, Appellant is not entitled to relief.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

Date: 1/18/2024