

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
	:	
ISMAEL FELIX ROSARIO	:	
	:	
Appellant	:	No. 371 MDA 2023

Appeal from the Judgment of Sentence Entered February 7, 2023  
In the Court of Common Pleas of Lancaster County Criminal Division at  
No(s): CP-36-CR-0002772-2021

BEFORE: BOWES, J., LAZARUS, J., and STEVENS, P.J.E.\*

MEMORANDUM BY LAZARUS, J.:

**FILED: JANUARY 18, 2024**

Ismael Felix Rosario appeals from the judgment of sentence, entered in the Court of Common Pleas of Lancaster County, following his convictions of one count each of delivery,<sup>1</sup> carrying a firearm without a license,<sup>2</sup> persons not to possess,<sup>3</sup> possession of a small amount of marijuana,<sup>4</sup> and possession of drug paraphernalia,<sup>5</sup> and two counts of possession with intent to deliver

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 35 P.S. § 780-113(a)(30).

<sup>2</sup> 18 Pa.C.S.A. § 6106(a)(1)

<sup>3</sup> **Id.** at § 6105(a)(1).

<sup>4</sup> 35 P.S. § 780-113(a)(31).

<sup>5</sup> **Id.** at § (a)(32).

(PWID).<sup>6</sup> After review, we affirm on the well-written opinion authored by the Honorable Merrill M. Spahn, Jr.

We adopt the trial court's full factual summary set forth in its opinion, **see** Trial Court Opinion, 5/3/23, at 3-8, but, nevertheless, provide a shortened version here. On June 22, 2021, the Lancaster City Bureau of Police's Selective Enforcement Unit (SEU), was operating a "Buy/Walk"<sup>7</sup> sting targeting street-level drug dealing in Lancaster City. An undercover officer made contact with a known low-level drug dealer, Dominic Padurano, and arranged to buy narcotics. Padurano and his roommate, William McCall, met with the undercover officer, got into his vehicle, and directed him to the 400 block of South Christian Street in Lancaster City.

Once there, McCall exited the vehicle with \$100.00 in documented police funds, approached and entered a white Acura, and eventually exited the white Acura. Upon returning to the undercover officer, McCall revealed he had none of the \$100.00 documented funds, and instead had \$80 worth of heroin and \$20 worth of crack cocaine. Shortly thereafter, Officer Matthew Deibler, uniformed and in a marked police cruiser, approached the white Acura and informed the two men, later identified as Rosario and Ernie Vega, that they

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<sup>6</sup> **Id.** at § 780-113(a)(30).

<sup>7</sup> The trial court defined a "Buy/Walk" as an operation where the "officer makes contact either with drug dealers or with unwitting informants used as middlemen to make various street-level narcotics purchases using documented buy money." **Id.** at 4.

were parked in a “no parking zone.” Neither occupant had a driver’s license and, in response, Officer Deibler asked for their names, birth dates, and home addresses. Initially, Officer Deibler had issues identifying both men, as Vega had provided a false name, and Officer Deibler had misspelled Rosario’s name. During this time, additional police officers arrived on the scene and observed, in plain view, a clear corner-tied baggie under Rosario’s leg. As a result of the entire interaction and the plain view observation, the officers ordered the men out of the white Acura and performed a pat down for officer safety.

During the pat down, one of the officers observed a firearm on the floor of the vehicle, and two clear corner-tied baggies, one containing crack cocaine and one containing forty-two pills of methamphetamine. Rosario was placed under arrest and charged with the above-mentioned offenses. Police then secured a search warrant for the vehicle and discovered a firearm with an accompanying magazine, 125 pills containing methamphetamine, 17 blue wax sleeves containing heroin and fentanyl, three foil packs of THC gummies, one gram of marijuana, sandwich bags, a scale, various paperwork, IDs, and Visa cards belonging to both men.

On November 24, 2021, Rosario filed an omnibus pre-trial motion in which he raised a motion to sever and a motion to suppress evidence. Rosario sought severance of his persons not to possess charge. Additionally, Rosario sought to suppress all evidence from the police encounter as fruits of the poisonous tree where the police lacked either the requisite reasonable

suspicion or probable cause for the stop, his arrest, and the subsequent search warrant.

On March 10, 2022, and March 30, 2022, the trial court conducted a bifurcated suppression hearing.<sup>8</sup> After the hearing, the trial court granted Rosario's motion to sever, and denied Rosario's motion to suppress. In particular, the trial court found that the police had reasonable suspicion when they detained Rosario and that no undue amount of time occurred during Rosario's detention. **See** N.T. Suppression Hearing, 3/30/22, at 20-21.

On November 16-17, 2022, Rosario proceeded to a jury trial on the severed charge of person not to possess. After the jury trial, Rosario was convicted of person not to possess, and the trial court postponed the bench trial on the remaining offenses and ordered a pre-sentence investigation report. On February 7, 2023, the trial court conducted a bench trial on Rosario's remaining offenses and found Rosario guilty.

On February 7, 2023, the same day of the bench trial, the trial court conducted a sentencing hearing and sentenced Rosario to one to two years in prison for his conviction of delivery – cocaine; two to five years in prison for his first conviction PWID; five to ten years in prison for his second conviction of PWID; three-and-one-half to seven years in prison for his conviction of carrying a firearm without a license; seven-and-one-half to fifteen years in

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<sup>8</sup> Officer Deibler was unavailable on March 10, 2022, and, accordingly, the trial court postponed the hearing with regard to just his testimony.

prison for his conviction of person not to possess; and to pay costs of prosecution on his remaining convictions. The trial court imposed Rosario's sentences at his first conviction of PWID and person not to possess consecutively. Rosario's remaining sentences were imposed concurrently, resulting in an aggregate sentence of 9½ to 20 years' incarceration plus costs.

Rosario did not file a post-sentence motion. Rosario filed a timely notice of appeal, and a court-ordered Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. Rosario now raises the following claims for our review:

1. Did the suppression court err in denying suppression of illegally seized evidence after [a] warrantless, illegal seizure and search of [a] motor vehicle and of [Rosario,] who was a passenger in the vehicle, where neither seizure and search of the vehicle, nor seizure and search of [Rosario] were supported by reasonable suspicion or probable cause?
2. Did the [c]ourt err in answering a jury question, thereby[] lowering the standard of proof required of the Commonwealth from "beyond a reasonable doubt" to "more likely than not?"

Brief for Appellant, at 4.

In his first claim, Rosario argues that the trial court erred in denying suppression. **See id.** at 12-15. Rosario contends that when Officer Deibler approached the car and informed him that he was in a "no parking zone," Rosario was no longer free to leave and, therefore, was under arrest. **Id.** at 14. Rosario asserts that because he was under arrest, the entire subsequent search was fruit of the poisonous tree. **Id.** at 14-15.

In reviewing the denial of a suppression motion,

[w]e may consider only the Commonwealth's evidence and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error. An appellate court, of course, is not bound by the suppression court's conclusions of law.

***Commonwealth v. Hampton***, 204 A.3d 452, 456 (Pa. Super. 2019). Such an inquiry must take into account the totality of the circumstances.

***Commonwealth v. Delvalle***, 74 A.3d 1081, 1085 (Pa. Super. 2013).

We rely on and adopt the thorough and well-reasoned opinion authored by the trial court. **See** Trial Court Opinion, 5/3/23, at 8-12. We emphasize that the trial court addressed the moment of detention as follows:

The SEU officers observed McCall leave the undercover officer's vehicle, enter the white Acura with \$100[.00] in documented buy money, and return to the undercover officer's vehicle moments later with a quantity of drugs worth \$100[.00] and none of the buy money. Padurano and McCall had specifically instructed the undercover officer to drive to the street on which the white Acura was located to obtain drugs, and at no point did McCall interact with anyone but the occupants of the white Acura before returning with drugs in hand. Importantly, the officers were unable to view the exchange within the Acura, requiring further investigation to ascertain the identity of the dealer in the Acura. As such, as soon as [the undercover officer] confirmed that a successful drug purchase had occurred, the SEU officers possessed reasonable suspicion to initiate an investigatory detention of the Acura's occupants.

Trial Court Opinion, 5/3/23, at 11-12.

We further observe that Detective Timothy Sinnott followed the undercover officer in a separate car and observed the entire interaction. **See** N.T. Suppression Hearing, 3/10/22, at 42-46 (Detective Sinnott detailing he

operated “surveillance car” and followed undercover officer; observed McGall enter and exit white Acura; observed white Acura remain in place throughout events and contact with Officer Deibler). After careful review, we conclude that the trial court’s findings of fact are supported by the record, and its legal conclusions are sound. **See Hampton, supra.** Having adopted the trial court’s analysis, we afford Rosario no relief on this claim.

In his second issue, Rosario argues that the trial court erred in issuing a jury instruction about constructive possession, in which it told the jury that the Commonwealth needed to prove it was “more likely than not” that Rosario constructively possessed the firearm. **See** Brief for Appellant, at 15-17. Rosario contends that this phrasing misled the jury from the proper standard of “beyond reasonable doubt.” **Id.** Rosario acknowledges that the trial court reiterated several times that the Commonwealth must prove possession beyond a reasonable doubt, he nevertheless asserts that the “more likely than not” phrasing had already confused the jury. **Id.** at 16-17.

Pennsylvania courts are generally afforded “broad discretion in phrasing [jury] instructions, and may choose [their] own wording so long as the law is clearly[,] adequately[,] and accurately presented to the jury for its consideration. Only where there is an abuse of discretion or an inaccurate statement of law is there reversible error.” **Commonwealth v. Antidormi**, 84 A.3d 738, 754 (Pa. Super. 2014).

During deliberations, the jury sent a question to the trial court requesting that the trial court “define possession in the eyes of the law.” N.T. Jury Trial (Volume 2), 11/17/22, at 210. In response, the trial court spoke with the parties, and, after overruling Rosario’s objection, read the following jury instructions to the jury:

As I told you in my instructions, there are essentially two elements to this offense. The first element is that the Commonwealth **must prove beyond a reasonable doubt** that the defendant was a person prohibited by law from possessing . . . a firearm because [of] a prior conviction which also must be proven beyond a reasonable doubt by the Commonwealth.

The second, which goes directly to your question, is that the Commonwealth **must prove beyond a reasonable doubt** that the defendant[, ] on a date more than 60 days from the time when he became prohibited from possessing a firearm[, ] possessed that firearm.

\* \* \*

For a person to possess a firearm, he or she must have the intent to control and the power to control the firearm.

In essence, possession may be proven by a firearm being physically on the person of an individual, or, our [a]ppellate [c]ourts have instructed us, that illegal possession of a firearm may be established by what they call constructive possession.

With respect to constructive possession, the [a]ppellate [c]ourts have held that when contraband is not found on a defendant’s person, the Commonwealth must establish constructive possession; that is, the power to control the contraband and the intent to exercise that control.

The fact that another person may also have control or access does not eliminate the defendant’s constructive possession.

As with any other element of a crime, constructive possession may be proven by circumstantial evidence. The requisite knowledge and intent may be inferred from the totality of the circumstances. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not.

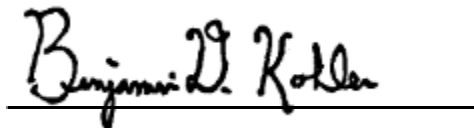
**So again, the element of possession must be proven beyond a reasonable doubt.** And that's further guidance as to the definition of possession.

***Id.*** at 210-12 (emphasis added).<sup>9</sup>

Mindful of the record, the applicable standard of review, the relevant case law, and the parties' briefs, we affirm on the basis of the trial court's thorough and well-reasoned opinion. **See** Trial Court Opinion, 5/3/23, at 1-14. Consequently, we afford Rosario no relief. The parties are directed to attach a copy of the trial court's opinion in the event of further proceedings.

Judgment of sentence affirmed.

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

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<sup>9</sup> The trial court initially defined possession for the jury using the standardized jury instructions. **See *id.*** at 201-02; **see also** Trial Court Opinion, 5/3/23, at 11-14.

May 3, 2023

Re: Ismael Rosario

Cp Cr No: 2772-2021

Superior Cr No: 371 MDA 2023

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IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA  
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :  
 :  
 v. : No. CP-36-CR-0002772-2021  
 :  
 ISMAEL ROSARIO :

**OPINION PURSUANT TO RULE 1925(a) OF THE  
PENNSYLVANIA RULES OF APPELLATE PROCEDURE**

BY: SPAHN, JR., J  
May 2, 2023

**BACKGROUND**

By Criminal Information docketed to Number CP-36-CR-0002772-2021, Appellant was charged with allegedly having committed the offenses of Delivery of Cocaine,<sup>1</sup> Possession with Intent to Deliver Cocaine,<sup>2</sup> Possession with Intent to Deliver Heroin,<sup>3</sup> Possession with Intent to Deliver Methamphetamine,<sup>4</sup> Firearms Not to be Carried Without a License,<sup>5</sup> Persons Not to Possess, Use, Manufacture, Control, Sell, or Transfer Firearms,<sup>6</sup> Possession of a Small Amount of Marijuana,<sup>7</sup> and Possession of Drug Paraphernalia.<sup>8</sup> Said charges stem from a criminal incident alleged to have occurred in Lancaster City, Lancaster County, Pennsylvania on June 22, 2021.

On November 24, 2021, Appellant filed an Omnibus Pre-Trial Motion. Evidentiary hearings were held relative to the motion on March 10 and March 30 of 2022 before the Honorable Dennis E. Reinaker. In said motion, Appellant raised multiple claims.

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<sup>1</sup> 35 Pa.C.S.A. § 780-113(a)(30).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 18 Pa.C.S.A. § 6106(a)(1).

<sup>6</sup> 18 Pa.C.S.A. § 6105(a)(1).

<sup>7</sup> 35 Pa.C.S.A. § 780-113(a)(31).

<sup>8</sup> 35 Pa.C.S.A. § 780-113(a)(32).

Appellant first motioned for the severance of the charge of Persons Not to Possess, Use, Manufacture, Control, Sell, or Transfer Firearms, alleging that the introduction of evidence of a prior conviction which renders him a person not to possess would unduly prejudice him at trial and that such evidence would not be admissible at trial for the remaining counts. Next, Appellant alleged that the officers lacked sufficient reasonable suspicion or probable cause for the initial stop, his arrest, and the subsequent warranted search of the vehicle Appellant occupied during the alleged criminal incident. Accordingly, Appellant sought suppression of all evidence produced from the initiation of the stop through the completion of the search of the vehicle as fruits of the poisonous tree.

On March 30, 2022, at the conclusion of the evidentiary hearings relative to the motion, the court granted in part, and denied in part, Appellant's motion. First, the court granted Appellant's claim to sever the Persons Not to Possess, Use, Manufacture, Control, Sell, or Transfer Firearms charge.<sup>9</sup> Second, the court denied Appellant's claims that: the officers lacked sufficient reasonable suspicion to initiate the stop; the officers lacked sufficient probable cause to arrest Appellant; and the officers lacked sufficient probable cause to secure a search warrant for the vehicle.

Following the court's ruling regarding Appellant's Omnibus Pre-Trial Motion, a jury trial was held on November 16, 2022 relative to the severed charge of Persons Not to Possess, Use, Manufacture, Control, Sell, or Transfer Firearms.<sup>10</sup> On November 17, 2022, the jury returned a verdict finding the Appellant guilty. Subsequently, a bench trial was held relative to the remaining charges on February 7, 2023. The court found the Appellant guilty of all the remaining charges

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<sup>9</sup> The Commonwealth did not oppose this motion and an understanding was reached during the evidentiary hearings that this was the appropriate remedy.

<sup>10</sup> Following the court's ruling regarding the Appellant's Omnibus Pre-Trial Motion, this case was reassigned to the Honorable Merrill M. Spahn, Jr., who presided over both the subsequent jury and bench trials.

except count three, Possession with Intent to Deliver Heroin. Accordingly, the court sentenced Appellant to a sentence of not less than nine-and-one-half nor more than twenty years incarceration in the State Correctional System. Thereafter, Appellant filed a timely notice of appeal to the Superior Court of Pennsylvania on March 6, 2023. In response to the relevant order of the court, Appellant filed a statement of errors complained of on March 31, 2023. As such, this matter is ripe for review.

### **FINDINGS OF FACT**

Based upon the testimony and evidence presented at the suppression hearings, the court makes the following findings of fact: Officer Joshua Aziza has been employed since June of 2015 as a member of the Lancaster City Bureau of Police, has been a member of the Bureau's Selective Enforcement Unit ("SEU") for three years, and was working undercover in his SEU capacity on the day of the alleged criminal incident. (N.T.S.H., 3/10/22, p. 4-6). Detective Timothy Sinnott has been employed as a member of the Lancaster City Bureau of Police since June of 2014, was a member of the SEU from December 2018 to January of 2022, and was working in his SEU capacity on the day of the alleged criminal incident. (N.T.S.H., 3/10/22, p. 40-41). Over the course of his career, Detective Sinnott has been involved in hundreds of drug investigations and has, at different times, played every type of role involved in such investigations such as working undercover or operating surveillance equipment. *Id.* On the day of the alleged criminal incident, Detective Sinnott acted as the primary surveillance officer for the undercover operation. (N.T.S.H., 3/10/22, p. 41). Officer Matthew Deibler is an officer for the Lancaster City Bureau of Police. (N.T.S.H., 3/30/22, p. 4). On the day of the alleged criminal incident, Officer Deibler was working with the patrol division of the SEU in the contact car.<sup>11</sup> (N.T.S.H., 3/30/22, p. 4-5). Officer Shane Douglas-Snyder

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<sup>11</sup> A contact car is a marked police car used by uniformed officers to make contact with and identify any individuals or vehicles targeted as part of a "Buy/Walk" operation.

is a member of the Lancaster City Bureau of Police and has been so employed since November of 2016. (N.T.S.H., 3/10/22, p. 18). Officer Jonathon Reppert is a member of the Lancaster City Bureau of Police and has been so employed since June of 2007. (N.T.S.H., 3/10/22, p. 34). On the day of the alleged incident, Officers Douglas-Snyder and Reppert were working as patrol officers aiding the SEU operation. (N.T.S.H., 3/10/22, p. 18-19, 35).

On June 22, 2021, Officer Aziza was working undercover as part of a “Buy/Walk” operation targeting street-level drug dealing within Lancaster City, with Detective Sinnott leading the operation as primary surveillance officer. (N.T.S.H., 3/10/22, p. 4-6, p. 41). A “Buy/Walk” operation involves an undercover officer making contact either with drug dealers or with unwitting informants used as middlemen to make various street-level narcotics purchases using documented buy money. (N.T.S.H., 3/10/22, p. 6). After the undercover officer completes the narcotics purchase and leaves the scene of the exchange, the contact car officers involved in the operation work to ascertain the identity of the dealer and/or middleman for the purposes of prosecution. *Id.*

On that day, at 3:19 p.m., an undercover Officer Aziza made contact with a known low-level drug dealer, Dominic Padurano, via a cellular telephone (“phone”) call. (N.T.S.H., 3/10/22, p. 8). Officer Aziza called Padurano to obtain illegal narcotics, specifically heroin, from Padurano. *Id.* Padurano initially told Officer Aziza to meet him and his roommate, William McCall, at the Turkey Hill convenience store at 501 Park Avenue, Lancaster City, Lancaster County, Pennsylvania. *Id.* While Officer Aziza was en route to the Turkey Hill, Padurano texted Officer Aziza to meet Padurano and McCall at their residence, 620 Olive Street, Lancaster City, Lancaster County, Pennsylvania. (N.T.S.H., 3/10/22, p. 9). Officer Aziza picked up Padurano and McCall from their residence moments later. *Id.* Then, Padurano, sitting in the passenger seat with McCall

in the backseat, directed Officer Aziza to drive to the 400 block of South Christian Street in Lancaster City. *Id.*

Upon arriving, Officer Aziza parked on the west side the street in front of 440 South Christian Street, Lancaster City, Lancaster County, Pennsylvania. *Id.* Officer Aziza provided McCall with \$100 of the documented buy money and instructed McCall to get him \$80 worth of heroin and \$20 worth of crack cocaine. (N.T.S.H., 3/10/22, p. 9-10). McCall exited the vehicle and walked across to the east side of the street. (N.T.S.H., 3/10/22, p. 10). McCall approached, and initially walked past, a white Acura sedan. *Id.* After McCall took a few steps past the Acura, someone from inside the Acura got McCall's attention and McCall turned and, at 3:41 p.m., entered the Acura on the rear passenger side. (N.T.S.H., 3/10/22, p. 10-11). Still with Padurano, Officer Aziza observed all of this in his rearview mirror but due the Acura having heavily tinted windows, was unable to observe what occurred once McCall entered the Acura.<sup>12</sup> (N.T.S.H., 3/10/22, p. 11).

After being in the car for approximately three minutes, McCall exited the Acura and returned to the car driven by Officer Aziza. *Id.* McCall returned to Officer Aziza with eight unstamped blue wax sleeves suspected of containing heroin and fentanyl and one clear corner-tied baggie of crack cocaine. *Id.* McCall was compensated for his role as middleman with three of the eight blue wax sleeves, giving the remaining five to Officer Aziza along with the baggie of crack cocaine. (N.T.S.H., 3/10/22, p. 11-12). Within ten minutes of acquiring the narcotics, Officer Aziza had returned Padurano and McCall to their residence at 620 Olive Street. (N.T.S.H., 3/10/22, p. 13). Officer Aziza then immediately advised the SEU unit that a "good deal" had occurred. *Id.*

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<sup>12</sup> Besides the interaction within the Acura, Officer Aziza never lost visual contact of McCall.

Accordingly, Officer Deibler was instructed to make contact with the white Acura to ascertain the identities of the suspected drug dealers. (N.T.S.H., 3/30/22, p. 5).

Officer Deibler arrived at the 400 block of South Christian Street at approximately 3:50 p.m. and observed that the white Acura was illegally parked in a temporary no parking zone. (N.T.S.H., 3/30/22, p. 6). Officer Deibler decided to use this parking violation as a ruse to identify the occupants of the vehicle rather than alert the suspects to the drug investigation and approached the sedan. (N.T.S.H., 3/30/22, p. 6-7). Upon making contact with the sedan, Officer Deibler observed two male occupants inside. *Id.* Officer Deibler made contact with the driver, advised him that he was parked illegally, and requested identifying information<sup>13</sup> from both of them as neither occupant was in possession of a driver's license. *Id.* The driver claimed his name was Matthew Wilson<sup>14</sup> and the passenger informed Officer Deibler his name was Ismael Rosario (Appellant). (N.T.S.H., 3/30/22, p. 7, 10).

As Officer Deibler relayed the occupants' information to dispatch, other officers arrived on scene and made contact with the Acura. (N.T.S.H., 3/30/22, p. 7). Dispatch informed Officer Deibler that the name Matthew Wilson had returned a result, but "Ishmael" Rosario had not. (N.T.S.H., 3/30/22, p. 8). Officer Deibler then confirmed the spelling of Appellant's name, realized there was "no h," and had the information run again through dispatch. *Id.* While waiting for dispatch to run Appellant's information a second time, Officer Deibler stepped away to make a phone call to Detective Sinnott and inform him of what he had learned. (N.T.S.H., 3/30/22, p. 8-9).

After informing Detective Sinnott of the identities of the occupants, Officer Deibler ended the phone call, received confirmation from dispatch that Appellant's information was correct

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<sup>13</sup> Names, birth dates, and places of residence.

<sup>14</sup> This was later determined to be false information and that the driver's real name is Ernie Vega.

following the re-spelling, and headed back towards the Acura. (N.T.S.H., 3/30/22, p. 9). As he was nearing the Acura, another officer on scene, Officer Reppert, informed Officer Deibler that he had observed a clear corner tied baggie under Appellant's leg but could not see what the baggie contained. *Id.* Officer Deibler then called Detective Sinnott again to inform him of the baggie and ask how Detective Sinnott would like him to proceed. *Id.* Detective Sinnott instructed Officer Deibler to remove the occupants from the vehicle, conduct pat-down searches, and ask for consent to search the vehicle, with the understanding that a search warrant would be requested if the occupants did not consent to the vehicle search. *Id.*

Accordingly, Officer Deibler and the other officers on the scene instructed the occupants to put their hands on their head and step out of the vehicle; both occupants complied. (N.T.S.H., 3/30/22, p. 9-10). Officer Deibler assisted the driver out of the vehicle and conducted a pat-down search which only produced a bundle of cash containing \$80 of the documented buy money. (N.T.S.H., 3/10/22, C. Ex. 1). Officer Douglas-Snyder assisted Appellant out of the vehicle and conducted a pat-down search. (N.T.S.H., 3/10/22, p. 26-29). As Officer Douglas-Snyder began his pat-down search of Appellant, Officer Reppert observed a firearm on the floor of the front passenger side resting between the seat and the door frame and alerted Officer Douglas-Snyder. (N.T.S.H., 3/10/22, p. 30-31). At this point, Officer Douglas-Snyder placed Appellant in handcuffs for safety and finished his pat-down search.<sup>15</sup> (N.T.S.H., 3/10/22, p. 31). In addition to the corner tied baggie of crack cocaine on Appellant's seat, Officer Douglas-Snyder found another two clear corner tied baggies, one containing crack cocaine and one containing forty-two pills of methamphetamine, and \$20 of the SEU documented buy money in Appellant's pocket. (N.T.S.H., 3/10/22, C. Ex. 1). The officers then decided to place Appellant under formal arrest. *Id.*

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<sup>15</sup> It was later confirmed that Appellant did not possess a license to carry a firearm.

The officers obtained a search warrant for the vehicle and discovered a multitude of contraband in addition to the firearm and an accompanying magazine including: one hundred and twenty-five pills containing methamphetamine; seventeen blue wax sleeves containing heroin and fentanyl; three foil packs of THC gummies; one gram of marijuana; multiple boxes of sandwich bags; a scale; and various paperwork, IDs, and visa cards belonging to both Vega and Appellant.<sup>16</sup>

### **DISCUSSION**

Appellant raises multiple claims in his appeal. Appellant first challenges the court's denial of his motion to suppress all evidence produced after the officers initiated the investigative detention, alleging that the officers lacked sufficient reasonable suspicion or probable cause to seize Appellant while he was in the Acura and that all evidence produced as a result of the seizure, the subsequent arrest and search of his person, and the warranted search of the vehicle constitutes fruit of the poisonous tree.

The Fourth Amendment to the United States Constitution and Article One, Section Eight of the Pennsylvania Constitution protects private citizens from unreasonable searches and seizures by government officials. *Byrd v. United States*, 138 S.Ct. 1518, 1526 (2018); *Commonwealth v. Hudson*, 92 A.3d 1235, 1241 (Pa. Super. 2014); *Commonwealth v. Miller*, 56 A.3d 424, 429 (Pa. Super. 2012); *Commonwealth v. Walls*, 53 A.3d 889, 892 (Pa. Super. 2012). Generally speaking, the protection against unreasonable searches and seizures afforded by the Constitution of the Commonwealth of Pennsylvania is broader than those under the United States Constitution. *Commonwealth v. Jackson*, 698 A.2d 571 (Pa. 1997). However, in determining whether reasonable suspicion exists for a *Terry* stop, the inquiry is the same under either Article I, Section

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<sup>16</sup> This evidence was introduced at trial and not the suppression hearing. It is included in the factual findings of this opinion for the sole purpose of completeness.

8 of the Pennsylvania Constitution or the Fourth Amendment to the United States Constitution. *In the Interest of D.M.*, 743 A.2d 422, 425 (Pa. 1999).

Pennsylvania jurisprudence has long recognized three types of encounters that occur between law enforcement and private citizens. The first is a mere encounter, or request for information, which need not be supported by any level of suspicion. *Commonwealth v. Strickler*, 757 A.2d 884, 889 (Pa. 2000). The second category of interaction, an investigative detention, or *Terry* stop, “subjects an individual to a stop and period of detention but is not so coercive as to constitute the functional equivalent of an arrest.” *Strickler*, 757 A.2d at 889. To survive constitutional scrutiny “an investigative detention must be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity and may continue only so long as is necessary to confirm or dispel such suspicion.” *Id.* Finally, an arrest or custodial detention must be supported by probable cause to believe the person is engaged in criminal activity. *Id.*<sup>17</sup>

As to the reasonable suspicion required to initiate an investigative detention, our Supreme Court has held,

The determination of whether an officer has reasonable suspicion that criminality was afoot so as to justify an investigatory detention is an objective one, which must be considered in light of the totality of the circumstances. It is the duty of the suppression court to independently evaluate whether, under the particular facts of a case, an objectively reasonable police officer would have reasonably suspected criminal activity was afoot. As the United States Supreme Court has explained:

[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that

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<sup>17</sup> See also, *Commonwealth v. Downey*, 39 A.3d 401, 405 (Pa. Super. 2012).

assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple 'good faith on the part of the arresting officer is not enough'. ... If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police.

*Commonwealth v. Holmes*, 14 A.3d 89, 96 (Pa. 2011) (quoting *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)) (citations omitted). It is axiomatic that to establish reasonable suspicion, an officer "must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); *Commonwealth v. Williams*, 125 A.3d 425 (Pa. Super. 2015); *Commonwealth v. Carter*, 105 A.3d 765 (Pa. Super. 2014).

Additionally, our Supreme Court has held that,

In making this determination, we must give due weight . . . to the specific reasonable inferences the police officer is entitled to draw from the facts in light of his experience. Also, the totality of the circumstances test does not limit our inquiry to an examination of only those facts that clearly indicate criminal conduct. Rather, even a combination of innocent facts, when taken together, may warrant further investigation by the police officer.

*Commonwealth v. Young*, 904 A.2d 947, 957 (Pa. Super. 2006).

In making this determination, it is incumbent on the suppression court to inquire, based on all the circumstances known to the officer *ex ante*, whether an objective basis for the seizure was present. *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L.Ed.2d 612 (1972); *Commonwealth v. Williams*, 125 A.3d 425 (Pa. Super. Ct. 2015). Stated another way, our courts have mandated that law enforcement officers, *prior to* subjecting a citizen to investigative detention, must harbor at least a reasonable suspicion that the person seized is then engaged in

unlawful activity. *Commonwealth v. Beasley*, 761 A.2d 621, 625 (Pa. Super. 2000); *Commonwealth v. Allen*, 681 A.2d 778, 783 (Pa. Super. 1996) (emphasis added). *See also* *Commonwealth v. Polo*, 759 A.2d 372, 375 (Pa. 2000) (reaffirming rule of law that an investigative detention must be supported by reasonable suspicion) (internal citations omitted).

It must also be recognized that while the same facts may give rise to both a reasonable suspicion and probable cause, the two standards are far from one in the same.

It is well settled that reasonable suspicion necessary for investigative detentions is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

*Commonwealth v. Davis*, 102 A.3d 996, 1000 (Pa. Super. 2014).

In the instant matter, the police possessed sufficient reasonable suspicion to initiate the investigative detention<sup>18</sup> and the subsequent arrests and searches were supported by sufficient probable cause. Based upon the totality of the circumstances, the SEU officers had an objectively reasonable basis to suspect that criminal activity was afoot in the Acura prior to initiation of the investigatory detention. The SEU officers observed McCall leave the undercover officer's vehicle, enter the white Acura with \$100 in documented buy money, and return to the undercover officer's vehicle moments later with a quantity of drugs worth \$100 and none of the buy money. Padurano and McCall had specifically instructed the undercover officer to drive to the street on which the white Acura was located to obtain drugs, and at no point did McCall interact with anyone but the

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<sup>18</sup> The crux of Appellant's argument at the suppression hearing was that the initial seizure that occurred when Officer Deibler made contact constituted an arrest unsupported by sufficient probable cause. The court finds that the initial seizure initiated by Officer Deibler constitutes an investigatory detention until such time Appellant was placed under formal arrest. *See Commonwealth v. Guillespie*, 745 A.2d 654 (Pa. Super. 2000) (act of handcuffing suspects during investigative detention "was merely part and parcel of ensuring the safe detaining of the individuals during the lawful *Terry* stop" and did not constitute an arrest).

occupants of the white Acura before returning with drugs in hand. Importantly, the officers were unable to view the exchange within the Acura, requiring further investigation to ascertain the identity of the dealer in the Acura. As such, as soon as Officer Aziza confirmed that a successful drug purchase had occurred, the SEU officers possessed reasonable suspicion to initiate an investigatory detention of the Acura's occupants.

The officers' use of a parking violation as the purported basis for the investigative detention does not vitiate the existing reasonable suspicion regarding the suspected narcotics sale. Rather, the parking violation provides a new, unrelated basis for initiating a seizure as the officer possessed probable cause to believe that the criminal act of illegally parking was afoot. Therefore, Officer Deibler's initiation of the seizure was supported by sufficient probable cause even if based upon the parking violation and not the narcotics sale.

As the officers possessed sufficient reasonable suspicion to effectuate an investigatory detention, they also possessed sufficient reasonable suspicion to carry out the tasks akin to an investigatory detention concerning contraband; namely, a pat-down search. The pat-down search of the Appellant produced multiple bags of narcotics and \$20 of the documented buy money. Additionally, upon Appellant exiting the vehicle, officers observed a firearm located directly next to Appellant's seat, well within his reach. Taken in combination with the officers' observation of suspected drug dealing, the discovered narcotics, and possession of the documented buy money, the officers possessed sufficient probable cause to arrest Appellant. Further, this same probable cause to suspect criminal activity occurred within the Acura provides a sufficient basis for the later warranted search of the vehicle.

Lastly, Appellant claims that the court erred when answering a jury question at the trial regarding the severed charge of Persons Not to Possess, Use, Manufacture, Control, Sell, or

Transfer Firearms, alleging that the court lowered the standard of proof required of the Commonwealth from “beyond a reasonable doubt” to “more likely than not.”

The jury question presented to the court during deliberations read, “Can you define ‘possession’ in the eyes of the law.” (N.T.T., 11/17/22, p. 210). The court answered using a combination of the standard jury instructions and precedent of this Commonwealth to explain the legal definitions of both possession and constructive possession. (N.T.T., 11/17/22, p. 210-12). Specifically, the court quoted a passage from *Commonwealth v. McClellan*, which states, “Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not.” 178 A.3d 874, 879 (Pa. Super. 2018) (citing *Commonwealth v. Mudrick*, 507 A.2d 1212, 1213 (Pa. 1986)). (N.T.T., 11/17/22, p. 211). Our Commonwealth’s Supreme Court has held that “trial courts are invested with broad discretion in crafting jury instructions and such instructions will be upheld so long as they clearly and accurately present the law to the jury for its consideration.” *Commonwealth v. Rainey*, 928 A.2d 215, 242-43 (Pa. 2007). Where a defendant appeals a jury instruction, the reviewing court must consider the challenged instruction in its entirety, rather than isolated fragments. *Id.* at 243.

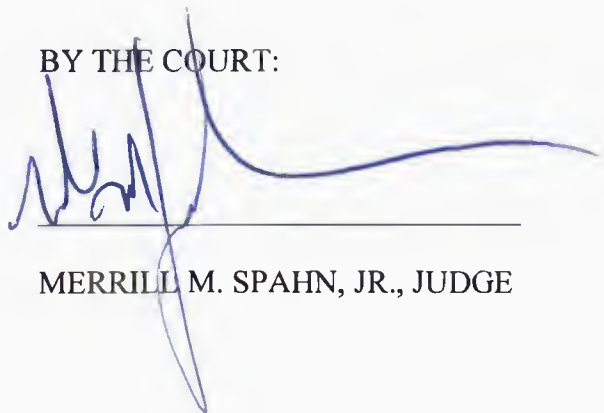
Appellant’s challenge to the jury instructions in the instant matter alleges that by including the phrase “more likely than not” in the definition of constructive possession, the court lowered the standard of proof required to convict Appellant below “beyond a reasonable doubt.” However, when one reads the entirety of the court’s answer to the jury’s question, it is clear that the court clearly and repeatedly impressed upon the jury that notwithstanding the definition of constructive possession provided by our Superior Court in *McClellan*, the element of possession for the alleged crime must be proven beyond a reasonable doubt. Twice in the answer to the jury’s question, before and after the definition quoted from *McClellan*, the court explicitly instructed the jury that

the Commonwealth must prove the element of possession beyond a reasonable doubt. (N.T.T., 11/17/22, p. 210-12). Therefore, the court both clearly and accurately presented the law to the jury regarding constructive possession and preserved the standard of proof at the “beyond a reasonable doubt” threshold for each element of the alleged crime.

**CONCLUSION**

Accordingly, for the reasons set forth above, I conclude the grounds identified by Appellant in his concise statement of the matters complained of on appeal lack merit and respectfully request that the instant appeal be denied.

BY THE COURT:

A handwritten signature in blue ink, appearing to read 'Merrill M. Spahn, Jr.', is written over a horizontal line. The signature is stylized with a long, sweeping horizontal stroke extending to the right.

MERRILL M. SPAHN, JR., JUDGE

**ATTEST:**

Copies to:     Cody L. Wade, Esquire, Assistant District Attorney  
                     Dennis C. Dougherty, Esquire, Attorney for Appellant