

IN THE COURT OF COMMON PLEAS FOR LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**MARK BURKHART,
Defendant**

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**No. 923-2011
CRIMINAL**

OPINION AND ORDER

The Defendant filed a Petition for Habeas Corpus on September 2, 2011. By agreement of both parties, the Court will decide the Petition based on the transcripts of the Preliminary Hearing held in this matter on June 23, 2011 before Magisterial District Judge C. Roger McRae.

Background

On March 21, 2010, Pennsylvania Board of Probation and Parole agents Mark Johnson (Johnson) and Tracy Gross (Gross) visited the home of Mark Burkhart (Defendant) and Karen Kepner (Kepner) at 610 Highland Lake Road in Wolf Township. During the preliminary hearing, Gross testified that the purpose of the agent's visit was to visit the residence to determine if it would serve as an approved parole site upon the Defendant's release from state incarceration. Once the agents arrived at the residence, where the Defendant had resided for approximately ten (10) days, they came into contact with both Kepner and the Defendant, who Gross testified were the only two individuals living in the residence. In response to questioning by Gross, Kepner informed the agents that there was a firearm present in the residence and directed Thompson to a .22 caliber Savage rifle with a synthetic camouflage stock. The firearm was found in plain view leaning against a wall by the television in the living room about one and

one half feet from a hallway in the residence. The Defendant informed Gross that he was not aware that the firearm was present in the residence at that time, and that although he knew that Kepner owned a gun, he had requested that she remove all firearms from the residence. However, Gross testified that for purposes of supervision, it does not matter if an offender is aware of the presence of a firearm, that the mere presence of a firearm in the home is enough to generate an arrest. Trooper Matthew Sweet of the Pennsylvania State Police also testified at the preliminary hearing and established that the Defendant was previously convicted of the offense of Corrupting the Morals of a Minor, which is an enumerated offense for Persons not to Possess a Firearm under 18 Pa.C.S. §6105(b).

Discussion

In his Petition for Habeas Corpus, the Defendant contends that the charge of Persons not to Possess a Firearm should be dismissed for failure of the Commonwealth to present a prima facie case. “A prima facie case consists of evidence produced by the Commonwealth which sufficiently establishes that a crime has been committed and that the accused is probably the perpetrator of that crime.” Commonwealth v. McConnell, No. 1795 C 2009, 2009 Pa. Dist. & Cnty. Sept. LEXIS 252 at 9 (Pa. Dist. & Cnty. Sept. 10, 2009) (See Commonwealth v. McBride, 595 A.2d 589, 591 (Pa.1991). “Every element of the crime charged must be supported by the evidence; however the Commonwealth need not establish guilt beyond a reasonable doubt.” McConnell at 9. (See Commonwealth v. Lopez, 654 A.2d 1150, 1153 (Pa. Super. 1995). “The Commonwealth establishes a prima facie case as long as the evidence presented establishes sufficient probable cause to warrant the belief that the accused committed the offense.” McConnell at 9. (See Lopez at 1153.)

The Defense contends that a prima facie case for the offense of Persons not to Possess a Firearm was not established as the Commonwealth failed to establish the Defendant's constructive possession of the firearm, as no evidence was presented showing the Defendant's intent to control the firearm. In support of this argument, the Defense cites to the fact that Kepner is the lawful owner of the firearm, that the Defendant instructed Kepner to remove all firearms from the home, and the fact that no testimony was offered to indicate that the Defendant had any interest in, or intent to possess the firearm.

A person violates Persons Not to Possess a Firearm under 18 Pa.C.S. §6105(a)(1) if that person has previously been convicted of an offense which prohibits them from possessing a firearm, and on a date that is more than sixty (60) days from the time that they became a person prohibited by law from possession or controlling a firearm, they either possessed or controlled a firearm within the Commonwealth of Pennsylvania. As noted above, the Defendant is a person prohibited from possessing a firearm as he was previously convicted of Corrupting the Morals of a Minor¹. Possession can be established by showing either actual possession, wherein the firearm is found on the defendant's person, or constructive possession. See Commonwealth v. Macolino, 469 A.2d 132 (Pa. 1983). Constructive possession is defined as the ability to exercise a conscious dominion over the prohibited object, meaning the power to control the object and the intent to exercise that control. Macolino at 134. Intent to maintain a conscious dominion can be inferred from the totality of the circumstances and circumstantial evidence can be used to establish a defendant's possession. Macolino at 134-135. As the Commonwealth pointed out, in Macolino, where cocaine and other items of drug paraphernalia were found in the bedroom of a

¹ The Defendant pled guilty to and was sentenced on Corrupting the Morals of a Minor on December 5, 1986, which the Court finds is well beyond the sixty (60) day period provided by statute.

residence, an area jointly and exclusively controlled by the husband and wife, the Pennsylvania Supreme Court found that “[c]onstructive possession can be found in one defendant when both the husband and wife have equal access to an area where the illegal substance or contraband is found.” The Macolino Court reasoned that:

[i]n this case, the fact-finder, examining all of the evidence in its totality, could reasonably conclude that the appellee was aware of the cocaine, along with the items found in his bedroom which are commonly used in cocaine use and trafficking, that he exercised a conscious dominion over the illegal substance and that he intended to possess it.

The Court in Commonwealth v. Gilchrist, 386 A.2d 603 (Pa. Super. 1978) stated that joint constructive possession is established by proving the power to control and the intent to exercise joint control on the part of the defendant, and that these elements can be inferred from the totality of the circumstances. The Gilchrist Court stated further that in proving joint constructive possession where contraband was found in the bedroom of a residence where appellee lived with his wife and children, that “[t]he Commonwealth was not bound to prove that appellee exerted more control over the premises than his wife, but rather, that he exerted joint control, and had equal access both to the apartment and the contraband.” The Court notes that a marital relationship is not a necessary element to the finding of joint constructive possession “[e]ven absent a marital relationship joint constructive possession may be found in either or both actors if contraband is found in an area of joint control and equal access.” Commonwealth v. Mudrick, 507 A.2d 1212, 1214 (Pa. 1986).

Like the circumstances of the Macolino case, the firearm in this case was found in an area exclusively and jointly controlled by both the Defendant and Kepner. Testimony presented at the preliminary hearing established that the Defendant and Kepner were the only two individuals who resided in the home and that the firearm was found in plain view in the living room area.

Although the Defendant indicated to the agents that he was unaware the firearm was present in the house, the Court finds this difficult to believe, given that the firearm was in plain view in the living room of the home and the Defendant had been residing there for approximately ten (10) days. The Court finds that the Commonwealth has presented sufficient evidence to establish that the Defendant jointly and constructively possessed the firearm for the purpose of establishing a prima facie case for the offense of Persons Not to Possess a Firearm.

ORDER

AND NOW, this ____ day of October, 2011 based on the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Petition for Habeas Corpus is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

cc. Aaron Biichle, Esq.
Jeffrey Rowe, Esq.