

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	: No. CR-400-2017
	:
vs.	:
	:
TYRONE DONOVAN JACOBS,	: Motion for Funds for Private Investigator
Defendant	: Motion to Quash Information

OPINION AND ORDER

By Information filed on March 17, 2017, Defendant Tyrone Jacobs (hereinafter “Jacobs”) is charged with persons not to possess firearms, a felony of the second degree; possession of a firearm with altered manufacturers number, a felony of the second degree; firearms not to be carried without a license, a felony of the third degree; criminal attempt – forgery, a felony of the second degree; and conspiracy to commit forgery, a felony of the second degree. A preliminary hearing was held on February 27, 2017 before MDJ Gary Whiteman. Following the preliminary hearing, all of the charges against Jacobs were held for court.

Jacobs proceeded pro se at the preliminary hearing and subsequently filed numerous motions including a motion for change of venue, a motion for discovery, a motion for funds for a private investigator and a motion to quash the Information. A hearing and argument on Jacobs’ motions were held before this court on June 15, 2017. Following the hearing, the court entered Orders addressing all of Jacobs’ motions except the motion to quash and the motion for funds. As well, the court conducted an oral colloquy of Jacobs and entered an Order permitting him to proceed pro se. Aaron Biichle, Esquire was appointed to act as standby counsel.

This Opinion shall address Jacobs' motion to quash and motion for funds for private investigator.

In an Order dated June 15, 2017, the court noted that it would consider Jacobs' motion to quash the Information as a habeas corpus petition to dismiss Counts 1, 2 and 3, the offenses related to possession of the firearm. Jacobs claims that the preliminary hearing evidence was insufficient for prima facie purposes to establish possession, i.e. knowledge. The parties agreed to submit this issue to the court on the basis of the preliminary hearing transcript.

Officer Kurt Hockman of the Montoursville Police Department testified at the preliminary hearing. On February 1, 2017, he was on patrol and observed an automobile turn onto Washington Street. He noticed that the left taillight was "a white light" in violation of the Vehicle Code. As a result, he activated his emergency lights in order to stop the vehicle.

The vehicle did not stop immediately. "It traveled down two more streets south, made a left hand turn onto Spruce Street, and that's where the stop was made, the 400 block of Spruce Street."

As he was stopping the vehicle, his lights were shining on the car and he noticed that the right front seat passenger, on three separate occasions, leaned forward and disappeared from his view. Concerned about these "furtive movements," he called for backup. He described the movements as the right front passenger "forward leaning down to disappear" from his "line of view."

Officer Hockman made contact with the occupants of the vehicle. The front seat passenger initially gave a false name but was soon identified as Jacobs. He was removed from the vehicle and subjected to a pat-down search which revealed no contraband.

The two other occupants of the vehicle were removed. The vehicle was searched. Officer Hockman checked the area where Jacobs had been sitting and first located a black laptop computer. Officer Hockman then looked underneath the seat where Jacobs had been sitting and he found a loaded handgun described as “like a model 95” Ruger. A large amount of counterfeit currency also was found inside the vehicle.

If a defendant wishes to challenge the sufficiency of the evidence that was adduced during a preliminary hearing, the defendant may file a pretrial petition for a writ of habeas corpus. *Commonwealth v. Claffey*, 80 A.3d 780, 788 (Pa. Super. 2013) (citing *Commonwealth v. Landis*, 448 A.3d 432, 444 (Pa. Super. 2012)). The Commonwealth’s duty at the habeas corpus stage is to present a prima facie case. *Id.* “A prima facie case consists of evidence showing the existence of each material element of the charged offenses and probable cause to believe that defendant committed the crimes such that, if the evidence were presented at trial, the court would be warranted in submitting the case to the factfinder.” *Id.*

In other words, a “prima facie case consists of evidence, read in a light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime.” *Commonwealth v. Packard*, 767 A.2d 1068, 1070 (Pa. Super. 2001). A prima facie case merely requires evidence of each element of the offense charged, not evidence beyond a reasonable doubt. *Commonwealth v. Santos*, 583 Pa. 96, 101, 876 A.2d 360, 363 (2005).

The parties agree that with respect to counts 1, 2 and 3, the Commonwealth must prove possession. Possession can be established by showing either actual or constructive possession. Actual possession is established by showing that the defendant had the item on his

person, while constructive possession can be proved through showing that the defendant exercised conscious dominion over the item. *Commonwealth v. Macolino*, 503 Pa. 201, 469 A.2d 132, 134 (1983).

In a case such as this, where the gun was not found on Jacobs' person, the Commonwealth must establish constructive possession of the item. *Commonwealth v. Haskin*, 677 A.2d 328, 330 (Pa. Super. 1996), *appeal denied*, 692 A.2d 563 (Pa. 1997). Constructive possession is defined as "the ability to exercise a conscious dominion" over the item, meaning "the power to control the contraband and the intent to exercise that control." *Macolino, id.* (citations omitted).

In *Commonwealth v. Mundrick*, 510 Pa. 305, 507 A.2d 1212 (1986), the Pennsylvania Supreme Court described 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." *Id.* at 1213. "An intent to maintain a conscious dominion may be inferred from the totality of the circumstances...[and], circumstantial evidence may be used to establish the defendant's possession...." *Commonwealth v. Valette*, 613 A.2d 548, 550 (Pa. Super. 1992) (*quoting Macolino*, 469 A.2d at 134). In addition, multiple people may be found to constructively possess an item in situations where the item was found in an area of joint control and equal access. *See Haskins*, 677 A.2d at 330.

Jacobs is correct that close proximity to the item is not enough to establish constructive possession. *Commonwealth v. Keblitis*, 500 Pa. 321, 456 A.2d 149, 151 (Pa.

1983). However, the court concludes for prima facie purposes that there is sufficient circumstantial evidence that Jacobs probably constructively possessed the gun.

Not only was the gun found directly underneath Jacobs' seat, but there is a strong inference that he was hiding it when the vehicle was being stopped by the police. Officer Hockman had activated his lights and, before Officer Hockman actually confronted him, Jacobs moved furtively three times in a manner which can easily be construed as hiding or attempting to hide the weapon. Finally, Jacobs provided a false name to Officer Hockman when he was apprehended. This represents consciousness of guilt. From the totality of the circumstances, there is a reasonable inference that Jacobs had control over the gun in the vehicle and the intent to exercise said control.

Accordingly, Jacobs' motion to quash the Information, which the court has treated as a petition for habeas corpus with respect to counts 1, 2 and 3, shall be denied.

The court will next address Jacobs' motion for funds for a private investigator. Jacobs contends that he is indigent and cannot afford a private investigator. He further contends that a private investigator is necessary in order to interview the other occupants of the vehicle, to interview personnel at certain stores who can verify that Jacobs did not pass counterfeit bills or did not forge any documents and to interview and obtain character witnesses on his behalf. Jacobs further argues that an investigator can access the vehicle, obtain measurements and take photographs to prove that he could not have reached down and placed the gun where it was located.

“[T]here is no constitutional mandate, either federal or state, that [an investigator] be appointed at public expense to assist in the preparation of a defense whenever

requested by one accused of a crime.” *Commonwealth v. Gelormo*, 327 Pa. Super. 219, 475 A.2d 765, 770 (1984). The appointment of an investigator to assist in the preparation of a defense is a decision within the trial court’s sound discretion and will not be reversed absent an abuse thereof. *Commonwealth v. Wholaver*, 605 Pa. 325, 989 A.2d 883, 894 (2010); *Commonwealth v. Woods*, 394 Pa. Super. 223, 575 A.2d 601, 604 (1990).

As this court has indicated in prior Opinions, there is no question that a defendant’s indigence should not preclude him from having a fair trial. On the other hand, it is clear that a defendant should be required to set forth with specificity a substantial basis for appointing an investigator. Jacobs has done so here.

Jacobs does not have an attorney who would be able to perform at least some of the investigation requested. An investigator can, as Jacobs asserts, interview both fact and character witnesses to the extent they agree to speak with him. An investigator can obtain access to the vehicle, make measurements and take photographs to support Jacobs’ claim.

On the other hand, defendant’s claim regarding an investigator visiting retail establishments and questioning employees is or at least appears to be nothing more than an vain attempt to obtain information which would not be relevant under any circumstance. It would, in this court’s opinion, be a complete waste of time and resources.

Accordingly, the court grants in part defendant’s motion for funds for a private investigator.

ORDER

AND NOW, this ____ day of July 2017, following a hearing, argument and the submission of case law, the court **DENIES** Jacobs’ motion to quash, i.e. petition for habeas

corpus with respect to counts 1, 2 and 3. The court **GRANTS** in part and **DENIES** in part Jacobs' motion for funds for a private investigator. No funds shall be allocated to an investigator for any work associated with interviewing merchants at retail establishments to determine if Jacobs passed any counterfeit bills or forged any documents. Lycoming County shall, however, make \$320.00 available for Jacobs to hire an investigator at a rate of no more than \$40 per hour to investigate the availability of fact and character witnesses and to access the vehicle, obtain measurements and take photographs on behalf of the defense. With the assistance of standby counsel, Jacobs shall hire an investigator, who will provide an itemized bill to Lycoming County (and may be required to enter a contract with Lycoming County) for his services. Jacobs shall provide the investigator and standby counsel with a list of the names of his potential witnesses and any information he may have that would assist them in locating and contacting his potential witnesses so that the witnesses can be interviewed and standby counsel can assist Jacobs with subpoenaing the witnesses for trial, if necessary.

By The Court,

Marc F. Lovecchio, Judge

cc: CA (AS)
Nicole Ippolito, Esquire, ADA
Tyrone Donovan Jacobs, pro se (c/o Lycoming County Prison)
Aaron Biichle, Esquire
Gary Weber, Esquire (Lycoming Reporter)
Work file