

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

**NAFIS JONES,
Defendant**

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CR-1669-2017

HABEAS MOTION

OPINION AND ORDER

Nafis Jones (Defendant) filed a Petition for Habeas Corpus on December 26, 2017. A hearing was held on March 2, 2018. The Commonwealth presented no additional testimony but relied upon the transcript of the preliminary hearing held on October 5, 2017. Defendant also presented no testimony at the hearing.

Factual Background

Defendant is charged with Persons Not to Possess a Firearm¹, Conspiracy to Possess a Controlled Substance with the Intent to Deliver², Possession of a Controlled Substance with the Intent to Deliver³, Possession of a Controlled Substance⁴, and Possession of Drug Paraphernalia⁵.

Preliminary Hearing Testimony

Testimony of Tamika Moore

Tamika Moore (Moore) testified that on October 27, 2016, she received a phone call from Defendant on her step daughter's phone. He told her that "he was

¹ 18 Pa. C.S. § 6105(a)1

² 18 Pa. C.S.A. §903

³ 35 P.S. § 780-113(a)30

⁴ 35 P.S. § 780-113(a)16

⁵ 35 P.S. §780-113(a)32

sorry Miss Mika...I left something in there.” She testified that “in there” was her son’s⁶ house at 340 Mountain Ave, City of Williamsport. Moore testified that she thought he called around 2:30 PM about when “a lot of cops was in my son’s house.” She said that he told her he “left a gun in the laundry room underneath a curtain,” and “I was gonna flush the dope but I got scared, I put it in a nightstand drawer.” She didn’t ask for more information; her son was being locked up so she didn’t press for details. After she got the call she spoke with Defendant’s parole officer while members of the Williamsport Bureau of Police were also present.

Testimony of Officer Clinton Gardner

Officer Clinton Gardner (Gardner) testified that he is employed by the Williamsport Bureau of Police (WBP). He testified that the WBP became involved in an investigation at 340 Mountain Avenue, City of Williamsport on September 8, 2017.

While he was at the scene he spoke with a Tamika Moore who provided him with information that both heroin and a gun could be found inside the house and where they would be located. When Gardner went inside he was able to locate both the gun, wrapped in a curtain in the pantry on the shelf as Moore described, and eight (8) heroin bags from underneath the mattress in one of the bedrooms upstairs. An additional thirty-two (32) bags of heroin were found on top of the toilet in the bathroom. Gardner testified he believed that some of the heroin would have been flushed since some of the bags from the bathroom were wet.

Gardner also testified that he saw the Co-Defendant Burks parked in a maroon sedan at the intersection of Elmira and Louisa Streets. As soon as Burks observed

⁶ Tamika Moore’s son is Nazeer Burks

the patrol unit come into view Gardner saw the vehicle pull out from the parking spot at the intersection to directly in front of 340 Mountain Ave. Gardner approached the vehicle in front of the house and confirmed Burks as the driver. When asked why he was there, Burks stated that he lived at the 340 Mountain Avenue address.

Gardner also testified that when he came to the scene he observed someone open the door of 340 Mountain Avenue and quickly close it. While the door was open he could smell the odor of marijuana coming from inside. While another officer was talking to Burks, Gardner went to the rear of the residence and observed three individuals climbing a fence in the yard running away from the house in a northerly direction. Although he gave chase, he was unable to stop any of the individuals.

After Gardner came back to the residence, he ultimately discovered the following: one handgun, five (5) individually packaged packages of marijuana in a Mason jar, and a total of forty (40) packages of heroin. Along with those items he found packaging material, a digital scale, rubber bands, and \$100 in US currency. Gardner testified that based upon his training and experience the heroin and marijuana found in the residence were possessed with the intent to deliver and not for personal use.

Finally, Gardner testified that he ran the Defendant's prior record and found he had convictions for both firearms violations and felony drug offenses which made him a person ineligible to possess a firearm.

At the conclusion of the testimony, Magisterial District Judge (MDJ) Allen P. Page, III bound all of the charges over for court. Arraignment was scheduled on

October 30, 2017; Defendant's Petition was timely filed as the Commonwealth agreed to a 30 day extension of time to file Omnibus Pretrial Motions on November 29, 2018.

Discussion

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove the defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused committed the offense. *Commonwealth v. Karetny*, 880 A.2d 505, 583 Pa. 514, 529 (Pa. 2005). The *prima facie* standard requires that the Commonwealth's evidence must establish that the crime has been committed and to satisfy this requirement the evidence must show that the existence of each of the material elements of the charge is present. *Commonwealth v. Wodjak*, 446 A.2d 991, 996 (Pa. 1983). While the weight and credibility of the evidence are not factors at this stage, and the Commonwealth need only demonstrate sufficient probable cause to believe the person charged has committed the offense, the absence of evidence as to the existence of a material element is fatal. *Id.* at 997.

Possession can be found by proving actual possession, constructive possession or joint constructive possession. See *Commonwealth v. Gladden*, 445 Pa.Super. 434, 665 A.2d 1201 (1995), appeal denied, 544 Pa. 624, 675 A.2d 1243 (1996); *Commonwealth v. Magwood*, 371 Pa.Super. 620, 538 A.2d 908 (1988), appeal denied, 519 Pa. 653, 546 A.2d 57 (1988); *Commonwealth v. Naguski*, 223

Pa.Super. 301, 299 A.2d 39 (1972). *Commonwealth v. Heidler*, 1999 PA Super 266, 741 A.2d 213, 215 (1999).

Constructive possession “is found where the individual does not have actual possession over the illegal item but has conscious dominion over it.” *Commonwealth v. Carroll*, 510 Pa. 299, 507 A.2d 819 (1986). In order to prove “conscious dominion,” the Commonwealth must present evidence to show that the defendant had both the power to control the firearm and the intent to exercise such control. See Gladden, *supra*, 665 A.2d at 1206; *Magwood, supra*, 538 A.2d at 909-10. These elements can be inferred from the totality of the circumstances. *Commonwealth v. Gilchrist*, 255 Pa.Super. 252, 386 A.2d 603 (1978). *Heidler, supra*, 741 A.2d 213, 215–16.

Defense Counsel objects to the sufficiency of the Commonwealth’s case arguing that the Commonwealth presented no testimony to show that the Defendant ever had possession of the gun or drugs, a critical element of all of the crimes charged against Defendant. No witness testified that Defendant would have been in the house to have placed the items there; additionally there was no evidence of Defendant’s DNA or fingerprints on the gun.

Whether the Defendant constructively possessed the gun and drugs is a factual determination that will be made by the trier of fact. For the purpose of a *prima facie* showing, the Court finds that the Commonwealth has met its burden. The evidence presented at the preliminary hearing was sufficient for the MDJ to infer from the totality of the circumstances that the Defendant knew more than just the existence of the items within the co-Defendant’s house; he would have actually exercised control over them. Generally, credibility is not an issue at a preliminary hearing.

Commonwealth v. Fox, 422 Pa.Super. 224, 619 A.2d 327 (1993). *Commonwealth v. Stinson*, 427 Pa. Super. 289, 298, 628 A.2d 1165, 1169–70 (1993). Therefore it will be up to the jury to determine the credibility of the Commonwealth's witness on the issue of possession.

Pennsylvania Crimes code defines the offense of Conspiracy as follows:

A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Criminal Conspiracy, 18 Pa.C.S.A. § 903.

In the instant prosecution, the Commonwealth seeks to establish Defendant's involvement in a conspiracy by relying upon circumstantial evidence. The use of inferences is a process of reasoning by which a fact or proposition sought to be established is deduced as the logical consequence from the existence of other facts that have been established. See *Commonwealth v. Whitman*, 199 Pa.Super. 631, 186 A.2d 632 (1950). Accord, *Commonwealth v. Gladden*, 226 Pa.Super. 13, 311 A.2d 711 (1973). An understanding of the nature of an inference thus is crucial to an evaluation of the sufficiency of the evidence under consideration.

An inference is no more than a logical tool enabling the trier of fact to proceed from one fact to another, if the trier believes that the weight of the evidence and the more experiential accuracy of the inference warrant so doing. *Commonwealth v. Shaffer*, 447 Pa. 91, 105–06, 288 A.2d 727, 735–36, cert. denied, 409 U.S. 867, 93

S.Ct. 164, 34 L.Ed.2d 116 (1972). Accord *Commonwealth v. Mason*, 483 Pa. 409, 397 A.2d 408 (1979).

The test for reviewing statutory and common law inferences is well established:

Evidentiary inferences, like criminal presumptions, are constitutionally infirm unless the inferred fact is “more likely than not to flow from the proved fact on which it is made to depend.” *Turner v. United States*, 396 U.S. 398 [90 S.Ct. 642, 24 L.Ed.2d 610] (1970); *Leary v. United States*, 395 U.S. 6 [89 S.Ct. 1532, 23 L.Ed.2d 57] (1969); *Commonwealth v. Shaffer*, 447 Pa. 91, 288 A.2d 727 (1972); *Commonwealth v. Swiatkowski*, 446 Pa. 126, 285 A.2d 490 (1971); *Commonwealth v. Owens*, 441 Pa. 318, 271 A.2d 230 (1971). Where the inference allowed is tenuously connected to the facts proved by the Commonwealth, due process is lacking.

Commonwealth v. McFarland, 452 Pa. 435, 439, 308 A.2d 592, 594 (1973).

(Emphasis supplied).

This “more-likely-than-not” test, which must be applied to inferences already enjoying judicial or legislative sanction, must be viewed as a minimum standard in assessing the reasonableness of inferences relied upon in establishing a prima facie case of criminal culpability. Anything less than such a standard would rise no higher than suspicion or conjecture which our law has repeatedly rejected as being a basis for a finding of a prima facie case. See *Commonwealth v. Prado*, supra; cf.

Commonwealth v. Hudson, 489 Pa. 620, 414 A.2d 1381 (1980); *Commonwealth v. Farquharson*, 467 Pa. 50, 354 A.2d 545 (1976); *Commonwealth v. Fields*, 460 Pa. 316, 333 A.2d 745 (1975); *Commonwealth v. Simpson*, 436 Pa. 459, 260 A.2d 751 (1970). *Wojdak*, supra, at 368–69, 466 A.2d at 996.

Although tenuous, the Court finds prima facie evidence of a conspiracy. The named co-conspirator, Nazeer Burks returned while the police were searching the residence. More likely than not Defendant’s knowledge of the large quantity of drugs

and the attempt to dispose of them a short time prior to the police finding them with others running from the house support the inference that the Defendant was working with others to sell the drugs. Therefore, the Commonwealth has presented sufficient evidence to hold the case for court.

ORDER

AND NOW, this _____ day of April, 2018, the Defendant's Petition for Habeas Corpus is hereby DENIED.

BY THE COURT,

Nancy L. Butts, President Judge

cc: DA (NI)
Mary Kilgus, Esq.
Gary Weber, Esq.