

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :
 :
 vs. : NO. 078-06
 :
 DARROLL C. SMITH, : CRIMINAL ACTION - LAW
 :
 Defendant :
 : OMNIBUS PRETRIAL MOTION

DATE: May 17, 2006

OPINION and ORDER

Before the court for determination is the Omnibus Pretrial Motion of Defendant Darroll C. Smith filed April 18, 2006. The motion will be denied.

I. BACKGROUND

A. Facts

On January 25, 2006, a preliminary hearing was held in this case. Based upon the evidence presented at that hearing, the court finds the following facts. Chad Aldenderfer (hereafter “Sergeant Alenderfer”) is a sergeant with the Jersey Shore Borough Police Department (hereafter “the JSPD”). Notes of Testimony, 20 (1/25/06). Sergeant Alenderfer was contacted by Detective Paul of the JSPD and informed that there was an individual at the police station who stated that he could make a controlled buy of narcotics from the individuals in an apartment at 115 North Main Street, Jersey Shore, Pennsylvania. Id. at 21. That individual was Joshua Kreamer (hereafter “Kreamer”). Kreamer wanted to be a confidential informant for the JSPD because he had pending charges against him. Id. at 5. Kreamer had been in the apartment at 115 North Main Street on the 20th and 19th of December 2005 and had stayed over night on both occasions. Id. at 5, 9.

Prior to going to the 115 North Main Street apartment, Sergeant Alenderfer strip searched Kreamer. N.T., 5 (1/25/06). Sergeant Alenderfer also searched Kreamer's vehicle. Both searches revealed nothing. Id. at 21. Kreamer was given \$195 in prerecorded United States currency to make the controlled buy. Id. at 21, 23.

115 North Main Street is a brick apartment building. N.T., 24 (1/25/06). The target apartment was not visible from the outside of the building. Ibid. Kreamer, Sergeant Alenderfer, and members of the JSPD went to the 115 North Main Street address. The members of the JSPD set up surveillance at the address. Id. at 21. Kreamer was observed entering the 115 North Main Street apartment building. Ibid.

The target apartment was 4A. N.T., 12 (1/25/06). It is located at the top of the stairs on the right hand side. Id. at 24. Penny Schultz (hereafter "Schultz") resided there with her daughter, Samantha Stewart (hereafter "Stewart"), and son. Id. at 12, 14-15.

Kreamer knocked on the back door of apartment 4A. N.T., 15 (1/25/06). Stewart answered the door.¹ Id. at 12, 15. Kreamer entered the apartment and handed Stewart some money. Id. at 12-13. Stewart then walked across the bedroom and met Defendant Darroll C. Smith (hereafter "Smith") at the doorway leading from the bedroom into the interior of the apartment. Id. at 16. Stewart handed Smith the money and he handed her two clear cellophane packets containing a white powder. Id. at 14, 16, 17. The white powder was cocaine. Id. at 17, 21. Smith then handed the two packets to Kreamer. Id. at 13, 14. Kreamer then gave one of the packets to Schultz, who

¹ Kreamer testified that Schultz answered the door. N.T., 2, 6 (1/25/06). He stated that he gave her the money, she went into the living room room, and came back with two little baggies containing drugs. Id. at 2, 4, 7, 8. Kreamer testified that he did not see from whom Schultz got the two baggies. Id. at 3, 7. Kreamer further testified that once he received the two baggies from Schultz he left the apartment. Id. at 8.

was in the bedroom as the transaction was occurring, for her to cook and turn into crack cocaine. Id. at 17. It took approximately fifteen minutes for Schultz to cook the cocaine. Ibid. Once this was done, Kreamer left the apartment.

Kreamer was observed by the JSPD surveillance team exiting the 115 North Main Street apartment building. N.T., 21(1/25/06). Kreamer got in his vehicle and drove back to the JSPD office. Id. at 9. Sergeant Alenderfer followed Kreamer back to the office. Id. at 21. Kreamer gave Sergeant Alenderfer a packet containing a white powder. Ibid. The powder was tested, and it tested positive for cocaine. Ibid. Kreamer was searched again, but nothing was found on him. Ibid. Kreamer was then debriefed. Ibid.

Following Kreamer's debrief, officers of the JSPD were assembled to execute a search warrant at the 4A apartment. N.T., 21 (1/25/06). Sergeant Alenderfer had obtained an anticipatory search warrant for the 4A apartment in advance of Kreamer's controlled buy. Ibid. The officers arrived at the 115 North Main Street address and made entry into apartment 4A.

Sergeant Alenderfer was not the first officer into apartment 4A. By the time he entered the apartment several of the occupants had been ordered to the ground. Schultz was on the floor in the back hallway. N.T., 21 (1/25/06). Becky Rodriguez was on the floor of the bedroom. Ibid. Charlie Stewart was on the bed in the bedroom. Another individual was on the kitchen floor. Ibid. Smith was located on the floor in the closet area of the bedroom. N.T., 22 (1/25/06). A cellophane bag containing eleven smaller cellophane bags was found on the floor inches away from Smith's person. Id. at 22, 25. The eleven smaller cellophane bags contained a white, powdery substance, which later tested positive for cocaine. Id. at 22. To the front and left of

Smith, a .22 caliber handgun with a black barrel and brown handle was found. Id. at 22, 26. The handgun was about three feet away from Smith's person. Id. at 26. A search of Smith's person recovered \$40 of the pre-recorded buy money that had been given to Kreamer to make the controlled buy. Id. at 24.

Two individual's testified that they had seen a similar handgun in Smith's possession a few days earlier. Kreamer testified that while he and his friend were at the 4A apartment on December 20, 2005 Smith pulled a handgun from his pocket and displayed it to them. N.T., 4, 10 (1/25/06). Kreamer testified that it was a revolver type handgun that was black with a brown handle. Id. at 4. Schultz testified that a couple of days prior to the controlled buy she had seen Smith with a weapon. Id. at 13, 18. Schultz testified that the weapon was a handgun with a black barrel and brown handle. Id. at 13, 14. Schultz testified that she and Smith were in the living room of the 4A apartment when she observed Smith in possession of the handgun. Id. at 18.

B. Smith's Argument

In his omnibus pretrial motion, Smith has asserted a *habeas corpus* petition with regard to Count 6 of the Information, which charges him with violating 35 P.S. § 780-113(a)(30), Possession with Intent to Deliver a Controlled Substance. The basis of this charge is the eleven cellophane bags containing cocaine that were found near his person. Smith argues that the evidence presented at the preliminary hearing fails to establish a *prima facie* case against him with regard to Count 6. Smith asserts that the only evidence that the eleven cellophane bags belonged to him was their proximity to his person. Smith argues that this is insufficient to establish possession by him. Smith asserts that Sergeant Alenderfer testified that he was not the first officer into the bedroom

where Smith was found. Smith further asserts that Sergeant Alenderfer testified that he had first seen the eleven cellophane bags where they were located on the floor of the bedroom inches away from Smith's person. However, Smith argues that Sergeant Alenderfer does not know whether the eleven cellophane bags were located there when the police first entered the residence or if the bags were later moved to the location where Sergeant Alenderfer first observed them. As such, Smith argues that the Commonwealth has failed to present sufficient evidence to establish that he possessed the eleven cellophane bags.

II. ISSUE

There is one issue before the court. It is:

Whether the Commonwealth has presented sufficient evidence to establish that Smith possessed the eleven cellophane bags, thereby establishing a *prima facie* case against Smith for the charge of Possession with Intent to Deliver a Controlled Substance?

III. DISCUSSION

The discussion section of this opinion will be divided into three main parts. The first will set forth the standard of review for a pretrial *habeas corpus* petition. The second main part will set forth some general rules and principles regarding possession of a controlled substance. The third main part will set forth why the Commonwealth has presented sufficient evidence to support a conclusion that Smith possessed the eleven cellophane bags containing cocaine.

A. Standard of Review

“The writ of *habeas corpus* exists to vindicate the right of personal liberty in the face of unlawful government deprivation.” *Commonwealth v. Jackson*, 809 A.2d 411, 416 (Pa. Super.

2002) (quoting *Commonwealth v. Morman*, 541 A.2d 356, 358 (Pa. Super. 1988)). “It is settled that a petition for writ of *habeas corpus* is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a *prima facie* case.” *Commonwealth v. Keller*, 822 A.2d 1004, 1010 (Pa. Super. 2003), *app. denied*, 832 A.2d 435 (Pa. 2003). “A trial court may grant a defendant’s petition for *habeas corpus* when the Commonwealth has failed to present a *prima facie* case against the defendant.” *Commonwealth v. Santos*, 876 A.2d 360, 363 (Pa. 2005).

The question of the evidentiary sufficiency of the Commonwealth’s *prima facie* case is a question of law. *Commonwealth v. Nieves*, 876 A.2d 423, 424 (Pa. Super. 2005), *app. denied*, 891 A.2d 731 (Pa. 2005).

A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes sufficient probable cause to warrant the belief that the accused committed the offense. (citation omitted). The evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury. (citation omitted). Moreover, ‘inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth’s case.’ (citation omitted).

Commonwealth v. Huggins, 836 A.2d 862, 866 (Pa. 2003). The Commonwealth is not required to prove the defendant’s guilt beyond a reasonable doubt in order to establish a *prima facie* case. *Santos*, 876 A.2d 363.

In determining whether the Commonwealth has presented sufficient evidence to establish a *prima facie* case, the trial court is not limited to the evidence presented at the preliminary hearing. *Keller*, 823 A.2d at 1011. The trial court may accept “... into evidence the record from the preliminary hearing as well as any additional evidence which the Commonwealth may have

available to further provide its *prima facie* case.” *Ibid.* Suspicion and conjecture are not evidence and are unacceptable as such in determining the existence of a *prima facie* case. *Commonwealth v. Packard*, 767 A.2d 1068, 1071 (Pa. Super. 2001), *app. denied*, 782 A.2d 544 (Pa. 2001).

B. General Rules and Principles Regarding Possession of a Controlled Substance

To establish the offense of possession with intent to deliver a controlled substance, the Commonwealth must prove that the defendant possessed a controlled substance and did so with the intent to deliver it. 35 P.S. § 780-113(a)(30)²; *Commonwealth v. Kirkland*, 831 A.2d 607, 611 (Pa. Super. 2003), *app. denied*, 847 A.2d 1280 (Pa. 2004); *Commonwealth v. Cardona*, 463 A.2d 11, 15 (Pa. Super. 1983). “Possession of a controlled substance can be proven by showing that a defendant actually possessed drugs through direct evidence, such as finding the controlled substance on the defendant’s person, or it can be proven by showing that the defendant constructively possessed a controlled substance.” *Commonwealth v. Pippy*, 732 A.2d 1216, 1220 (Pa. Super. 1999). Constructive possession is a legal fiction. *Commonwealth v. Battle*, 883 A.2d 641, 644 (Pa. Super. 2005). “Constructive possession is an inference arising from a set of facts that

2 Section 113(a)(30) of The Controlled Substance, Drug, Device, and Cosmetic Act provides:

- (a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

(30) Except as authorized by this act, the manufacture, delivery, or possession with the intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30).

possession of the contraband was more likely than not.” *Commonwealth v. Murdick*, 507 A.2d 1212, 1213 (Pa. 1986).

Constructive possession has been defined as “the ability to exercise a conscious dominion over the illegal substance: the power to control the contraband and the intent to exercise that control.” *Commonwealth v. Valette*, 613 A.2d 548, 550 (Pa. 1992) (quoting *Commonwealth v. Macolino*, 469 A.2d 132, 134 (Pa. 1983)); *Kirkland*, 831 A.2d at 610. “Constructive possession by its very nature is not amenable to “bright line” tests.” *Commonwealth v. Carroll*, 507 A.2d 819, 821 (Pa. 1986). As such, constructive possession may be established by the totality of the circumstances. *Murdick*, 507 A.2d at 1213; *Carroll*, 507 A.2d at 821. Also, circumstantial evidence may be used to establish a defendant’s constructive possession of a controlled substance. *Valette*, 613 A.2d at 550.

C. The Evidence Presented is Sufficient to Support a Conclusion that Smith Possessed the Eleven Cellophane Bags Containing Cocaine

The evidence presented is sufficient to support a conclusion that Smith had the ability to exercise conscious dominion over the eleven cellophane bags containing cocaine and had exercised that dominion. The eleven cellophane bags were contained in a larger cellophane bag. This larger cellophane bag was likely the source of the two cellophane bags that were delivered to Kremer during the controlled buy.

Schultz testified that Smith handed two cellophane bags containing a white powdery substance, which later tested positive for cocaine, to Stewart and that Stewart handed those two cellophane bags to Kremer. The eleven cellophane bags found inches away from Smith were cellophane bags containing a white powdery substance, which later tested positive for cocaine.

The similarity between the two bags used in the transaction with Kreamer and the eleven bags found next to Smith allows for a reasonable inference to be made that the large cellophane bag was the source of the two bags involved in the controlled buy.

The evidence presented is sufficient to support a conclusion that Smith exercised control over the large cellophane bag and its contents. The evidence presented could allow one to conclude that Smith likely accessed the large cellophane bag and its contents in order to complete a drug sale. If so, the evidence presented sufficiently allows for the conclusion that Smith had the ability to control the large cellophane bag and its contents and that he exercised that control. As such, the evidence presented is sufficient to support a conclusion that Smith had constructive possession of the large cellophane bag and the eleven smaller cellophane bags contained therein.

Accordingly, the Commonwealth has presented sufficient evidence to establish a *prima facie* case against Smith for the charge of Possession with the Intent to Deliver a Controlled Substance.

IV. CONCLUSION

Smith's *habeas corpus* petition relating to Count 6 of the Information is denied.

ORDER

It is hereby ORDERED that the *habeas corpus* petition in the Omnibus Pretrial Motion of Defendant Darroll C. Smith filed April 18, 2006 is DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: Donald F. Martino, Esquire
District Attorney (RG)
Judges
Gary L. Weber, Esquire (Lycoming Reporter)
Christian J. Kalas, Esquire