

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

vs.

WILLIAM WEST,

Defendant

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:
: NO. CR-1518-2007
:
: CRIMINAL ACTION - LAW
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:
: MOTION TO QUASH

DATE: October 31, 2007

OPINION and ORDER

Before the Court for determination is the Motion to Quash of Defendant William West (hereafter “West”) which was filed September 10, 2007 and argued before this Court on September 28, 2007. The Motion will be denied. The Commonwealth has presented sufficient evidence to establish a *prima facie* case for persons not to possess use of a firearm in violation of §6105(c), firearms not to be carried without a license in violation of §6101(a), and receiving stolen property in violation of §3925(a) of the Criminal Code.

I. BACKGROUND

A. Facts

On July 27, 2007 at 9:00am, Williamsport Code Enforcement Official, Kyle Mutchler, (“Mutchler”) and Chief Fire Marshall Dean Hinebach (“Hinebach”) were responding to an anonymous call that there were possible code violations regarding sanitation and overcrowding at 319-321 Louisa Street, Williamsport, Pennsylvania. Tr. 3. The complaint was in regards to both addresses in the structure. Tr. 9. The address “319” was the residence of West on the date of the inspection. Tr. 8. When Mutchler entered the residence, he inspected the first floor and then went upstairs to the first bedroom to the right on the second floor. Tr. 4. In that bedroom he saw an individual, later identified as West, asleep in the bed. Tr. 4. At the foot of the bed in

the far corner of the room Mutchler noticed a hand gun lying on top of a dresser. Tr. 4. The inspectors did not awaken West who remained asleep throughout the code officials' presence in the bedroom. Tr. 15-16. Mutchler then notified the police and continued his inspection. Tr. 5.

Corporal John McKenna responded to Hinebach's call and arrived at 319 Louisa Street. Tr. 18. Officer McKenna observed Chuck Thomas ("Thomas") another Williamsport code enforcement official at the scene. *Id.* After exiting his vehicle, Officer McKenna heard from the external speaker of Thomas's cell phone the words ".40 cal. in his waistband," which Officer McKenna understood to mean that a handgun had been found. Tr. 18-19. Directly after hearing this, Officer McKenna observed West exit the front door of 319 Louisa Street. Tr. 19. After observing Officer McKenna, West made a movement to reenter the residence then stopped. Tr. 19. Officer McKenna proceeded to do a Terry Search on West and asked him if he had any weapons on his person in the belief that West may have a handgun in his waistband. *Id.* West said that he had no weapons on his person and the search results confirmed his statement. *Id.* Officer McKenna handcuffed West for safety. *Id.*

Officer McKenna then asked Tyana Martin, who at that time had exited the residence and was in close proximity to West, where the handgun was. Tr. 20. West said that he would show the officers where the gun was and gestured with his shoulder for the officers to follow West into the residence. *Id.* Officer McKenna followed West to the same second floor bedroom where West had been found sleeping earlier by the code enforcement officials. Tr. 20-21. Once inside the bedroom, West walked over to the corner to the dresser at the foot of the bed, looked on top of the dresser, briefly scanned the room, and stated that someone must have moved it. *Id.* West then shouted for Martin to come into the room. Tr. 21. Officer McKenna then asked Martin where the gun was. Martin immediately replied that she had not moved the gun. Tr. 22. Martin

then looked back to the left out the doorway of the bedroom to the stairwell. *Id.* Officer McKenna told Martin that he observed her looking to her left and again asked if she had moved the gun. *Id.* Martin then stated that she had moved the gun and that it was in a garbage bag out in the storage area. *Id.* At this point West was taken out of the residence and placed in the patrol car. *Id.*

Officer McKenna then searched the location described by Martin and found the gun in a garbage bag filled with clothes. Tr. 23. Officer McKenna found the gun by removing several articles of clothing from the bag to see the gun lying on top of the pile of clothing remaining in the bag. *Id.* Officer Kenneth Mains then conducted a search of the residence at 319 Louisa Street. Tr. 34. Inside the bedroom dresser where Mutchler first saw the gun located, Williamsport Police Officer Mains found men's clothing and some child's clothing. Tr. 36. In the other dresser in the bedroom Mains found some women's clothing. *Id.*

B. Charges

On July 27, 2007, Agent Leonard Dincher of the Williamsport Police filed a criminal complaint against West charging him with the following crimes: Count 1 Persons not to Possess, Use, Manufacture, Control, Sell or Transfer Firearms, 18 Pa. C.S.A. § 6105(c)(2); Count 2 Firearms Not to be Carried without a License, 18 Pa. C.S.A. § 6106(a)(1); Count 3 Receiving Stolen Property, 18 Pa. C.S.A. § 3925(a); Count 4 Possession with Intent to Deliver a Controlled Substance, 35 Pa. C.S.A. 13(a)(30); Count 5 Possession of a Controlled Substance, 35 Pa. C.S.A. § 13(a)(16); and Count 6 Possession of Drug Paraphernalia, 35 Pa. C.S.A. § 13(a)(32).

C. West's Argument

In the Motion to Quash, West argues that the Commonwealth has failed to present sufficient evidence to establish a *prima facie* case for Count 1 Persons not to Possess, Use,

Manufacture, Control, Sell or Transfer Firearms, 18 Pa. C.S.A. § 6105(c)(2); Count 2 Firearms Not to be Carried without a License, 18 Pa. C.S.A. § 6106(a)(1); and Count 3 Receiving Stolen Property, 18 Pa. C.S.A. § 3925(a). In the Motion to Quash, West offers the same argument as to all three of the above mentioned charges as they all require the Commonwealth to produce sufficient evidence supporting the element of possession. West alleges that the Commonwealth has failed to establish West “possessed” the gun in question under the applicable legal theory of “constructive possession.” West argues that because he was asleep when the gun was observed by the code enforcement officers, that West had neither the power to control the firearm nor the intent to exercise such control as is required to establish constructive possession. It is West’s contention that because he was asleep he could not have exercised conscious dominion over the gun and thus there is no evidence to satisfy the possession element of the crimes charged.

II. ISSUES

There is one issue before the court:

1. Is there sufficient evidence to prove that West more likely than not had the power to control and the intent to exercise that control over the firearm to satisfy the *prima facie* showing of constructive possession for Counts 1,2, and 3?

III. DISCUSSION

A. Standard of Review

“[T]he finding of a *prima facie* case is the prerequisite for requiring the accused to stand trial for the charges leveled against him.” *Commonwealth v. Cordoba*, 902 A.2d 1280, 1284 (Pa. Super. 2006). 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. *Commonwealth v. Santos*, 876 A.2d 360, 363 (2005). Rather, the “more-likely-than-not” test is the minimum standard to be used in assessing the reasonableness of the inferences relied upon to establish a *prima facie* case. *Commonwealth v. Wodjak*, 466 A.2d 991, 996 (Pa. 1983); *Commonwealth v. Lacey*, 496 A.2d 1256, 1261 (Pa. Super. 1985).

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. *Commonwealth v. Keller*, 823 A.2d 1004, 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*. However, 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. Constructive Possession

1. Background

The Pennsylvania Supreme Court has stated that “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. We have defined constructive possession as ‘conscious dominion.’” *Commonwealth v. Davis*, 280 A.2d 119, 121 (1971). “Conscious dominion” has been defined subsequently by the Court as “the power to exercise that control.” *Commonwealth v. Macolino*, 469 A.2d 132, 134 (1983). “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.” *Commonwealth v. Heidler*, 741 A.2d 213, 216 (1999) quoting *Commonwealth v. Gladden*, 665 A.2d 1201, 1206 (Pa. Super. 1995). (emphasis in original).

The Court in *Commonwealth v. Aviles*, 615 A.2d 398 (1992) addressed the challenge of proving constructive possession through the use of the above tests when more than one actor is involved in the situation. The Court in that case stated:

Though these tests may be helpful and logical in the abstract, application to actual factual situations, particularly when multiple actors are involved, has proven difficult for our...courts in cases involving controlled substances located on premises in joint possession but not on the actual person of any of the parties entitled to occupy the premises.

Id. at 402. “To aid application, we have held that constructive possession may be established by the totality of the circumstances.” *Commonwealth v. Fortune*, 318 A.2d 327 (1974).

“Individually, the circumstances may not be decisive; but, in combination, they may justify an inference that the accused had both the power to control and the intent to exercise that control, which is required to prove constructive possession.” *Commonwealth v. Carter*, supra 450 A.2d at 144 [citations omitted]. *Commonwealth v. Gladden*, 665 A.2d 1201, 1207 (1995).

Furthermore, “circumstantial evidence may be used to establish a defendant’s possession of drugs or contraband.” *Macolino*, 469 A.2d at 134.

In *Commonwealth v. Macolino*, 469 A.2d 132, 136 (1983) the Court took steps to further solve the problem of finding constructive possession when more than one person had access to the contraband and occupied the premises. In that case contraband and drug paraphernalia were found in the common bedroom of the Macolino's, a married couple. The husband was charged with possession of the controlled substance. The court ruled that "[i]t is no defense that the appellee's wife could also have maintained a conscious dominion over the cocaine. Possession of an illegal substance need not be exclusive; two or more can possess the same drug at the same time." *Id.* See *Commonwealth v. Griffin*, 326 A.2d 554 (1974). Because both the husband and the wife had equal access to and shared the closet in their bedroom, the court found these facts sufficient to establish possession on the part of the defendant-husband. *Id.* The Court held that "constructive possession can be found on one defendant when both the husband and wife have equal access to an area where the illegal substance or contraband is found." *Macolino*, 469 A.2d at 135.

The court in *Commonwealth v. Mudrick*, 507 A.2d 1212, 1213-14 (1986) expressly addressed the *Macolino* case and expanded its ruling by finding that "even absent a marital relationship, constructive possession may be found **in either of both actors if** contraband is found in an area of **joint control and equal access**."*** [In] the *Macolino* analysis[,] shared access to and control of the area where the contraband was found was crucial." *Id.* (emphasis added). The *Mudrick* court did not find that the marital relationship was of any importance *per se* in the joint constructive possession finding. *Id.* Finally, the *Mudrick* court found the fact that the contraband was in plain view in a jointly occupied bedroom to be significant in the holding of constructive possession. *Id.*

2. Analysis

In West's case, the Commonwealth presented sufficient evidence at the preliminary hearing to convince a reasonable fact finder that a *prima facie* showing of constructive possession has been made. These relevant factual determinations supporting this finding are as follows: (1) the firearm was seen in plain view on the dresser in the bedroom where West was observed sleeping by the code official; (2) the dresser was in close proximity to the bed West was found sleeping; (3) men's clothing was found in the dresser the gun had been lying on; (4) other indicia of West's ownership of the residence were found within the residence; (5) although other individuals resided in the residence, West still had unobstructed access to the firearm; (6) West lead police to the exact location the gun had reportedly been observed by code officials prior to Martin moving it.

(i) Gun in the Bedroom in Plain View

Pennsylvania courts have found contraband discovered "in the bedroom to be of special significance, noting that a bedroom is a 'more private place with limited access and usually subject to the exclusive control of the owner or lessee of the premises.'" *Commonwealth v. Gilcrest*, 386 A.2d 603, 605 (1978). See also *Commonwealth v. DeCampli*, 364 A.2d 454, 456-57 (1976) ("An accused may be charged with the knowledge of the location of the contraband which is essential to the proof of the intent to exercise control, if the contraband is found in places peculiarly within control of the accused."). Moreover, the Court in *Mudrick* noted that contraband found in plain view in the defendant's bedroom further added to the totality of the circumstances to suggest the defendant had constructive possession. *Mudrick*, A.2d at 213-214.

In this case, there was evidence presented at the preliminary hearing that would support a finding that West resided at the residence and that the bedroom in question was also his. Detective Edward McCoy testified to finding mail addressed to both West and Martin in the kitchen and dining room of the residence. Tr. 41-43. This evidence would support a finding that West resided at the residence and that the items therein were within his power and control. Furthermore, the gun was seen by code official Mutchler to be lying in plain view on top of the dresser on the side of the bedroom closest to the bed West was sleeping in. Tr. 4. The dresser was in close proximity to West, being at the foot of the bed. *Id.* Men's clothes were also found inside that particular dresser. Tr. 36. It can be presumed from these facts that the bedroom was West's bedroom, as there has been no evidence presented to the contrary.

Pursuant to *DeCampli* and *Mudrick*, it is significant that the gun's location was testified to as being in plain view on West's bedroom dresser in close proximity to his bed. This is a location in which West would have particular access and control as a storage place for personal items. At the very least, this particular location infers that West had knowledge of the gun's location, which under *DiCampli*, is essential to proof of intent to exercise control. A.2d at 456-57.

(ii) Joint Control and Access to the Gun

Generally Pennsylvania courts have held that "where another person has equal access to the area of where illegal contraband or a weapon is found, the defendant cannot be said to have either the power to control or the intent to control such contraband or weapon *per se*." *See Commonwealth v. Chenet*, 373 A.2d 1107 (1977) (emphasis in original) (finding no constructive possession because the contraband was found in area equally accessible to a third party). This rule has since been modified by the Courts in *Macolino* and *Mudrick*. In those cases,

constructive possession was found upon a showing of equal access and shared control.

West cites *Commonwealth v. Heidler*, 741 A.2d 213 (1999) in support of his contention that because West was asleep and in the presence of others, there can be no finding of a *prima facie* element of the power to control or intent to exercise that control. In *Heidler* the Court found the record could not support a holding that the defendant intended to exercise control over a gun because the gun was in a location where he could not access it; his girlfriend's purse. *Id.* at 217. Instead, the Court found that when the defendant had the gun placed in his girlfriend's purse it was his intent to "*relinquish* such control." *Id.* at 216. (emphasis in original). The court concluded that handing the gun to the girlfriend for her to keep in her purse was a form of relinquishment on the part of the defendant.

Unlike the facts in *Hiedler*, the facts in West's case do not support a finding that West "relinquished" control of the gun by placing it on his dresser in his bedroom while he slept. Although other residents did have access to the West's bedroom and lived at the residence with him, Tr. 14, this supports a finding of joint constructive possession at the very least and not relinquishment as in *Heidler*. In *Heidler*, the defendant placed his gun in a location where he no longer had equal and joint control or access to the gun; his girlfriend's purse. In our case, although others could access the gun on the dresser in West's room, the West himself could also access the gun equally. Therefore a *prima facie* finding of constructive possession can be supported by the evidence.

(iii) Defendant Brought Police to the Gun's Location

There is evidence West had the intent to exercise power over the gun because he brought the police to the location the gun had been seen by the code enforcement official. Tr. 20-21. Although not sufficient to prove intent, evidence that the defendant knew of the presence of the

firearm is a necessary prerequisite to proving intent. *Gladden*, 665 A.2d at 1206, n.6, citing *Commonwealth v. Magwood*, 538 A.2d 908, 909-910 (Intention presupposes knowledge).

In our case, the police asked West and the other occupant of the residence, Martin, to tell the officers the location of the gun. Tr. 20. Officer McKenna testified that West stated in reply, “Come on, I’ll show you,” and then gestured with his shoulder for Officer McKenna to follow him into the residence. *Id.* He led Officer McKenna to his bedroom, walked over to the corner to his dresser, looked at the dresser and then scanned the room. Tr. 20-21. Pursuant to Officer McKenna’s testimony, West then stated, “someone must have moved it.” Tr. 21. West then shouted for Martin to come into the room. *Id.* Martin eventually told the police that she had moved the gun and placed it in a garbage bag full of clothes in another room. Tr. 22-23. The police found the gun in the location given by Martin. Tr. 23.

The fact West was able to lead the police to the exact location on the dresser where he last knew the gun, shows that he knew the gun was in his room. The only reason the gun was not still in the location given by West is because Martin moved it upon the police entering the residence.

(iv) Sleeping Defendant

The fact that West was asleep when the gun was first observed by code enforcement officials does not affect the determination that he had constructive possession of the gun because (1) the totality of the circumstances supports such a finding and (2) a person’s immediate physical presence is not even necessary to make a finding of constructive possession.

Pennsylvania courts have consistently held that “a conscious dominion may be inferred from the totality of the circumstances.” *Commonwealth v. Fortune*, 318 A.2d 327, 329 (1974). In finding a *prima facie* showing of constructive possession, courts have considered within the

“totality of circumstances,” the following factors to be significant: the nature of location in which the contraband is found, indicia of ownership of the location in question, defendant’s knowledge of the whereabouts of such contraband, and defendant’s access to the contraband. *Id.*

In this case, there is sufficient evidence to establish that the residence in question was West’s. The gun was also found in what can be inferred as West’s bedroom on his dresser which is a place personal items are usually kept and the owner has particular knowledge and access to these items. Under the totality of the circumstances, a *prima facie* showing has been made by the Commonwealth that West had the power to control and exercise such control over the gun in his bedroom.

Under the totality of the circumstances, a finding of constructive possession may be made even when the defendant is not present in the room or residence being searched. Searches of individuals’ residences where contraband is constructively possessed often occur when the owner is not himself present at the residence or in the room being searched. Therefore if one’s physical presence is not required at the time the search takes place, then it can be reasoned that being awake is also not a requirement. In *DeCampli*, the court found constructive possession for a controlled substance even though during the search of his bedroom dresser the defendant was absent from the residence. 346 A.2d at 455-56. In *Commonwealth v. Aviles*, constructive possession was found when a police officer discovered contraband at the defendant’s residence within a bedroom she rented out to her sister and brother-in-law. 615 A.2d at 400-401. Even though the defendant was not present in the room when the contraband was found, the court found joint constructive possession under the totality of the circumstances. *Id.* at 403.

Therefore if constructive possession may be found even when the defendant is not present during the search, it may certainly be found in this case where West was found sleeping in the same room with the contraband at the time of the search.

IV. CONCLUSION

Under the totality of the circumstances, the Motion to Quash is denied.

ORDER

It is hereby ORDERED that the Motion of Defendant William West filed September 10, 2007 is DENIED in that the Commonwealth has presented sufficient evidence to establish a *prima facie* case for constructive possession in the charges against William West of person not to possess a firearm, firearms not to be carried without a license, and receiving stolen property. It is further ORDERED that a status conference shall be held before this court on December 20, 2007 at 10:30am. The Defendant and counsel shall appear. Defense counsel shall notify the Defendant of this order and obligation to appear.

BY THE COURT,

William S. Kieser, Judge

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