IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	
	:	
v.	**:**	**No.: 635-2007**
	:	
PONZETTE TILLER,	**:**	
Defendant	**:**	

OPINION AND ORDER

On November 14, 2008, Defendant filed a Post Sentence Motion and an amended Motion on November 26, 2008. Argument on Defendant's Motion was held on January 1, 2009. Defendant raises five issues in his motion: (1) that the Commonwealth did not meet its burden of proving the Defendant was in possession of the jacket and drugs; (2) that the jury did not have a proper understanding of the element of possession; (3) that the jury's verdict was contrary to the evidence presented at trial; and (4) that the jury's verdict was against the weight of the evidence. Defendant requests either Judgment Notwithstanding the Verdict, a New Trial, or Judgment of Acquittal.

Background

On March 25, 2007, around midnight, Officer Jeremy Brown ("Brown") and his partner, Officer Justin Snyder (Snyder) were in the area of Cemetery Street and Memorial Avenue when they observed a truck parked in front of a locksmith business. Brown noticed that the truck was running and remained stationary for several minutes, so he and his partner decided to go check it out. As the Officer's approached, they noticed the sticker on the license plate was expired. Snyder approached the driver, while Brown approached the passenger side where the Defendant

was sitting. Brown believed the Defendant had something in his hand because his hand was cupped and he was sticking it between his legs. Brown also noticed that the Defendant had a black leather jacket on his right knee closest to the door farthest from the two other female occupants. Brown ordered the Defendant to show his hands and found there was nothing in them. Brown went back to the rear of the vehicle and then re-established contact with the Defendant, who told Brown his name and that that there might be a warrant out for his arrest. Brown determined that there was a warrant[1] out for the Defendant's arrest. Brown had the Defendant exit the vehicle at which time he (Brown) noticed that the jacket was on the floor sort of balled up between the Defendant's legs.

The Defendant was taken into custody and searched. Found on the Defendant's person was a small vial containing marijuana, $53.00, and a cell phone. Found on the floor below the black leather jacket was another $20.00, and in the jacket were five bags of white powdery substance, which field tested positive for cocaine, a blunt containing marijuana, another little bag of marijuana, and a lighter.

On June 24, 2008, a jury trial was held before this Court, at which the Defendant was found guilty of one count of Possession with the Intent to Deliver (cocaine) at 35 P.S. § 780-113(a)(30), one count of Possession of a Controlled Substance (cocaine) at 35 P.S. § 780-113(a)(16), one count of Possession of a Controlled Substance, small amount of marijuana at 35 P.S. § 780-113(a)(31), and two counts of Possession of Drug Paraphernalia at 35 P.S. § 780-113(a)(32). On November 13, 2008, the Defendant received a sentence of thirty-six (36) months to one hundred and twenty (120) months in a State Correctional Institution for the Possession

[1] The warrant was later determined to be stale.

with the Intent to Deliver charge, with the Court the remaining counts would merge at the time of sentencing.

Discussion

The Commonwealth did not meet its burden of proving the Defendant was in possession of the jacket and drugs

Defendant asserts that the Commonwealth did not meet its burden of proving beyond a reasonable doubt, the Defendant was in possession of the jacket and therefore, in possession of the drugs. Due to this alleged failure, the Defendant moves for Judgment Not Withstanding the Verdict or in the alternative he moves for Judgment of Acquittal.

According to the Pennsylvania Superior Court, constructive possession is defined as "'conscious dominion,' which in turn has been defined as 'the power to control . . . contraband and the intent to exercise that control.'" Commonwealth v. Stembridge, 579 A.2d 901, 903 (Pa. Super. Ct. 1990) (quoting Commonwealth v. Mudrick, 507 A.2d 1212, 1213 (Pa. 1986)). Constructive possession "is a legal fiction, 'an inference arising from a set of facts that possession of the contraband was more likely than not.'" Id. The purpose of the constructive possession "doctrine is to expand the scope of possession statutes to encompass cases in which possession at the time of arrest cannot be shown, but in which there is a strong inference that there has been actual possession." Stembridge, 579 a.2d at 903 (citing Commonwealth v. Carroll, 507 A.2d 819, 820 (1986)). Constructive possession '"may be inferred from the totality of the circumstances . . . . [and], circumstantial evidence may be used to establish a defendant's possession of drugs or contraband.'" Commonwealth v. Valette, 613 A.2d 548, 550 (Pa. 1992) (quoting Commonwealth v. Macolino, 469 A.2d 132, 134 (1983).

In Commonwealth v. Thomas, when police officers approached the car driven by defendant, they saw the defendant reach down with his right arm and hand toward the gas pedal. After search of the car, the officers found a package containing heroin in the vicinity of the gas pedal. 386 A.2d 64-65 (1978). The Court held that although another person had been in the car with the defendant, the jury could reasonably have inferred from the evidence of defendant's closeness to the location of the drugs and his reaching in that direction that immediately before the drugs were found the defendant had controlled the heroin and intended to exercise that control. Id. at 66.

In the instant case, upon approaching the vehicle in which the Defendant was a passenger, Brown noticed that the Defendant had his hand cupped and was sticking it between his legs and that he had a black leather jacket on his right knee closest to the door farthest from the existing occupants. When Defendant exited the vehicle, Brown noticed that the jacket was off his right knee and was down on the floor kind of like balled up between his legs. Brown also testified that often times people discard drugs to avoid getting caught and here the mere fact that the jacket is on the floor shows that the Defendant was trying to distance himself from the jacket. Based upon the totality of the circumstances, the jury found, despite the testimony that there were others in the vehicle and clothing all over the vehicle, the jacket was first on Defendant's lap, then on the floor below where Defendant was sitting when exiting the vehicle, the defendant had controlled the cocaine and intended to exercise that control. As the Commonwealth met its burden, Defendant's request for Judgment Not Withstanding the Verdict or Judgment of Acquittal should be denied and the judgment affirmed.

The Defendant should be granted a new trial as the jury did not have a proper understanding of the element of possession

Defendant's next contention is that the jury did not have a proper understanding of the element of possession as during deliberations they asked to be read the definition of possession again. Therefore, Defendant asserts he should be granted a new trial.

Pennsylvania Rule of Criminal Procedure 647(c) states "[a]fter the jury has retired to consider its verdict, additional or correctional instructions may be given by the trial judge in the presence of all parties . . .."

After deliberating for a period of time, the jury sent out a note asking the Court to read the definition of the possession with the intent to deliver charge again. The Court read the following definition to the jury:

> In order for a person to be convicted of possession of a controlled substance with the intent to deliver the following four elements must be proved to you beyond a reasonable doubt. One, that the item is, in fact, a controlled substance and I hereby instruct you that cocaine is a controlled substance under the laws of the Commonwealth of Pennsylvania; two, that the substance was possessed by the Defendant; three, that the Defendant was aware of the item's presence; and that the item was, in fact, the controlled substance charged; and four, that the Defendant possessed this item or these items with the specific intent or goal of delivering the time to another. So again, if you're satisfied that the Commonwealth has met its burden of proof on those four elements you should find the Defendant guilty; otherwise, you must find the Defendant not guilty of this crime.

N.T. 6/24/08 pgs. 77-78. The Defendant does not allege the above definition was improperly given to the jury, he merely asserts the jury did not have a proper understanding of that definition. Additionally, there was no indication after the jury was instructed they had any additional questions or were confused by the instructions. After review of the relevant case law, the Court is unable to locate any authority which states that the jury's request to repeat an element of an offense is cause for a new trial. Furthermore, Rule 647(c) speaks to the issue and

provides the procedure for the Court to follow when given additional or correctional information. As the Court cannot locate any authority on the issue and the Defendant has not asserted the above charge was improper, Defendant's request for a new trial should be denied and the judgment affirmed.

The jury's verdict was contrary to the evidence presented at trial

The Defendant also asserts he should be granted a new trial as the verdict rendered by the jury was contrary to the evidence presented at trial.

The test used to determine the sufficiency of the evidence in a criminal matter is "whether the evidence, and all reasonable inferences taken from the evidence, viewed in the light most favorable to the Commonwealth, as verdict-winner, were sufficient to establish all the elements of the offense beyond a reasonable doubt." Commonwealth v. Maloney, 876 A.2d 1002, 1007 (Pa. Super. Ct. 2005) citing Commonwealth v. Lawson, 759 A.2d 1 (Pa. Super. Ct. 2000). In applying the sufficiency of the evidence test, the Court "may not weigh the evidence and substitute [it's own] judgment for that of the fact-finder." Commonwealth v. Lambert, 795 A.2d 1010, 1014 (Pa. Super. Ct. 2002). When applying "the above test, the entire record must be evaluated and all evidence actually received must be considered." Id. at 1015.

The elements of a charge of Possession with the Intent to Deliver are the possession of a controlled substance and the specific intent to deliver said controlled substance to another. 35 Pa.C.S.A. § 780-113(a)(30). According to the Pennsylvania Supreme Court, the intent to deliver may be inferred from possession of a large quantity of controlled substances. Commonwealth v. Jackson, 645 A.2d 1366, 1368 (Pa. Super. 1994). However,

> if the quantity of the controlled substance is not dispositive as to the intent, the court may look to other factors. Other factors to consider . . . include the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large sums of cash found in possession of the defendant.

Commonwealth v. Ratsamy, 934 A.2d 1233, 1237-38 (Pa. 2007) citing Jackson, 645 A.2d at 1368. Further, "[e]xpert opinion testimony is admissible concerning whether the facts surrounding the possession of controlled substances are consistent with an intent to deliver rather than with an intent to possess it for personal use." Ratsamy, 934 A.2d 1238.

In the instant case, the Commonwealth introduced into evidence that the contraband found in the jacket originally seen on the Defendant's lap, then the floor of the vehicle below where Defendant had been sitting consisted of four small clear plastic bags containing cocaine, inside a larger clear sandwich bag containing and eight ball of cocaine, for a total weight of 9.6 grams. N.T. 6/24/08 p. 16. At trial, the Commonwealth's narcotics expert, Officer Jeremy Brown testified that he believed the Defendant possessed the cocaine with the intent to deliver, but not the marijuana. Brown based his assertion upon several factors:

> The cocaine, however, the fact that it was – I determined it was possessed with the intent to deliver is, one, the packaging. He had five bags, each containing – they're big indicators, the one bag was substantially larger than the other, which was approximately 3.54, which is considered an eight ball of cocaine so prices change. Had probably a couple, four, twenty bags and then an eight ball. That, the fact that he had a cell phone, more common than not drug deals are arranged by phone, particularly, cell phone and he had no personal use paraphernalia for the cocaine. He did the marijuana, the blunt . . . was utilized to smoke the marijuana. . . . There is no personal use other than, you know, snorting, . . . the cocaine. . . . There was also two drugs. It's not uncommon for drug dealers to possess more than one drug. Usually 99 percent of the time, a consistent dealer somebody who strictly deals for profit, not for product, someone who deals for profit doesn't use what they deal, one, because it's very expensive, obviously, and you're losing profit. . . . They don't use their profit. It's common for them to use other drugs. Marijuana is very common. . . . The fact that he had some money, wasn't a large amount of money, but again he had, you know 80, 280, $300 worth of cocaine. That and the fact that where it's specifically located, too, in the jacket if it was together he had the weed on him in his pocket in addition to some weed in the coat, but he had it in the coat itself, the product. It's not uncommon for drug dealers to have it readily available, but can get rid of

> it pretty quick. Usually they want to have it out because when the . . . police show up they don't want to get caught with it. . . . The fact that he had it on his lap, it was in his possession I took – I was –no doubt in my mind I thought there was coke or drugs in the jacket for the mere fact that its' now on the floor, which it's common for people to do they'll distance themselves. . . . It's a very, very, high crime area, too.

N.T. 6/24/08, pgs. 19-21. Brown also testified that he never had an addict or user have that much cocaine at one time and packaged in this manner due to the high cost. Viewed in the light most favorable to the Commonwealth, the Court finds there was sufficient evidence for the jury to find the Defendant guilty of Possession with the Intent to Deliver cocaine. Therefore, the Defendant's request for a New Trial should be denied and the judgment affirmed.

The jury's verdict was not against the weight of the evidence

"The question of weight of the evidence is one reserved exclusively for the trier of fact who is free to believe all, part, or none of the evidence and free to determine the credibility of witnesses." Commonwealth v. Solano, 906 A.2d 1180, 1186 (Pa. 2006) citing Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003). The test to determine whether the jury's verdict was against the weight of the evidence is not whether the trial judge, based on the same facts, would have arrived at the same conclusion. Commonwealth v. Edwards, 903 A.2d 1139, 1148 (Pa. 2006) (and cases cited therein). Rather the test is "whether the jury's verdict is so contrary to the evidence so as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." Id.

Instantly, in light of the physical evidence and expert testimony, the jury's verdict does not shock the Court's sense of justice. Therefore, the Court suggests that the Defendant's contention that the jury's verdict of guilty was against the weight of the evidence is not justified. As such, the Defendant's request for a New Trial should be denied and the judgment affirmed.

Conclusion

Based upon the foregoing, the Court finds no reason upon which to grant Defendant's Post-Sentence Motion. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4)(a), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty days (30) of the date of this Order to the Pennsylvania Superior Court; "(b) the right to assistance of counsel in the preparation of the appeal; (c) the rights, if the defendant is indigent, to appeal in forma pauperis and to proceed with assigned counsel as provided in Rule 122; and (d) the qualified right to bail under Rule 521(B)."

ORDER

AND NOW, this 13th day of March 2009, based on the foregoing Opinion, it is hereby ORDERED AND DIRECTED that Defendant's Post Sentence Motion is DENIED.

By The Court,

Nancy L. Butts, Judge

cc: DA (PP)
Andrea Pulizzi, Esq.
Trisha D. Hoover, Esq. (Law Clerk)
Gary Weber, Esq. (LLA)