

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH</b>	:	<b>No.: 1600-2008</b>
	:	<b>OTN: K 684401-4</b>
<b>v.</b>	:	
	:	<b>CRIMINAL DIVISION</b>
<b>JAMAL THOMAS,</b>	:	
<b>Defendant</b>	:	

**OPINION AND ORDER**

The Defendant filed a Post-Sentence Motion on August 11, 2010. Argument on the Post-Sentence Motion was held August 27, 2010. The Defendant requests either a Motion in Arrest of Judgment or a New Trial to dismiss the charges of Possession With Intent to Deliver (PWID) (cocaine) (marijuana), Possession of a Controlled Substance (cocaine) (marijuana) (Xanax) and Possession of Drug Paraphernalia.

***Background***

During the jury trial on April 26, 2010, Corporal Jason Gill of the Hughesville Borough Police Department testified to the following facts: On or about midnight on August 17, 2008, Gill and Officer Brian Naylor (Naylor) of the Hughesville Borough Police Department observed a Chevrolet Blazer travel past the gas station with its turn signal on, but the Blazer failed to turn. They then observed the vehicle continue on and then cross the double yellow line by approximately one-fourth of the vehicle as it turned right onto Route 220 at the borough line. They continued to follow the vehicle during which time they observed the vehicle cross the double yellow line once more and the fog line twice.

Gill and Naylor stopped the vehicle at the intersection of Wolf Run Road and Route 220. The driver of the vehicle stopped the vehicle in the middle of the bridge. Gill approached the

driver's side of the vehicle while Naylor approached the passenger side. As the driver attempted to provide identification, Gill detected an odor of marijuana and observed burnt ashes on the lap of the driver. Gill observed that the driver's eyes were blood shot. The driver was later identified as Jamal Thomas (Defendant). The passenger of the vehicle, Harry Thomas, opened the glove box in an attempt to provide vehicle information. Gill then observed a bag of suspected marijuana in the glove box. The Defendant was then requested to exit the vehicle. As the Defendant exited the vehicle, he was holding his pants at the buckle. When the Defendant let go of his pants, a white powdery substance, suspected cocaine, fell out of the bottom of the pant leg. The Defendant then attempted to kick the substance in the direction that would place it under the vehicle. The Defendant was searched and found to have two cell phones and \$419.00 on his person. The passenger, Harry Thomas, was also searched and was found to have \$915.00 on his person.

After both the driver and the passenger were removed from the vehicle and placed into custody, Gill returned to the vehicle to retrieve the bag of suspected marijuana out of the glove box and discovered a second bag of suspected marijuana in the vehicle. All of the substances were field tested. The suspected cocaine was positive for 30.8 grams of cocaine and the both bags of the suspected marijuana tested positive for marijuana weighing 11.74 grams and 27.45 grams.

On August 21, 2008 Gill obtained a search warrant for the Chevrolet Blazer. Upon a thorough search of the vehicle, Gill and Naylor found: 1) a bag in the passenger side door containing six (6) Xanax pills; 2) a black bag containing a digital scale with marijuana particles on it, and a box of baggies; 3) marijuana pieces and stems on the floor of the vehicle and in the bag; 4) a bag containing the insides of cigars; 5) a shopping bag containing clothing purchased

on August 16, 2008 from the Lycoming Mall, the contents of which were paid for in cash and totaled \$726.98; and 6) numerous hidden places inside the vehicle where objects could be placed.

## ***Discussion***

### ***Motion in arrest of judgment***

In deciding a motion in arrest of judgment, the question to be decided is whether sufficient evidence was established to sustain the jury's verdict. The standard to apply in determining the sufficiency of the evidence is whether, "[v]iewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the trier of fact could have reasonably determined that all of the elements of a crime have been established beyond a reasonable doubt." Commonwealth v. Keblitis, 456 A.2d 149 (Pa.1983).

In order to prove the Defendant guilty of PWID, the Commonwealth had to prove beyond a reasonable doubt that the Defendant possessed a controlled substance and that he intended to deliver the controlled substance to another person. Commonwealth v. Radford, 33 Phila 399 (Phila.Cty.1997). Possession of a controlled substance is established by showing either actual or constructive possession. Actual possession is established when the Commonwealth shows that the defendant had the controlled substance on his person. Constructive possession is 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." Radford at 405 (See Commonwealth v. Macolino, 469 A.2d 132, 134 (Pa. 1983)). "The intent required to show a conscious dominion and control over the controlled substances may be inferentially proven from the totality of the circumstances." Radford at 405 (See Commonwealth v. Ocasio, 619 A.2d 352 (Pa.1993)). In this case, the Defendant was found with the cocaine on his person, as the bag of cocaine fell out of

his pant leg. The Defendant was also found to be operating a vehicle with a large amount of marijuana and a small amount of Xanax inside the vehicle. Furthermore, during the jury trial, Gill testified that the Defendant admitted that the marijuana was his and his brother's, his brother being the passenger Harry Thomas. The totality of the circumstances demonstrates that the Defendant had the power to exercise control over the marijuana and Xanax, and the intent to exercise that control.

Viewing this evidence in a light most favorable to the Commonwealth as verdict winner, the Court believes the Commonwealth presented sufficient evidence to find the Defendant guilty of Possession of a Controlled Substance (cocaine) (marijuana) (Xanax).

While the possession element of PWID was addressed in the preceding paragraph, “[t]he intent to deliver may be inferred from an examination of all of the facts and circumstances of the case.” Radford at 404 (See Commonwealth v. Williams, 615 A.2d 416 (Pa. 1992)). Factors to be used to infer the intent to deliver include “[t]he manner in which the substance is packaged, the presence of drug paraphernalia, large sums of cash found on the defendant's person, and the behavior of the defendant.” Radford at 405 (See Commonwealth v. Ramos, 573 A.2d 1027 (Pa.1990)). In this case, the Defendant was found with \$419.00 and a bag of cocaine on his person. The vehicle the Defendant was driving at the time he was arrested had a scale and a box of baggies in the trunk. Furthermore, during the jury trial on April 26, 2010 Corporal Chris Moore (Moore) of the Williamsport City Police testified as an expert on PWID. N.T. 39-59. Defense Counsel stipulated to Moore's qualifications as an expert on PWID. N.T. 40. Moore testified that the large amount of cocaine found in this case (28 grams), indicated that the drugs were used for sale rather than for personal use. N.T. 46-48. Moore also testified that the presences of two cell phones, the box of baggies, the digital scale, the amount of cash found on the Defendant's person, and the presence of hiding places in the vehicle, were all indicators that

the Defendant possessed the cocaine with the intent to use. N.T. 52-58. Moore also addressed the fact that it appeared as though the Defendant had smoked marijuana in the car, but had not used the cocaine. N.T. 49. Moore's testimony revealed that while a drug dealer may smoke marijuana for personal use, they would not use their product because selling their product was how they made money. N.T. 49. However, Moore indicated that a drug dealer of other controlled substances may also sell marijuana from time to time. N.T. 49. Furthermore, the digital scale found in the vehicle had marijuana pieces on it. Moore testified that the presence of a scale was indicative of a drug seller, not a drug user. N.T. 55.

Viewing this evidence in a light most favorable to the Commonwealth as verdict winner, the Court believes that the Commonwealth presented sufficient evidence to find the Defendant guilty of possession with intent to deliver.

To maintain a conviction for Possession of Drug Paraphernalia, the Commonwealth must prove that the "items possessed by defendant were used or intended to be used with a controlled substance so as to constitute drug paraphernalia and this burden may be met by Commonwealth through circumstantial evidence." Commonwealth v. Coleman, 984 A.2d 998 (Pa.Super.2009) (See Commonwealth v. Little, 879 A.2d 273, 300 (Pa.Super.2005)). Possession of drug paraphernalia is defined as:

The use of, or possession with intent to use, drug paraphernalia for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this act

35 P.S. § 780-113(a)(32). Drug paraphernalia is defined as "all equipment, products and materials of any kind which are used, intended for use or designed for use in ... storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human

body a controlled substance in violation of this act.” 35 P.S. § 780-102. In determining whether an object is drug paraphernalia, a court or other authority should consider:

in addition to all other logically relevant factors, statements by an owner or by anyone in control of the object concerning its use ... the proximity of the object, in time and space, to a direct violation of this act, the proximity of the object to controlled substances, the existence of any residue of controlled substances on the object, direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons who he knows, or should reasonably know, intend to use the object to facilitate a violation of this act ... the existence and scope of legitimate uses for the object in the community, and expert testimony concerning its use.

35 P.S. § 780-102. The facts of this case show that the Defendant was pulled over by the police for driving in an erratic manner. The Defendant was then placed under arrest when suspected marijuana was seen in the vehicle. Subsequently, another bag of marijuana in the vehicle and a bag of cocaine on the Defendant’s person were discovered. A search warrant was then obtained and executed for the vehicle. The search warrant revealed, in addition to other items, a digital scale with marijuana particles on it and a box containing bags. At the time of the jury trial, Moore testified as an expert on PWID that digital scales are used by drug dealers to weigh drugs before they are packed. N.T. 54. Moore also testified that baggies are used by drug dealers to assist with weighing out drugs and also to package the drugs once they are weighed. N.T. 55. Furthermore, a bag containing cigars was found in the vehicle, which Gill testified was common for a marijuana user to use to smoke their marijuana. N.T. 29.

Viewing this evidence in a light most favorable to the Commonwealth as verdict winner, the Court believes that the Commonwealth presented sufficient evidence to find the Defendant guilty of possession of paraphernalia.

*Motion for a new trial*

The Defendant avers that the verdict of the jury was against the weight of the evidence. The Defendant argues that the evidence failed to prove beyond a reasonable doubt: 1) that the Defendant possessed cocaine or marijuana with the intent to deliver; 2) that the Defendant possessed a controlled substance (marijuana) (Xanax) and; 3) that the Defendant possessed drug paraphernalia.

“A motion for a new trial alleging that the verdict was against the weight of the evidence is addressed to the discretion of the trial court.” Commonwealth v. Keaton, 729 A.2d 529 (Pa.1999). A challenge to the weight of the evidence assumes that the evidence was sufficient but argues that the verdict was so contrary to the evidence as to shock one’s sense of justice and mandate the granting of a new trial. See Commonwealth v. Hunter, 554 A.2d 550, 555 (Pa.Super.1989). To support his claim that the verdict of the jury was against the weight of the evidence, the Defendant avers that the testimony of Harry Thomas, in conjunction with the Defendant’s testimony, presented reasonable doubt as to the charges against the Defendant. The Defendant contends that the Commonwealth produced no testimony which tended to controvert that produced by the Defendant. This argument is clearly untrue as the Court has already quoted extensively from both Corporal Gill and Corporal Moore’s testimonies taken at the jury trial. Significantly, the Court notes that case law is clear that “[t]he finder of fact is free to believe all, part or none of the evidence and to determine the credibility of the witnesses.” Keaton at 540.

In light of the evidence and testimony presented at trial, the Court finds that the verdict of the jury does not shock the Court’s sense of justice. Therefore, the Court finds the Defendant’s contention that the verdict was against the weight of the evidence to be without merit.

***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 (30) days 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 \_\_\_\_\_ day of December, 2010, it is ORDERED AND DIRECTED that for the reasons stated above, the Defendant's Post-Sentence Motion is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: DA  
Nicole Spring, Esq.  
Amanda B. Browning, Esq. (Law Clerk)