

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
	:	
v.	:	No.: 1052-2008
	:	CRIMINAL DIVISION
RAHEEM TURNER,	:	
Defendant	:	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE

The Defendant appeals this Court’s Order of January 22, 2010, denying his Post Sentence Motion. The Court notes a Notice of Appeal was timely filed on January 27, 2010, and that the Defendant’s Concise Statement of Matters Complained of on Appeal was then filed on February 26, 2010. The Defendant raises the following issues on appeal: (1) that the Court erred by denying his request for a mistrial; (2) that the jury’s verdict was against the weight of the evidence; (3) that the Commonwealth failed to establish beyond a reasonable doubt that Defendant was in physical possession of a firearm or had the specific intent to possess a firearm; (4) that the Court’s sentence was unduly harsh and excessive; and (5) that the Court erred in denying his Motion for Reconsideration of Sentence.

Background

On May 1, 2008, at around 5:00 p.m, Trooper Tyson Havens (Havens) and Corporal Ron Clark of the Pennsylvania State Police (PSP) responded to Consolidated Sportsmans on Route 87 because Havens had received a report that Kalif English (English), for whom he had a warrant was there along with Raheem Turner (Defendant) and Walter Martin. The report also stated Defendant was shooting a handgun. Upon approaching the pistol range, Havens observed

Defendant sitting at a bench with a .45 caliber Ruger handgun, along with ammunition, within arms reach. Havens also noted the target board in front of the bench had holes in it as if someone had been shooting a gun into the target. Havens also observed that Defendant was wearing small plugs in his ears for hearing protection. Defendant was taken into custody and the firearm was sent to the PSP Forensics Lab. Tests were conducted on the seized firearm and it was determined that the firearm was capable of firing a projectile. Counsel stipulated to the lab findings at trial.

Gary Evans (Evans), the caretaker for Consolidated Sportsmans testified that as caretaker he patrols the grounds. Evans explained that on May 1, 2008, he observed four people at shooting benches not wearing eye protection. Membership at the Consolidated Sportsmans requires eye protection when discharging a firearm. Evans related that before he approached the group of people to tell them they needed eye protection, he observed Defendant shooting.

Defendant testified on his own behalf at trial. He stated he went to Consolidated Sportsmans to support a friend, Hydia Shavers. Defendant had no intention of shooting a gun, and while there neither held nor shot a gun. Defendant also explained that he was not sitting in front of a shooting bench, but was in fact sitting on the trunk of the car when Havens arrived.

On March 24, 2009, a jury trial was held before this Court, at which time the Defendant was found guilty of one count of Persons not to Possess, Use, Manufacture, Control, Sell, or Transfer Firearms under 18 Pa.C.S. § 6105(a)(1). Due to the seriousness of the offense and Defendant's prior record, on September 15, 2009, Defendant received a sentence of four (4) to eight (8) years in a State correctional Institution.

On September 23, 2009, the Commonwealth filed a Motion to Reconsider Sentence and on September 25, 2009, Defendant filed his Post Sentence Motion. Argument on both Motions was scheduled for October 13, 2009, but was continued until December 10, 2009 to allow the

Defendant to participate at his request by video conferencing. The Commonwealth challenged the calculation of Defendant's prior record score. After denial of Defendant's Post Sentence Motion on January 22, 2010, by Order, Defendant filed this appeal.

Discussion

The Court erred in denying Defendant's request for a mistrial

Defendant asserts that the Court erred in denying his request for a mistrial due to the prejudicial testimony of Havens regarding statements made by English concerning the Defendant's possession of a firearm and the subsequent failure of English to testify at trial. It is within the trial judge's discretion to make determinations regarding the admissibility of evidence. "A[n] appellate court will reverse the judge's decision only for an abuse of discretion." Commonwealth v. Brown, 2009 Pa. LEXIS 2788, p. 20 (Pa. Dec. 29, 2009) (quoting Commonwealth v. Vandivner, 962 A.2d 1170, 1179 (Pa. 2009)). Further, "[a] motion for mistrial is a matter addressed to the discretion of the court. A trial court need only grant a mistrial where the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial." Commonwealth v. Fletcher, 750 A.2d 261, 269 (Pa. 2000).

In Brown, the Defense introduced the affidavit of probable cause into evidence. The Prosecution questioned the detective regarding the general content of the affidavit, but the affidavit's language read was "never read aloud to the jury, nor were any witness statements discussed, other than to say the document contained specific witness statements." Brown, 2009 LEXIS 2788 at 20-21. The Superior Court held that as

no statements, incriminating or otherwise, were actually provided to the jury, neither the Confrontation Clause nor the hearsay rule was violated. The questions were not improper,

and any inferences derived therefrom were a matter for the jury going to the weight of the evidence. Accordingly, we reject appellant's Crawford and hearsay arguments.

Id. at 21.

At trial in the instant case, the Court denied Defendant's request for a mistrial because the Court did not allow Havens to get into the substance of the statement made by English. The Court felt that Havens testimony that a written statement was given, but not what the statement contained and the fact that English did not testify was not enough to justify a mistrial as it did not deprive the Defendant of a fair trial. See Brown, 2009 Pa. LEXIS 2788 at 20-21. The Court also instructed the jury that they were not to consider any testimony regarding statements made by English as he did not testify. Therefore, the Court did not err in denying Defendant's request for a mistrial.

The jury's verdict was against the weight of the evidence

The Defendant alleges that the jury's verdict was against the weight of the evidence and that the Commonwealth failed to establish beyond a reasonable doubt that he was in physical possession of a firearm or had the specific intent to possess a firearm.

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. Further, “[t]he 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.

A person is guilty of Persons not to Possess, Use, Manufacture, Control, Sell, or Transfer Firearms and violates 18 Pa.C.S. § 6105(a)(1), when that person has been convicted of an offense enumerated in subsection (b) or meets the criteria of subsection (c) as set forth in the statute and “possess[es], use[s], control[s], sell[s], transfer[s] or manufacture[s] or obtain[s] a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth. According to the Pennsylvania Superior Court, constructive possession must be established when the contraband is not found on the Defendant’s person. See Commonwealth v. Sanes, 955 A.2d 369, 373 (Pa. Super. Ct. 2008) . Constructive possession is defined as “the ability to exercise conscious control or dominion over the illegal substance and the intent to exercise that control.”” Sanes, 955 A.2d at 373 (quoting Commonwealth v. Kirkland, 831 A.2d 607, 610 (Pa. Super. Ct. 2003), appeal denied, 577 Pa. 712, 847 A.2d 1280 (2004) (citing Commonwealth v. Macolino, 503 Pa. 201, 469 A.2d 132 (1983))). ““The intent to exercise conscious dominion can be inferred

from the totality of the circumstances.” Sanes, 955 A.2d at 373 (quoting Kirkland, 831 A.2d at 610).

In the instant case, the Commonwealth and Defendant stipulated prior to trial that the Defendant was prohibited from possessing, using, manufacturing, controlling, selling, or transferring firearms due to a previous felony drug conviction. At trial, the Commonwealth presented the testimony of Havens that upon approaching the pistol range, he observed Defendant sitting at a bench with a .45 caliber Ruger firearms laying within arms reach of him, along with ammunition, and the target board in front of the bench had holes in it as if someone had been shooting that gun into the target. Havens also observed that Defendant was wearing small plugs in his ears for hearing protection. Evans also testified that when he approached Defendant and the group of individuals he was with, he observed Defendant shooting. Finally, Counsel stipulated that the firearm was capable of firing a projectile. 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 Persons Not to Possess, Use, Manufacture, Control, Sell, or Transfer Firearms. Further, the jury’s verdict does not shock the Court’s sense of justice. As such, the Defendant’s Motion shall be denied.

The Court’s sentence was unduly harsh or excessive

Defendant asserts that the Court’s sentence was unduly harsh or excessive and that he should be resentenced in the mitigated range. Specifically, Defendant asserts that the firearm he was allegedly shooting at the shooting range was properly registered and owned by another person present at the range, the gun was not being used in furtherance of a crime, it was not

concealed on his person or in a vehicle owned by him, and finally that he is a bright young man that can be an asset to society.

When a Defendant is challenging the discretionary aspects of his sentence, there is no absolute right to appeal the sentence imposed. 42 Pa.C.S.A. § 9781(b). The Defendant is required to show there is a substantial question that the sentence imposed is not appropriate under the sentencing code. Id. “A bald claim of excessiveness of sentence does not raise substantial question so as to permit review where the sentence is within the statutory limits.”

Commonwealth v. Petaccio, 764 A.2d 582, 587 (Pa. Super. Ct. 2000). See also Commonwealth v. Jones, 613 A.2d 587, 593 (Pa. Super. 1992) (en banc). “In order to establish a substantial question, the appellant must show actions by the sentencing court inconsistent with the Sentencing Code or contrary to the fundamental norms underlying the sentencing process.”

Commonwealth v. Fiascki, 886 A.2d 261, 263 (Pa. Super. Ct. 2005). The trial court's sentence will stand unless there is a manifest abuse of discretion. To demonstrate an abuse of discretion, “the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias, or ill will, or arrived at a manifestly unreasonable decision.” Commonwealth v. Perry, 883 A.2d 599, 602 (Pa. Super. Ct. 2005).

The Defendant was found guilty of Persons Not to Possess, Use, Manufacture, Control, Sell, or Transfer Firearms, which is a Felony of the second degree. The statutory maximum for the offense is ten (10) years. The Defendant also had a prior record score of 3. The Defendant received a sentence of four (4) to eight (8) years in state prison which is within the standard range of forty-two (42) to fifty-four (54) months. At the time of sentencing, the Court did not consider any aggravating factors, but also felt there were no mitigating factors. The Court’s

decision was based upon the fact that Defendant was on supervision at the time, associate[d] with people and [was] involved in an activity that [he] shouldn't have been involved with. N.T.

3/24/2009 p. 23. The Court went on to state that it was not as if the Defendant was driving around in a car with a gun under the floor mat

or engaged with people who had just committed a serious offense. You were out at a shooting range. But the law is the law that says, you as a person with your prior record can't be carrying – can't even be holding a gun.

Id. The Court asserts the Defendant's standard range sentence was appropriate and his Post Sentence Motion was denied.

Conclusion

As none of the Defendant's contentions appear to have merit, it is respectfully suggested that the Defendant's sentence be affirmed.

By The Court,

Nancy L. Butts, P.J.

xc: DA (PP)
PD (RB)
Trisha D. Hoover, Esq. (Law Clerk)
Gary Weber, Esq. (LLA)