

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
vs. : **No. CR-1260-2009**
 :
DAMONTRAY TAYLOR, :
Defendant :

OPINION AND ORDER

Before the Court are the “Post Trial Motions” of Defendant. The Motions include a Motion for a New Trial, what is styled as an Omnibus Pretrial Motion, a Motion in Arrest of Judgment and a Motion for Reconsideration of Sentence.

Argument on the Motions was held before the Court on September 20, 2010. Defendant’s Motion was filed on June 30, 2010.

Following a jury trial, on March 11, 2010, Defendant was found guilty of Count 1, Possession with Intent to Deliver a Controlled Substance, Count 2, Possession of a Controlled Substance, Count 3, Possession of Drug Paraphernalia and Count 5, Delivery of a Controlled Substance. Defendant was sentenced on June 29, 2010 with respect to Count 1 to an eight-month minimum and a one and a half year maximum to be served in a State Correctional Institution. Count 2 merged with Count 1 for sentencing purposes. With respect to Count 5, Defendant was sentenced to a consecutive eight months to one and a half years to be served in a State Correctional Institution. The sentence of the Court with respect to Count 3 was guilt without further punishment.

With respect to Defendant’s Motion for a New Trial, he contends that the evidence was insufficient to establish the elements of Possession with Intent to Deliver marijuana, with respect to Count 1 and Delivery of a Controlled Substance-Marijuana with respect to Count 5.

With respect to the Possession with Intent to Deliver charge, Count 1, Defendant alleges that the evidence was both insufficient to establish possession of the marijuana and that the Defendant possessed the marijuana with the intent to deliver it.

With respect to the Delivery of a Controlled Substance charge, Count 5, Defendant argues that the evidence was insufficient to establish that the Defendant delivered the marijuana.

The applicable standard in connection with a sufficiency of evidence claim is whether, viewing all of the evidence admitted at trial in a light most favorable to the verdict winner, there is sufficient evidence to enable the factfinder to find every element of the crime beyond a reasonable doubt. Commonwealth v. Muniz, 2010 Pa. Super. 160 (September 3, 2010) citing Commonwealth v. Hennigan, 753 A.2d 245 (Pa. Super. 2000).

With respect to Defendant's possession argument, because no controlled substance was found on the Defendant's person, the Commonwealth must satisfy the burden of proving possession by proof of constructive possession. Commonwealth v. Valette, 531 Pa. 384, 613 A.2d 548 (1992). Constructive possession of controlled substances "requires proof of the ability to exercise conscious dominion over the illegal substance, the power to control the substance and the intent to exercise such control". Commonwealth v. Perez, 931 A.2d 703, 708 (Pa. Super. 2007), quoting Commonwealth v. Bricker, 882 A.2d 1008, 1014 (Pa. Super. 2005).

Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. Constructive possession has been defined as "conscious dominion". Conscious dominion has been defined as the power to control the contraband and the intent to exercise that control. Constructive possession may be

established by the totality of the circumstances. Muniz, supra., citing Commonwealth v. Thompson, 779 A.2d 1195, 1199 (Pa. Super. 2001).

In reviewing the totality of the circumstances and considering the evidence in this matter, especially when considered in a light most favorable to the Commonwealth, it is more than sufficient to establish the Defendant's constructive possession of the marijuana.

The facts surrounding the case point to a strong inference of possession. Following the initial stop, two police officers observed the Defendant through the car window. According to the officers, the Defendant appeared to be checking, assessing or concealing something by lifting his hips. They observed the Defendant lean forward, and dump his right shoulder as if putting something under the seat. Upon a legal search of the vehicle, the police located under the seat where Defendant was sitting and easily accessible to the Defendant a plastic bag which contained smaller bags of marijuana. The packaging and size of the marijuana was similar to the packaging and size of a small bag of marijuana found in the map pocket of the back of the front seat. Robert Kirk testified on behalf of the Commonwealth. He indicated that he placed the smaller bag in the map pocket following the vehicle being stopped by the police. He also specifically testified that he previously purchased the bag of marijuana from the Defendant, while they were driving around in the vehicle.

Defendant argues that the drugs were found in a car belonging to another and that other individuals in the car had the power to control the drug. Defendant specifically argues that the drugs were in a location easily accessible to the others.

The Commonwealth need not preclude every possibility of innocence. The fact remains that the jury, while passing on the credibility of the witnesses and the weight of the

evidence produced, evaluated the evidence and concluded that the Commonwealth met its burden.

In order for the Defendant to be found guilty of Possession with Intent to Deliver, the Commonwealth must also prove that he intended to deliver the marijuana. Commonwealth v. Bostick, 950 A.2d 543 (Pa. Super. 2008). The intent to deliver a controlled substance may be inferred from the evidence. Bostick, supra. All the facts and circumstances surrounding the possession of illegal substances are relevant in determining whether they were possessed with intent to deliver. Commonwealth v. Jackson, 645 A.2d 1366 (Pa. Super. 1994).

The Court concludes that there was sufficient evidence upon which the jury could conclude that the Defendant possessed the controlled substances with the intent to deliver them. First, the marijuana was packaged in 22 separate baggies and of a weight that was consistent with delivery. Next, the Defendant did in fact deliver marijuana to Mr. Kirk. Additionally, other items were confiscated from the Defendant evidencing the intent to distribute marijuana. Finally, the Commonwealth presented an expert who testified that in his opinion and experience the circumstances were such that the Defendant possessed the marijuana with intent to deliver it.

Next, Defendant argues that there was insufficient evidence to sustain his conviction for delivery of marijuana. This charge was based on the Defendant's delivery of a small baggie containing marijuana, to Robert Kirk. Mr. Kirk testified at trial. He specifically testified that he purchased the small baggie of marijuana from the Defendant. He indicated that he paid \$10.00 for the baggie. Further, the parties stipulated to a report from the Pennsylvania

State Police lab verifying that the substance contained in the baggie was in fact marijuana, an illegal controlled substance.

The jury, as the trier of fact, was free to believe all, part or none of the aforesaid evidence. Commonwealth v. Lette, 613 A.2d 548 (Pa. 1992). Obviously, the jury believed all of it. There is no doubt that there was more than sufficient evidence upon which to convict the Defendant on the delivery charge.

Defendant next argues that the Court erred in dismissing his Omnibus Pretrial Motion. Defendant filed an Omnibus Pretrial Motion on August 27, 2009. Included in the Omnibus Motion was a Motion to Suppress Evidence. More specifically, Defendant alleged that the search of the front passenger seat was unconstitutional under both the Pennsylvania Constitution and the United States Constitution. A hearing was held before the Honorable Nancy L. Butts, President Judge on October 29, 2009.

Following the hearing, Judge Butts issued an Opinion and Order dated December 4, 2009. Judge Butts concluded that the Defendant's actions gave the police officers at least articulable suspicion that the Defendant was either reaching for or concealing a weapon or contraband under the seat. Therefore, Judge Butts concluded that the officers neither violated the Pennsylvania Constitution or the United States Constitution.

This Court agrees with and adopts the reasoning and decision of Judge Butts. Moreover, however, this Court is bound by the decision of Judge Butts. The Coordinate Jurisdiction Rule mandates that judges of coordinate jurisdiction sitting in the same case not overrule each other's decision. Okerse v. Howe, 521 Pa. 509, 556 A.2d 827 (1989). This is a Rule of sound jurisprudence based on a policy of fostering the finality of pretrial applications

in an effort to maintain judicial economy and efficiency. Okerse, supra. As part of the law of the case doctrine, the Coordinate Jurisdiction Rule operates to protect the settled expectation of the parties, to ensure uniformity of decisions, to maintain consistency during the course of a case, to effectuate the proper and streamline administration of justice and to bring litigation to an end. Commonwealth v. Star, 541 Pa. 564, 664 A.2d 1326 (1995).

Further, Defendant argues that his convictions were against the weight of the evidence. Defendant argues that because the evidence at trial “shows the drugs were in a location easily accessible to Ms. Aikey and Mr. Kirk and that both witnesses had bias and motivation for making statements against Defendant”, it shocks one’s sense of justice.

When reviewing a challenge to the weight of the evidence, the verdict may be reversed only if it is so contrary to the evidence as to shock one’s sense of justice.

Commonwealth v. Hunzer, 868 A.2d 498 (Pa. 2005).

Shocking one’s sense of justice has been defined as causing the Judge to lose his breath temporarily, causing a Judge to almost fall from the bench or indeed, causing the figure of justice to totter on her pedestal. Commonwealth v. Davidson, 860 A.2d 575 (Pa. Super. 2004). While Defendant may be correct regarding the location of the drugs being accessible by others in the vehicle as well and that both witnesses may have had a bias or motivation in testifying against the Defendant, those claims were addressed before and considered by the jury. Moreover, and perhaps more importantly, the evidence against the Defendant was clearly sufficient for the convictions and did not come even slightly close to shocking this Court’s sense of justice.

Defendant's final argument is that the sentence of the Court was excessive and should be reconsidered.

In fashioning a sentence, the Trial Court must impose a term of confinement consistent with the protection of the public, the gravity of the offense as it relates to the impact of the victim and to the community, and the rehabilitative needs of the Defendant. 42 Pa. C.S. § 9721; Commonwealth v. Begley, 566 Pa. 239, 780 A.2d 605 (Pa. 2001). The Trial Court is vested with broad discretion in determining the Defendant's sentence since the Court is in the best position to view the Defendant's character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime. Begley, supra., citing Commonwealth v. Ward, Jr., 524 Pa. 48, 52; 528 A.2d 1242, 1243 (1990). The Trial Court's sentence should not be disturbed as long as the Court considers the relevant sentencing factors. Commonwealth v. Frazier, 347 PA. Super. 64, 500 A.2d 158 (1985). In this particular case, Defendant has not articulated any specific reason in support of his claim of an excessive sentence.

Defendant argues in general terms that the sentence imposed was not designed to punish, rehabilitate or to teach lessons and personal responsibility. This general claim is insufficient to support an excessive argument. There is nothing asserted, argued or of record which establishes that the Court acted substantially in derogation of the Pennsylvania Sentencing Code in assessing the sentence. See, for example, Commonwealth v. Rhodes, 2009 Pa. Super. 261 (December 31, 2009). Defendant has not raised a substantial question as to whether the Court, in imposing the sentence, violated a provision of the Sentencing Code or contravened a fundamental norm of the sentencing process. Commonwealth v. Fiascki, 886 A.2d 261 (Pa. Super. 2005).

It is not alleged, for example, that the Court failed to consider all of the relevant factors, relied upon impermissible considerations, imposed an excessive sentence beyond the ranges of the sentencing guidelines based on impermissible considerations, relied on crimes or conduct not charged or relied on matters outside the record. Further, it is not alleged that the Court failed to consider the sentencing guidelines, failed to possess sufficient and accurate information about the circumstances of the offense or failed to possess sufficient and accurate information about the character of the Defendant.

The Court noted on the record its reasons for the sentence and the Court's reasons demonstrated that it weighed the sentencing guidelines with the facts of the crime and the Defendant's character in a meaningful fashion. Begley, supra.; Commonwealth v. Devers, 519 Pa. 88, 546 A.2d 12 (1988). Accordingly, Defendant's claim of excessiveness is without merit.

ORDER

AND NOW, this _____ day of September 2010 following argument, the Court denies the Defendant's Post-Sentence Motion in the nature of a Motion for a New Trial, an "Omnibus Pretrial Motion", Motion in Arrest of Judgment and Motion for Reconsideration of Sentence.

Pursuant to Rule 720 of the Pennsylvania Rules of Criminal Procedure, this Order shall be filed and served as provided in Rule 114 of the Pennsylvania Rules of Criminal Procedure. Furthermore, Defendant is advised of his right to appeal within thirty (30) days of the date of this Order, his right to assistance of counsel in the preparation of the appeal, his right, if he is indigent, to appeal in forma pauperis and to proceed with assigned counsel as

provided in Rule 122 of the Pennsylvania Rules of Criminal Procedure, and finally, the qualified right to bail under Rule 521 (B) of the Pennsylvania Rules of Criminal Procedure. .

BY THE COURT,

Marc F. Lovecchio, Judge

cc: Paul J. Petcavage, Esquire (ADA)
Robin Buzas, Esquire (PD)
Gary Weber, Esquire (Lycoming Reporter)
Work File