

COMMONWEALTH OF PA,

vs.

CHRISTOPHER WHITE,
Defendant

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

:
: NO. 591-2010

:
:
: 1925(a) OPINION

Date: May 31, 2011

OPINION IN SUPPORT OF THE ORDER OF FEBRUARY 4, 2011, APRIL 7, 2011 AND APRIL 20, 2011, IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant Christopher White has appealed this Court's sentence imposed pursuant to his criminal jury trial in which he was found guilty on February 4, 2011. This Court sentenced Mr. White to imprisonment in a State Correctional Institution for a sentence of 5 years to 10 years. This sentence was imposed on April 7, 2011 for the charge of Possession with Intent to Deliver, 35 Pa.C.S. § 780-113(a)(30). In addition, this Court imposed a 30 day period of probation for the charge of Possession of a Controlled Substance, 35 Pa.C.S. § 780-113 (a)(31), and a 1 year period of probation for the charge of Possession of Drug Paraphernalia, 35 Pa.C.S. § 780-113(a)(32). The probation periods are to run concurrently with each other but consecutive to the incarceration. This Court also imposed a fine of \$300 on Mr. White for the charge of Driving While Operating Privileges Suspended, 75 Pa.C.S. § 1543 (b) (1.1).

Mr. White's Concise Statement of Matters Complained of on Appeal, filed May 27, 2011, raises the two following issues: 1) the trial court erred in not granting the Defendant's motion for a new trial, as the evidence presented at trial was equally consistent with innocence as with guilt; and 2) the trial court erred in denying the Defendant's motion in arrest of judgment as

the evidence failed to establish beyond a reasonable doubt that the Defendant was guilty of possession with intent to deliver. Mr. White's appeal should be denied and the verdict and sentence affirmed.

I. FACTS AND PROCEDURAL HISTORY

On Friday, February 4, 2011 during a jury trial of *Commonwealth v. White* the following facts were determined to have occurred.

On the morning of April 4, 2010 at approximately 3:18 am Officer Jeffery Paulhamaus and his partner Officer Houseknecht were in their patrol car when Officer Paulhamaus observed the defendant as the sole occupant of a black Volvo. The officer recognized Mr. White from prior dealings and believed there to be active bench warrants on him. The officers proceeded to follow the Volvo while they contacted dispatch to inquire whether Mr. White still had active bench warrants. Dispatch confirmed that Mr. White had active warrants and that the vehicle in question was in fact registered to Christopher White. The officers then proceeded to call for back up. Once Corporal Womer arrived Officers Paulhamaus and Houseknecht then performed a traffic stop on Mr. White and took him into custody. White was then subjected to a search incident to arrest of his person. The search recovered one baggie with money sign logos containing white powdery substance, and drug paraphernalia in the form of a piece of foil that was slightly burned.

Mr White was transported to Lycoming County Prison, once there he was stripped searched. During the search a second baggie with money sign logos; paraphernalia in the form

of a straw and some foils; and a small baggie of green leafy substance was recovered. The two baggies tested positive as cocaine, and the green leafy subject tested positive as marijuana.

Back at the car, Corporal Womer, who was on the scene to assist, performed a canine sniff, in the presence of Officer Paulhamaus, on Mr. White's vehicle. The canine officer alerted as to the presence of drugs. The car was then seized and taken to the police impound lot. Officer Paulhamaus obtained a search warrant, Lycoming County Search Warrant – 7-10, for Mr. White's car and at approximately 9 am on April 5, 2010 proceeded to search the car.

The search produced three plastic baggies which were knotted at the top and contained a powdery substance that field tested positive for cocaine; a baggie knotted at the top with a green plant substance that field tested positive for marijuana; three different cell phones, one from the front passenger seat, one from another area of the front passenger seat and another in the front passenger pouch; two phone chargers; a digital scale with white residue on it on floor in rear of vehicle passenger side; a box containing paraphernalia in the form of a bottle of Inositol powder, a spray bottle, bottle of First Cleanse, two small empty baggies with Ziplock top, hand sanitizer bottle; various empty baggies, some labeled with the money sign; razor blades; an empty glass vial; a spoon that was burnt on the bottom with white residue on it; and a cigarette box with a piece of foil. Additionally, in the car was Mr. White's wallet, two IDs, a pill bottle prescribed to Mr. White, a registration card signed by Mr. White, two court orders addressed to Mr. White, Mr. White's social security card, permit to carry a firearm and driver's license. In the trunk of the car there was a 9mm sub-machine gun, which was fully loaded and registered to Mr. White, and two empty gun cases.

In addition to the positive field tests, both the white powdery substance and green leafy substances lab tested positive as cocaine and marijuana respectively.

During the trial, Trooper Scott Davis was determined to be a qualified expert in the field of controlled substances and possession with intent to deliver by the court testified. He testified that in his opinion based on both his training and experience taking all of the factors into consideration that he felt that this was a case of possession with intent to deliver. He further testified that he felt this was a case of a user who was also selling to support habit. In response to the items produced by the search it was established that both Inositol and First Cleanse have legal and illegal uses associated with them. In addition, razor blades are sometimes used by drug users to cut lines for snorting cocaine and a spoon is also an instrument for drug use.

At the close of the trial Mr. White was found guilty on all counts by a jury of his peers.

II. DISCUSSION

Although we will discuss the specific issues Mr. White has raised in his Statement of Matters Complained of on Appeal, we first wish to state it is our belief that Mr. White's appeal should be deemed as waived because of his failure to timely file the Concise Statements of Matters Complained.

On February 4, 2011, the Court issued an Order adjudicating Defendant Christopher White guilty on all counts charged in the criminal information, and on April 7, 2011, the Court imposed sentence. On April 20, 2011 the Court denied Mr. White's post-sentence motion. Mr. White filed a notice of appeal on May 4, 2011 appealing this Court's orders of February 4, 2011, April 7, 2011 and April 20, 2011. On May 5, 2011, this Court issued an order in compliance

with Pa. R.A.P. 1925 (b) directing Mr. White to file a Concise Statement of Matters Complained of on appeal within twenty-one days of the order. Mr. White failed to timely comply. Instead of filing by the court deadline of May 26, 2011 Mr. White filed his response on May 27, 2011.

Because of this failure to timely file, Mr. White's appeal should be dismissed. A Concise Statement of Matters must be filed in order to preserve the issues for appeal. *Commonwealth v. Halley*, 870 A.2d 795, 797 (Pa. 2005). "Where an appellant fails to timely file a Concise Statement, all issues to be raised on appeal are waived." *Commonwealth v. Heggins*, 809 A.2d 908, 911 (Pa. 2002) (citing *Commonwealth v. Overby*, 744 A.2d 797 (Pa. Super. 2000)).

Mr. White's defense was weak at best. The only possible defense that the Court can ascertain is that the drugs and paraphernalia found were for personal use. However, personal use is not or was not contested by the Commonwealth. The Court Certified Expert on Possession With Intent to Possess testified that he felt this was a case of the user selling to support his habit. N.T. February 4, 2011, p. 97.

We will now proceed to discuss Mr. White's specific statement of issues seriatim.

A. Arrest of Judgment

"When ruling on a motion in arrest of judgment, a trial court is limited to ascertaining 'the absence or presence of that quantum of evidence necessary to establish the elements of the crime.' . . . [T]he trial court is limited to rectifying trial errors, and cannot make a redetermination of credibility and weight of the evidence." *Commonwealth v. Marquez*, 980 A.2d 145, 147-48 (2009 Pa. Super) (citing *Commonwealth v. Melechio*, 442 Pa. Super. 231. (1995). In this instance there are no trial errors present. Mr. White is arguing that "[t]he trial court erred in denying the Defendant's motion in arrest of judgment as the evidence failed to

establish beyond a reasonable doubt that the Defendant was guilty of possession with intent to deliver.” Concise Statement of Matters Complained on Appeal #5. When reviewing a denial of arrest of judgment the appellate court must decide whether the evidence was sufficient to maintain the verdict of the trial court. *Commonwealth v. McFadden*, 850 A.2d 1290, 1293 (Pa. Super 2004.) (citing *Commonwealth v. McFadden*, 547 A.2d 774, 775 (Pa. Super 1988.)

B. Sufficiency of the Evidence

A claim challenging the sufficiency of the evidence is a question of law. *Commonwealth v. Sullivan*, 820 A.2d 795, 805 (Pa. Super. 2003). When reviewing a challenge to the sufficiency of the evidence, the following standard of review is employed:

‘The standard we apply when reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant’s guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence.’

Commonwealth v. Gray, 867 A.2d 560, 567 (Pa. Super. 2005) (quoting *Commonwealth v. Nahavandian*, 849 A.2d 1221, 1229-30 (Pa. Super. 2004)). Direct and circumstantial evidence receive equal weight when assessing the sufficiency of the evidence. *Commonwealth v. Grekis*,

601 A.2d 1275, 1280 (Pa. Super. 1992). Whether it is direct, circumstantial, or a combination of both, what is required of the evidence is that it taken as a whole links the accused to the crime beyond a reasonable doubt. *Commonwealth v. Robinson*, 864 A.2d 460, 478 (Pa. 2004). In Mr. White's case, there was more than sufficient evidence to prove that White was in possession of controlled substances and in possession with the intent to deliver. The evidence is both direct and circumstantial.

Officer Paulhamuas's testimony described Mr. White as sole occupant of a car registered to him with his personal belongings, such as wallet, driver's license, social security card, permit to carry a firearm; drugs, drug paraphernalia for personal use, drug paraphernalia for purposes of distribution, and a gun registered to Mr. White in the car with him.

1. Possession of a Controlled Substance

35 P.S. § 780-113 describes the offense Possession of a Controlled Substance as the following:

- (a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:
 - (16) Knowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, unless the substance was obtained directly from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by this act.

Possession of a controlled substance can be established by showing either actual or constructive possession. Actual possession is established by showing that the defendant had the controlled substance on his person, while constructive possession can be proved through showing that the defendant exercised dominion over the substance. *Commonwealth v. Ocasio*, 619 A.2d 352 (1993). *See also Commonwealth v. Mercado*, 617 A.2d 342 (1992). The Commonwealth is required to prove constructive possession of any controlled substance not

found on the defendant's person. *Commonwealth v. Aviles*, 615 A.2d 398 (1992). See also *Commonwealth v. Bruner*, 564 A.2d 1277 (1989). See also *Commonwealth v. Gill*, 415 A.2d 2 (1980).

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." *Commonwealth v. Macolino*, 469 A.2d 132, 134 (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. *Commonwealth v. Valette*, 613 A.2d 548 (1992). See also *Ocasio*, 619 A.2d 352. The Pennsylvania Supreme Court, in *Commonwealth v. Mudrick*, 507 A.2d 1212 (1986), described the concept of "constructive possession" as follows: [It] 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. *Id.* at 1213.

In Mr. White's case there was actual possession of drugs and drug paraphernalia. During the search incident to arrest Officer Paulhamaus found one baggie containing what later tested positive as cocaine on Mr. White's person. N.T. February 4, 2011, p. 19. Later, during the strip search of Mr. White at the Lycoming County Prison another baggie of what later tested positive as cocaine was found on Mr. White along with a straw, some foils and a small baggy of a green leafy substance which later tested positive as marijuana. N.T. February 4, 2011, p. 19-20, 23. There was also constructive possession of drug paraphernalia because the paraphernalia was found in the car Mr. White had been the sole occupant of and was therefore under his control. N.T. February 4, 2011, p. 17, 28-32. *Macolino* at 134.

1. Possession with Intent to Deliver

35 Pa.C.S. § 780-113

(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited

30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

Possession with Intent to Deliver can be established by showing possession of a controlled substance coupled with the intent to deliver it. *Commonwealth v. Torres*, 617 A.2d 812, 813 (Pa. Super 1992) (*citing Commonwealth v. Parsons*, 391 Pa. Super. 273, 283). “When examining whether a controlled substance was possessed with intent to deliver, the court must consider all of the facts and circumstances surrounding the possession of the substance. *Torres* at 814 (*citing Commonwealth v. Robinson*, 399 Pa. Super 199, 205 (1990)). In the present case there was possession of a controlled substance, cocaine and marijuana, N.T. February 4, 2011, p. 19, 23, coupled with possession of various empty baggies for packaging, a scale with residue for weighing and a firearm. N.T. February 4, 2011, p. 28-32. Additionally, expert testimony was provided on the subject of possession with intent to deliver and the expert testified that in his opinion the above mentioned facts indicated that this present case was indeed a case of possession with intent to deliver. N.T. February 4, 2011, p. 97.

This case is analogous to *Commonwealth v. Torres*. In *Torres*, sole occupant was pulled over for a traffic stop; the occupant then failed field sobriety tests. *Torres* at 814. During a

search of the car the officer discovered seventeen individually wrapped packets of cocaine and three unopened boxes of plastic sandwich bags on the backseat. *Id.* Like in Mr. White's case the Commonwealth also presented an expert who testified that in his opinion the above mentioned facts were indicative of possession with intent to deliver. *Id.* The court in *Torres* held that the evidence presented was sufficient to support a conviction for possession with intent to deliver. *Id.* at 815. While in the present case the quantity of drugs is not to the magnitude of the quantity of drugs in *Torres* there is still the presence of drugs, baggies, a scale with residue, a firearm, and expert testimony that support the jury's finding of possession with intent to deliver and the Court's sentencing on the conviction. *See Supra* p. 9.

C. Weight of the Evidence

It is well settled that a weight of the evidence claim is primarily addressed to the discretion of the judge who actually presided at trial. *Armbruster v. Horowitz*, 813 A.2d 698, 702 (2002). It is axiomatic that it is the function of the jury as the finder of fact to determine the credibility of the witnesses. *Commonwealth v. Champney*, 832 A.2d 403, 408 (2003) (*citing Commonwealth v. Johnson*, 668 A.2d 97, 101 (1995)). A new trial should be granted only in truly extraordinary circumstances, *i.e.*, "when the jury's verdict is *so contrary to the evidence 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.*" *Abruster*, 813 A.2d 703 (emphasis in original). Without specific evidence detailing an "extraordinary circumstance," a jury's finding of fact as to the credibility of witnesses must not be disturbed on appeal.

In Mr. White's case, the jury's finding of guilt was not so contrary to the evidence as to shock one's sense of justice thereby necessitating a new trial. In fact the extensive evidence summarized above was so overwhelming the Court would have been shocked at an acquittal.

CONCLUSION

Given the overwhelming evidence of Mr. White's guilt, the jury's verdict of February 4, 2011 and the court's sentence of April 7, 2011 should be affirmed and Mr. White's appeal dismissed.

BY THE COURT,

Joy Reynolds McCoy, Judge

cc: Superior Court
Robin Buzas, Esquire
Paul Petcavage, Esquire
Judges
Gary L. Weber, Esquire (Lycoming Reporter)
Jerri Rook, Executive Secretary to Judge McCoy
Francesca Renee Schultz, Esquire (Law Clerk)