

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA :
vs. : **No. CR-923-2011**
 :
MARK BURKHART, :
Defendant :

OPINION AND ORDER

Following a jury trial, Defendant was found guilty of Count 1, Persons Not To Possess, Use, Manufacture, Control, Sell or Transport Firearms, a Felony 2 offense. Defendant requested immediate sentencing. The Commonwealth did not object and the Court proceeded to a sentencing hearing.

During the sentencing hearing, the parties stipulated that the Defendant's prior record score was a five (5) and that the offense gravity score for the Person Not To Possess charge was a nine (9), resulting in a guideline range of 48 to 60 months. Considering the relevant sentencing factors, the Court sentenced the Defendant to a period of State incarceration, the minimum of which was four (4) years and the maximum of which was eight (8) years.

The Commonwealth filed a timely Motion for Reconsideration of Sentence alleging that it "incorrectly and inadvertently represented to the Court that the offense gravity score of the charge was that of a nine (9)" when "in actuality, it was a ten (10)." (Commonwealth's Motion for Reconsideration of Sentence, Paragraphs 7, 8).

Argument on the Commonwealth's Motion was held on December 1, 2011. The Commonwealth argued that because the weapon constructively possessed by the Defendant was either loaded or in close proximity to ammunition for it, the proper offense gravity score was a ten (10). The Defendant argued that the enhancement does not apply, but if it does, the

Commonwealth is bound by its stipulation made at the sentencing hearing that the offense gravity score was a nine (9).

Initially, the Court finds that the Commonwealth has waived its right to now argue that the offense gravity score was improperly calculated. The Commonwealth stipulated at the time of sentencing that the offense gravity score was a nine (9). The fact that the Commonwealth “incorrectly” or “inadvertently” stipulated to an allegedly wrong offense gravity score does not excuse its error. To the contrary, the Commonwealth is bound by its stipulation and will be deemed to have waived any argument contrary thereto.

In the alternative, the Court does not find that the weapon was loaded or that Defendant possessed or controlled the ammunition under the facts and circumstances of this case.

Certain criminal offenses are scored by the Sentencing Commission in accordance with the particular circumstances involved in the offense. Firearm offenses such as the offense for which the Defendant was convicted are among the offenses that are scored in such a manner. 204 Pa. Code § 303.3 (b). If the possessed firearm was loaded or ammunition was in the possession or control of the Defendant, a higher offense gravity score applies. 204 Pa.Code §303.15.

While the sentencing guidelines are merely advisory, they nonetheless constitute a factor the Court must consider in imposing a sentence. The Court must demonstrate that it was aware of and fully considered the guidelines in imposing the sentence and must recite the guideline ranges. Commonwealth v. Gause, 442 Pa. Super. 329, 659 A.2d 1014, 1016 (1995).

With respect to determining the guideline range, the Court must determine the “correct starting point” in the guidelines based upon a correct offense gravity score and prior record score. Commonwealth v. Brown, 402 Pa. Super. 369, 587 A.2d 6, 7 (1991).

In order for the Court to apply the offense gravity score of a ten (10), there must be record evidence that the firearm was either loaded or there was ammunition in possession or control of the Defendant. 204 Pa. Code § 303. 3 (b); 204 Pa.Code §303.15.

There is no evidence of record that the firearm found to be possessed by the Defendant was loaded. Additionally, there is no evidence of record that any ammunition was found to be in the direct possession or control of the Defendant. The issue is whether the Defendant can be found to have constructively possessed or controlled any ammunition.

In order for this Court to find that the Defendant constructively possessed the ammunition, the Court would need to find that the Defendant had the ability to exercise conscious dominion over the ammunition, that the Defendant had the power to control the ammunition, and that the Defendant intended to exercise that control. Commonwealth v. Valette, 531 Pa. 384, 613 A.2d 548, 550 (1992); Commonwealth v. Omar Johnson, 26 A.3d 1078, 1086 (Pa. 2011).

The focus of the trial was whether Defendant possessed the weapon; the focus was not on the ammunition. Minimal testimony was presented about the ammunition from Agent Gross and Agent Johnson.¹

Generally speaking, the evidence presented at trial can be summarized as follows. Defendant was released from prison on March 17 and began residing with his

¹ The Commonwealth did not present any additional evidence at the hearing and argument on its motion for

girlfriend in her trailer. On March 21, parole agents went to the trailer for their initial home contact with Defendant. When they arrived, Defendant was out fishing, but he returned within minutes of their arrival. Agent Gross asked Defendant's girlfriend if there were any firearms in the residence. She stated there was a .22 caliber rifle in the living room. She indicated that the weapon was hers and she had won it at a raffle. Defendant told the agents he was not aware there was a weapon in the house. Although the trailer was fairly cluttered, when Agent Johnson walked into the living room, he immediately saw a .22 caliber rifle leaning against the wall. The rifle was against the same wall as the television, not far from the hallway. Agent Gross discovered ammunition on a shelf above the television, approximately 5 feet from the rifle, but Agent Johnson did not notice the ammunition when he recovered the firearm.

No evidence was presented that the ammunition was in plain view or that Defendant knew there was ammunition on the shelf or even in the residence.² Although close proximity between firearms and drugs is sufficient for the "guns and drugs" mandatory found at 42 Pa.C.S.A. §9712.1, mere proximity is insufficient to show constructive possession. See Commonwealth v. Tirpak, 441 Pa. 534, 272 A.2d 476 (1971). The Court, as fact finder for this sentencing issue, will not find that Defendant constructively possessed the ammunition.

Accordingly, the Court determines that the increased offense gravity score of ten (10) would not be applicable.

reconsideration of sentence.

² While the prosecuting attorney argued in a sidebar conference on the admissibility of the ammunition evidence that it was in plain view, the arguments of counsel are not evidence.

ORDER

AND NOW, this ___day of December 2011, for the reasons set forth in the foregoing Opinion, the Commonwealth's Motion for Reconsideration is **DENIED**.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: DA (AB)
PD
Gary Weber, Esquire (Lycoming Reporter)
Work File