

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CP-41-CR-923-2011  
vs. :  
 : CRIMINAL DIVISION  
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 :  
 :  
 :  
 : 1925(a) Opinion

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

This opinion is written in support of this Court's judgment of sentence dated October 19, 2011, which became final when the Court denied a motion for reconsideration filed by the Commonwealth. The relevant facts follow.

Appellant Mark Burkhart was released from prison and placed on supervision with the Pennsylvania Board of Probation and Parole on March 17, 2010. The officer supervising Burkhart was Agent Tracey Gross. One of the conditions of Burkhart's supervision was that he could not possess any weapons whatsoever. Burkhart was aware of this condition and signed a document that set forth his conditions of supervision, including the condition that he not possess any weapons.

On March 21, 2010, Agent Gross and Agent Mark Johnson went to the residence Burkhart shared with his girlfriend, Karen Kepner, at 610 Highland Lake Road, Hughesville, Pennsylvania to conduct Burkhart's initial home contact. When Agent Gross and Agent Johnson first arrived at the residence Burkhart was not at home. Kepner answered the door, allowed the Agents to enter and told them that Burkhart was out fishing. The

Agents briefly spoke to Kepner about why they were there. Within three to four minutes, Burkhart returned from fishing.

The Agents went over some general conditions and then Agent Gross asked if there were any weapons or firearms in the home. Kepner indicated there was a .22 rifle in the living room. Agent Gross waited in the kitchen with Burkhart and Kepner while Agent Johnson went to retrieve the rifle from the living room. The firearm was located in plain view in the living room, leaning up against a wall and an entertainment center. The Agents then took Burkhart into custody for violating his conditions of supervision.

On April 13, 2010, Burkhart was interviewed by Trooper Matthew Sweet of the Pennsylvania State Police. During this interview, Burkhart indicated he knew he was not to have firearms in his residence and prior to his release from prison he wrote to Kepner and asked her to make sure no firearms or weapons were in the residence.

On March 7, 2011, Trooper Sweet charged Burkhart with person not to possess a firearm, because his prior criminal convictions also precluded him from possessing a firearm.

A jury trial was held on October 19, 2011. The parties stipulated that Burkhart was a person prohibited by law from possessing a firearm. The sole issue at trial was whether Burkhart possessed the rifle found in the living room of the residence he shared with Kepner.

Agent Gross and Agent Johnson testified about the initial home contact with Burkhart as set forth above. Agent Johnson also testified that although there was something covering the bottom of the weapon, a portion of the stock, the scope and the barrel of the weapon were plainly visible from the living room area and he could see the entire length of

the weapon as he walked past it into the hallway. The Commonwealth also presented a copy of the supervision conditions with Burkhart's signature as an exhibit. In addition, Trooper Sweet testified about his interview with Burkhart, as well as his interview with Kepner, during which she stated that the firearm was hers.

Kepner and her neighbor, Deborah DeLong testified for the defense. Ms. DeLong testified that she had been present in the residence between March 17 and March 21, 2010. The lighting was poor, there was a lot of clutter, and she did not see any gun in the house. She neither saw Burkhart with a gun nor heard him talk about any gun in that time frame.

Kepner testified that the firearm was hers; she had won it in a raffle. Burkhart wrote to her and told her to remove any weapons back in December before he was released from prison. Kepner had taken the firearm to her mother's house, which was nearby, but brought the firearm back to the residence on March 16 or 17, because of a problem with bears. After Agents Gross and Johnson took Burkhart into custody, Kepner took photographs of the residence. These photographs were admitted as defense exhibits. The photographs depicted the lighting and the clutter in the residence.

The jury found Burkhart guilty. Burkhart asked to be sentenced immediately. The Court sentenced Burkhart to incarceration in a state correctional institution for four to eight years.<sup>1</sup>

Burkhart filed a timely appeal. The sole issue raised on appeal is whether the evidence presented was sufficient to show that Burkhart constructively possessed the firearm.

In reviewing the sufficiency of the evidence, the court considers whether the

evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. Commonwealth v. Davido, 582 Pa. 52, 868 A.2d 431, 435 (Pa. 2005); Commonwealth v. Murphy, 577 Pa. 275, 844 A.2d 1228, 1233 (Pa. 2004).

Constructive possession is defined as the ability to exercise conscious dominion over the prohibited object, meaning the power to control the object and the intent to exercise that control. Commonwealth v. Macolino, 503 Pa. 201, 469 A.2d 132, 134 (1983). Intent to maintain conscious dominion can be inferred from the totality of the circumstances, and circumstantial evidence can be used to establish a defendant's possession. Id. at 134-135. The law also recognizes the concept of joint constructive possession, which provides that constructive possession may be found in either or both actors if the prohibited item is found in an area of joint control and equal access, even absent a marital relationship. Commonwealth v. Mudrick, 510 Pa. 305, 507 A.2d 1212, 1214 (1986).

The evidence in this case established that the firearm was in plain view in the living room of the residence shared by Burkhart and Kepner. The living room was an area over which Burkhart had joint control and equal access. This is not a case where the firearm was retrieved from a safe to which Kepner had the only key or which otherwise could only be unlocked or opened by Kepner.<sup>2</sup> Quite simply, nothing prevented Burkhart from walking over to the firearm and picking it up any time he wanted. Just as evidence of joint control and equal access was sufficient for the jury to infer that the appellant in Mudrick

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<sup>1</sup> The minimum sentence was at the bottom of the standard guideline range.

<sup>2</sup> See Commonwealth v. Davis, 444 Pa. 11, 280 A.2d 119 (1971)(evidence was insufficient to support appellant's conviction where he was a mere visitor in the building and his paramour had the only key to the

constructively possessed the box of marijuana in plain view on the living room coffee table, the evidence of joint control and equal access in this case was sufficient for the jury to infer that Burkhart constructively possessed the firearm.

DATE: \_\_\_\_\_

By The Court,

\_\_\_\_\_  
Marc F. Lovecchio, J.

cc: District Attorney  
Kirsten Gardner, Esquire (APD)  
Work file  
Gary Weber, Esquire (Lycoming Reporter)  
Superior Court (original & 1)

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locked cabinet where the contraband was found).