IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-499-2010**
vs.	**:**	
	:	
PAUL COLEMAN,	**:**	**Opinion and Order Re**
Defendant	**:**	**Post Sentence Motion**

OPINION AND ORDER

Before the Court is the Commonwealth's Motion to Modify Sentence filed on March 28, 2012 and Defendant's Post Sentence Motion filed on April 2, 2012. The factual background of this case is as follows.

On February 27, 2010 at approximately 10:00 p.m., the resident of 517 Stevens Street, Apartment #4, heard the sound of a gun shot coming from the apartment below her's, Apartment #2, and she felt her floor vibrate. She looked out her window and observed an individual, who was bleeding and later identified as Adrian Harry, limp from the front door area. She called 9-1-1 then went downstairs to see if Defendant, who resided in Apartment #2, was okay. No one answered the door but she heard some movement inside the apartment.

The police responded to 517 Stevens Street. To ensure that no one inside Apartment #2 was injured or dead, the police forced entry into the apartment and observed a Glock pistol, and a round of ammunition in plain view.

The police secured the premises and obtained a search warrant. In addition to the Glock pistol, and ammunition, the police eventually seized a .38 caliber handgun, cocaine, heroin, marijuana, and documents that indicated Defendant resided in Apartment #2.

When the police ran the serial numbers of the firearms, they discovered that

both firearms had been reported stolen.

The police filed a criminal complaint against Defendant, charging him with the following offenses: two counts of persons not to possess firearms; two counts of receiving stolen property; three counts of possession with intent to deliver a controlled substance; three counts of possession of a controlled substance; and two counts of possession of drug paraphernalia.

Defendant waived his right to a jury trial and a three-day bench trial was held before the undersigned. The Court found Defendant guilty of Count 4, possession with intent to deliver a controlled substance (heroin), an ungraded felony; Count 5, possession of a controlled substance (heroin), an ungraded misdemeanor; Count 6, possession of drug paraphernalia, an ungraded misdemeanor; Count 7, possession with intent to deliver a controlled substance (cocaine), an ungraded felony; Count 8, possession of a controlled substance (cocaine), an ungraded misdemeanor; Count 9, possession of drug paraphernalia, an ungraded misdemeanor; Count 10, person not to possess firearms, a felony of the second degree; and Count 12, possession of a controlled substance (marijuana), an ungraded misdemeanor.

On March 21, 2012, the Court sentenced Defendant to an aggregate term of 12-25 years of incarceration in a state correctional institution, which consisted of 5-10 years on Count 10 persons not to possess firearms and a consecutive 7-15 years on Count 4 possession with intent to deliver a controlled substance (heroin). The remaining convictions either merged for sentencing purposes or Defendant received a concurrent sentence.

On March 28, 2012, the Commonwealth filed a Motion to Modify Sentence in which the Commonwealth argued that the Court incorrectly treated Defendant's conviction for possession with intent to deliver heroin as a first offense for purposes of the drug trafficking mandatory found at 18 Pa. C.S.A. §7508 when it should have been considered a second offense.

On April 2, 2012, Defendant filed his Post Sentence Motion, which consisted of a motion in arrest of judgment, a motion for a new trial and motion for reconsideration of sentence.

The Court will first address Defendant's motions, because if he prevails on his motion for arrest of judgment or motion for a new trial, the Commonwealth's motion will be rendered moot.

Defendant's motion in arrest of judgment "avers that the evidence presented fails to prove beyond a reasonable doubt that he was guilty of the charges; specifically, the Defendant submits that the Commonwealth failed to prove constructive possession of the guns and drugs found inside his residence." (Post Sentence Motion, Paragraph 8). This contention attacks the sufficiency of the evidence.

> The standard [the courts] apply in reviewing the sufficiency of the evidence is whether viewing all of the evidence submitted 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, [the court] may not weigh the evidence and substitute [its] judgment for the fact-finder. In addition, [the court] notes that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubt 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 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 [finder] of fact while passing on the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Haight, 2012 PA Super 149 (July 23, 2012), citing Commonwealth v. Jones, 874 A.2d 108, 120 (Pa. Super. 2005) (citations and quotations omitted).

In order to sustain Defendant's convictions on the gun and drug charges, the Commonwealth needed to prove that the Defendant knowingly or intentionally possessed the gun and controlled substances. See 35 P.S. § 780-113 (a) (30); 18 Pa. C.S.A. § 6105 (a) (1).

Because neither the gun nor the controlled substances were found on the Defendant's person, the Commonwealth was required to establish that the Defendant constructively possessed such in order to support his conviction. Commonwealth v. Brown, 2012 PA Super 119 (June 6, 2012); Commonwealth v. Kirkland, 831 A.2d 607, 610 (Pa. Super. 2003).

> Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of the criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as "conscious dominion." We subsequently defined "conscious dominion" as "the power to control the contraband and the intent to exercise that control." To aid application, we have held that constructive possession may be established by the totality of the circumstances.

Brown, supra, citing Commonwealth v. Parker, 847 A.2d 745, 750 (Pa. Super. 2004) (internal citations omitted).

Contrary to Defendant's argument, the Court finds that there was substantial evidence to prove constructive possession.

Vanessa Paniagua testified that she previously lived at 517 Stevens Street, Apt. 2 but moved out in the second or third week in February of 2010. When she left, everything had been removed from the apartment.

Michael Santalucia owns the apartment building at 517 Stevens Street. He corroborated Ms. Paniagua's testimony that she moved out in February and that the apartment was empty following her moving out. Subsequent to Ms. Paniagua moving out, the Defendant moved in sometime around February 19, 2010.

Rhonda Santalucia managed 517 Stevens Street. She recalled serving Ms. Paniagua with a Notice to Quit in the middle of February. Defendant subsequently contacted her and asked if he could rent the apartment. They met at Defendant's sister's apartment. Defendant paid prorated rent for the month of February as well as a security deposit of $400.00. According to Ms. Santalucia, Defendant took possession of the apartment on February 19.

Jody Lewandowski rented Apartment 4 at 517 Stevens Street during the time that Defendant rented Apartment 2. Apartment 4 is directly over Apartment 2. She was aware that the Defendant was living in Apartment 2 following Ms. Paniagua moving out. On at least one occasion, she witnessed him going from the Defendant's sister's Apartment No. 1 to the Defendant's apartment with his son.

Roy Snyder, a police officer for the city of Williamsport responded to a

shooting on February 28, 2010 and eventually forced entry to Apartment No. 2 “to check for victims.” Among other things, he noted that in the bedroom closet there were some sneakers and other footwear. In the bedroom, he saw a TV stand or entertainment stand.

Kevin Stiles, a detective for the Williamsport Bureau of Police also responded to the incident on the night in question. He and other “agents went into the apartment to conduct a search of that apartment.”

In the bedroom there was a bed and TV/entertainment center. In the dining room area, there was a folding table and folding chairs. In the room connected to the front door in addition to other small items, there was a small plastic basketball hoop.

In the closet to the bedroom there was suspected marijuana inside one boot of a pair of black polo boots. The size of the boots was 8 ½.

On the entertainment center, paperwork was seized, some of which had Defendant’s name on it.

In the kitchen area in a cabinet, the police located, among other things, a .38 special revolver and suspected bundles of heroin. They also found empty plastic baggies and one small plastic baggie of suspected marijuana.

In the bathroom next to the bedroom, the police located “leafy green materials in the toilet bowl” and in the vanity a plastic bag containing a large number of small black rubber bands and “a couple of loose rubber bands sitting on the shelf itself.”

Hanging on the door to the bathroom from the bedroom was a coat as well as

a plastic bag containing trash and other items. Inside the coat was a plastic baggie containing numerous smaller plastic baggies that appeared to contain heroin as well as small baggies of marijuana. Inside the trash bag officers found empty inch by inch ziplock baggies, partial blunts and at least two empty Newport cigarette packs. Also found in a pocket of the coat was a "distribution baggie" with bundles of heroin inside.

Justin Snyder was employed as well by the Williamsport Bureau of Police and responded to the incident on the night in question.

In addition to corroborating the previous testimony of the officers, he specified that in the boot located in the bedroom closet "you could see in plain view that there was a little baggie with little distribution baggies, several other baggies of marijuana in there."

Furthermore, he observed a photograph of the Defendant on top of the entertainment stand. He also identified other pictures located either on or in the entertainment stand including a picture of three black males, one being the Defendant, one of Danielle Taylor, the Defendant's girlfriend and another just of Ms. Taylor's face. Ms. Taylor and the Defendant have a child together.

Officer Snyder also confirmed the other items of furniture and contraband that were located in the residence including the card table and chairs in the dining room, the Nerf plastic basketball hoop in the living room, and the entertainment stand, the box spring and mattress in the bedroom.

As well, he observed the .38 handgun, bundles of heroin and baggie of marijuana in the corner cabinet in the kitchen. With respect to the heroin, there were 5 bundles in a "distribution baggie." A bundle consists of ten single bags of heroin and in this case each of the 5 bundles was wrapped with a black or tan rubber band. There also were three loose bundles of heroin outside the distribution baggie.

A few days later Officer Snyder executed an additional search warrant on Apartment No. 2. It was entirely clear and "all of the furniture and everything was missing."

Subsequently, police officers went to the apartment of Delores Coleman which was Apartment No. 1. Officer Snyder "took notice" that the furniture from the Defendant's apartment was now in Ms. Coleman's apartment including the card table with chairs, the box spring and mattress, and the entertainment center.

A warrant was issued for Defendant's arrest and on March 5, 2010, Officer Snyder observed the Defendant in the front passenger seat of an automobile being driven by an adult individual by the name of William Rockwell. The vehicle was stopped and the Defendant was subsequently removed. As the Defendant was getting out of the vehicle, he dropped a cell phone which was subsequently seized.

Following his arrest, when asked whether he was still living at 517 Stevens Street, Apartment No. 2, the Defendant replied no. He did not contend that he never lived there.

Don Mayes is employed as an Agent with the Williamsport Bureau of Police and was working on the day in question.

He was called to the shooting incident at 517 Stevens Street and his role was to "basically" search the bedroom, the closet in the bedroom and the bathroom adjoining the bedroom.

In the closet were men's clothing and multiple pairs of shoes between the sizes of 8 ½ and 9. All of the shoes were men's shoes.

Like Officer Snyder, he took note of the photographs that were on the entertainment center including the one with Mr. Coleman and two other males.

With respect to the entertainment center, he collected items which included "court papers with Paul Coleman's name on it." He observed various court documents referencing the Defendant in specific court cases.

Hanging on the bathroom door, he located a black men's coat. Inside the coat, he found a small plastic bag containing three bundles of heroin in it. As well, he found a plastic sandwich bag that contained 20 approximate small bags of cocaine each tied in a knot.

As well, there was a garbage bag handing on the bathroom door. In the bag were small dollar bill ziplock baggies, blunts "that were cigars that were torn apart," marijuana residue, and empty Newport cigarette packs.

Inside the "built-in closet" in the bathroom there were "a bunch of toiletries" as well as a bag "with a lot, 100, 200, 300 little black rubber bands." He testified that these rubber bands were commonly used to wrap bundles or tenpacks of individual heroin packets.

Damon Hagan is a police officer for the city of Williamsport and was working on March 5, 2010.

He described the vehicle stop of Mr. Blackwell and the Defendant.

Upon execution of the stop, the individuals in the car were ordered out of the vehicle. The Defendant exited from the front passenger seat and as he was exiting, Officer Hagan “heard something hit the ground.”

Officer Snyder indicated to Officer Hagan that it was the cell phone which Officer Snyder gave to Officer Hagan. The cell phone was a black Nextel Motorola.

Officer Hagan was also given a second item of evidence. Officer Reeder of the Williamsport Bureau of Police gave Officer Hagan a phone charger.

Arnold Duck, Jr. is a lieutenant with the Williamsport Bureau of Police. He processed numerous items of evidence from the apartment including the .38 gun. He took DNA swabs for the purpose of collecting what is known as touch DNA or grip DNA.

Dustin Reeder, a police officer with the Williamsport Bureau of Police was involved in the vehicle stop on March 5, 2010 when Defendant was taken into custody.

When the Defendant was ordered out of the vehicle, he was directed back to Officer Reeder’s location. A cell phone charger was found on Defendant.

Officer Reeder referenced the fact that his patrol unit was equipped with an in-car camera which recorded portions of the stop. The video was played and clearly depicted that as the Defendant was getting out of the car an item appearing to be a cell phone fell onto the ground.

When the Defendant was processed by Officer Reeder and asked to provide a phone number, he stated a partial phone number of area code 215-989. Officer Reeder could not remember the rest.

Stephen Sorage also an agent with the Williamsport Bureau of Police was requested by Agent Dincher to assist in the investigation. He confirmed that when a search was conducted on Apartment 1 on March 2, the front door was standing wide open, the apartment was vacant and there was no furniture at all.

Agent Sorage subsequently went to the apartment of Delores Coleman where he observed among other things a bed and entertainment center.

Jill Cramer, a Forensic DNA analyst employed at Orchid Cellmark in Dallas, TX was admitted as an expert in forensic DNA analysis.

She described receiving a swab of the left handgrip of the Smith & Wesson .38, a swab from the front side of the handgrip of the Smith & Wesson .38, another swab from the right side of the handgrip of the Smith & Wesson .38, a swab of a back strap of the handgun from the Smith & Wesson .38 and a swab from a latent print on a cylinder from the Smith & Wesson .38. Initially, the samples quantitated at a very low value. Once all of the swabs were combined, however, the lab had enough volume to test to obtain a DNA profile.

The combination from all of the swabs on the .38 weapon resulted in three potential donors. In other words, three different people could have provided the source of that DNA. The Defendant was excluded as the major donor, but he could not be excluded as one of the minor donors. More specifically, the Defendant could not be excluded “because he

is not present at every location that were tested above the threshold, but he was present above the threshold at 11 out of the 15 [loci] that [were] tested."

From a statistical standpoint, Ms. Cramer explained that if you were to randomly pick somebody out of the general population and that person happened to be of the black race, there would be a 1 in 6,031 chance that that person could also be included in this mixture.

She opined that this statistic was "kind of a middle of the road statistical frequency."

John Leeser has been a self-employed shoe store owner for 45 years. Agent Dincher brought to him the Timberland boots that were seized from the apartment. Mr. Leeser was asked to determine the size of the boots and while he could not "guarantee" that they were a men's 8 ½, he was willing to stake his reputation on such.

Leonard Dincher is employed as an agent with the Williamsport Bureau of Police. He became aware that a cell phone and charger were seized from the Defendant. With respect to such, he took the cell phone and the charger and they matched by plugging into each other.

Agent Dincher testified concerning a stipulated report of Agent Ronald Bachman of the Williamsport Bureau of Police regarding a forensic analysis of the cell phone. Specifically, the phone number on the cell phone seized from the Defendant was 215-989-6746.

The contacts on the phone included a contact for “landlord, Rhonda”, Defendant’s sister, Danielle Taylor, Medgar Blackwell and Adrian Harry, known as A-Money. Mr. Harry was the individual who sustained the gunshot wound on the evening in question.

Certain photographs were also obtained from the phone including a photograph of the Defendant that was an exact duplicate of the photograph seized from the entertainment center, numerous other photographs of the Defendant, a photograph of Danielle Taylor, a photograph of Delores Coleman, photographs of the Defendant with a child, one of which included the child holding a small basketball and photographs which depict in portion the door to Apartment No. 2.

Also, Agent Dincher testified to certain text messages that were retrieved from the Defendant’s phone. One referenced “Ju u good” while another one referenced “Raw, hit me back.” Agent Dincher testified that Ju-Ju was the name for Delores Coleman while Raw was one of the Defendant’s “street names.” Agent Dincher testified that Defendant has a tattoo below his left breast as follows: “Raw’s.”

Agent Dincher also testified as to items that were seized from the Defendant when he was processed at the Lycoming County Prison following his arrest. Significantly, the items included a pack of Newport cigarettes and a pair of black Timberland boots size 8M.

Incidentally, when Adrian Harry was subsequently arrested and taken to the Lycoming County Prison, he did not have any cigarettes and the size of his shoes was a 12.

With respect to the coat that was found hanging on the bathroom door, Agent Dincher subsequently went through it and found a pack of Newport cigarettes in the left front breast pocket.

Agent Dincher also testified regarding telephone conversation intercepts that were obtained from the Lycoming County Prison. The intercepts were of telephone conversations between the Defendant and others. One of the conversations included the Defendant admitting that he would take a plea of five to ten "with a smile." Agent Dincher also testified that one of the conversations concerned the Defendant getting Adidas sneakers. Agent Dincher testified that of the shoes located in the bedroom closet in Apartment No. 2, there were at least four pairs of Adidas sneakers. Agent Dincher also testified that some of the photographs that were obtained from the entertainment center as well as on the phone dropped by Mr. Coleman included pictures of Mr. Coleman's son, Naquis.

The suspected controlled substances were sent to the Wyoming State Police laboratory for testing. The thirty glassine packets found in the jacket hanging on the bathroom door contained 1.2 grams of heroin. The twenty knotted baggies contained 19.3 grams of cocaine. The eight Zip-loc baggies of vegetable material contained 2.9 grams of marijuana. The seventy-eight glassine packets found in the kitchen cupboard contained 3.1 grams of heroin.

The question is whether the above evidence is sufficient to establish that the Defendant had the power to control the drugs and gun and whether he intended to exercise that control. Clearly, he did.

The contraband was located in Defendant's apartment. Not only was there direct evidence that the Defendant was renting the apartment in that he agreed to such and actually paid prorated rent and the security deposit but there is also an abundance of circumstantial evidence. There were photographs displayed on an entertainment center in the bedroom of the Defendant, his friends and his loved ones. Important documents relating to court cases of the Defendant were also found on the entertainment center. Defendant's cell phone which was seized from him when he was subsequently arrested contained not only an exact photo of what was found in the entertainment center but also other photos of the same friends and loved ones that were depicted in the photos found in Apartment 2. The furniture that had been located in Apartment 2 was relocated to Defendant's sister's apartment following the shooting incident. Defendant clearly preferred Adidas sneakers of which there were numerous pairs in the bedroom closet. Defendant obviously smoked Newport cigarettes. They were confiscated from him when he was arrested. The coat that was found in the residence had a Newport cigarette pack in it and the garbage bag had numerous empty Newport cigarette packs. Moreover, there was no evidence pointing to any one else residing at the residence. While others including Adrian Harry may have been a guest, there was no evidence whatsoever that any other individual had joint possession or control over the apartment. There was only one bed, the bedroom had men's clothing and footwear consistent with one person, and there was no evidence of multiple toothbrushes, different styles of clothing, different sizes of clothing, or different personal items. As the sole tenant and

occupier of the apartment, clearly the Defendant had the power to control the items that were found in the apartment including the controlled substances that were found in the boot in his closet, the controlled substances that were found in his jacket hanging on his bathroom door and the controlled substances and gun found in his kitchen cabinet.

While the evidence may not be as strong, it is sufficient to establish as well that the Defendant intended to exercise control over the items of contraband. Following the shooting incident which obviously occurred in his apartment, someone was heard shuffling around and then leaving. A strong inference can be made that during this time period the Defendant, knowing that the police would be called to the scene, was hiding the controlled substances prior to leaving. The leaving, in and of itself under the circumstances, supports consciousness of guilt.

With respect to the gun, the fact that it was hidden in Defendant's apartment in a location that was difficult to access and was near controlled substances, some of which were identical in kind and packaging as those located in presumably Defendant's coat found in his bedroom establishes intent to control. Moreover, there was at least a fair probability from a statistical standpoint that Defendant's DNA was on the gun.

With respect to the controlled substances, there are several factors that lead the Court to conclude that the evidence was more than sufficient to prove that the Defendant intended to exercise control over them. First, the items were secreted in hidden areas throughout the apartment including the jacket, inside a pair of boots and in a kitchen cabinet. The evidence is overwhelming that the Defendant was the sole occupier of the residence and

that the boots were his, as was the jacket. The evidence strongly supports the inference that it was the Defendant who placed the items in his shoes and in his jacket. Under the circumstances, the evidence also supports a strong inference that it was the Defendant who hid the items in the kitchen cabinet, far out of reach, soon after the shooting took place and immediately prior to him vacating the premises. The items found in the kitchen cabinet next to the gun that probably had Defendant's DNA on it, were of the same substance and packaged similarly to the items found in his jacket. Moreover, they were bundled together by rubber bands similar to the rubber bands found in the bathroom vanity. Finally, there was expert testimony that the controlled substances were possessed with the intent to deliver. This opinion was based on a myriad of factors. This expert testimony supports in part the conclusion that the items were constructively possessed as well. If they were possessed with the intent to deliver them, obviously the subject, in this case the Defendant, had the intent to control them.

The Court finds that the following cases, which found that the sole tenant of an apartment had both the ability and intent to control the contents of the residence, support its finding that the evidence was sufficient to establish constructive possession in this case: Commonwealth v. Stamps, 493 Pa. 520, 427 A.2d 141, 145 (1991); Commonwealth v. Muniz, 5 A.3d 345, 348-49 (Pa. Super. 2010); Commonwealth v. Santiesteban, 552 A.2d 1072, 1074-75 (Pa. Super. 1988); Commonwealth v. De Campli, 364 A.2d 454, 456-57 (Pa. Super. 1976).

Accordingly, Defendant's attack on the sufficiency of the evidence with

respect to constructive possession fails.

Defendant's motion for a new trial raises four separate claims. Three address evidentiary rulings by the Court while the last addresses the weight of the evidence with respect to constructive possession. The Court will address the weight of the evidence argument first.

"A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict." Commonwealth v. Witmer, 744 A.2d 745, 751 (Pa. Super. 2010). In order for the Court to grant a new trial on a weight claim, the verdict must shock the conscience of the Court. Commonwealth v. Foley, 38 A.2d 882, 891 (Pa. Super. 2012).

In arguing that the verdict is against the weight of the evidence, Defendant reiterates his sufficiency claim. For the reasons set forth above, is clearly not against the weight of the evidence and a new trial will not be granted on this claim.

Defendant's first evidentiary claim of error contends that the Court erred by admitting photos obtained from a cell phone seized from the ground at the time of the Defendant's arrest because no evidence established when the photographs were taken. While Defendant is correct that no evidence was introduced to establish when the photographs were taken, this does not result in their inadmissibility.

The admissibility of evidence is within the discretion of the trial court. Commonwealth v. Johnson, 42 A.3d 1017, 1027 (Pa. 2012). The determinative standard is relevancy. See Pa.R.E. 402 ("All relevant evidence is admissible, except as otherwise

provided by law"). Evidence is relevant if it tends to prove or disprove a fact in issue. See Pa.R.E. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence").

The photographs were offered and admitted in evidence as circumstantial evidence that the Defendant resided at 517 Stevens Street, Apartment 2. The photographs tended to prove such because they were obtained from Defendant's cell phone and the same or similar photographs were on the television/entertainment stand in Apartment 2.

The following evidence showed that the cell phone belonged to Defendant: the cell phone was dropped by Defendant when he was arrested; the phone number to the cell phone had the same first six digits as admitted by the Defendant; and the charger seized from the Defendant's person fit the cell phone.

Next, the pictures obtained from the cell phone included the exact copy of the picture that was seized from the entertainment stand in the apartment and other photographs of individuals who were also present in the actual photographs seized from the entertainment stand. Photographs of the same individuals on both Defendant's cell phone and from the entertainment stand clearly tend to prove that the Defendant resided in the apartment where the gun and drugs were found. As a result, the photographs were relevant and the Court did not err in admitting them.

Defendant next argues that the Court erred by admitting text messages discovered on the cell phone because no evidence established who sent or who received the

messages; thus the messages lack any authentication.

The relevancy of the messages, however, did not depend upon who sent them or who received them. The messages were obtained from the cell phone that was dropped when the Defendant was arrested and were offered only as circumstantial proof that the phone was actually owned by the Defendant.

The first message referenced an individual by the name of Ju. There was direct testimony that this was the street name of Defendant's sister. The next text message referenced an individual by the name of Raw. There was direct evidence that this was one of the Defendant's street names.

While the text messages alone carried little weight, the fact that the Defendant dropped a cell phone that referenced both his sister's and his street names through text messages respectively sent and received is corroborating evidence regarding ownership of the cell phone. Thus, the Court did not err in admitting the evidence.

Defendant's last claim of error contends that the Court erred in admitting the DNA evidence when the frequency was so low and the Commonwealth's expert, Jill Cramer, testified that it would not be sufficient for a positive identification.

Ms. Cramer was admitted as a Forensic DNA analyst and permitted to give her opinion regarding the DNA testing that was conducted on the swabs obtained from the .38 Smith & Wesson handgun. Ms. Cramer testified that through combining the swabs, there was a sufficient amount of DNA to test. In testing the DNA and comparing it with the known sample from the Defendant, Defendant was excluded as the major contributor to the DNA

mixture; however, he could not be excluded as a minor contributor. Defendant's DNA profile matched 11 out of 15 loci of one of the minor contributors. This resulted in a statistical probability that if 6,031 random black males were tested, one would have a similar profile. According to Ms. Cramer, this was a middle of a road or medium statistical conclusion. By way of comparison, it would be much more likely that the Defendant's DNA was a match if the results were one in two million and much less likely if the results were one in two.

The fact that Ms. Cramer's opinion was not sufficient for a positive identification does not render her testimony inadmissible, but only goes to the weight of the evidence. See Commonwealth v. Crews, 536 Pa. 508, 640 A.2d 395 (1994). In rejecting the appellant's Frye challenge to the admissibility of DNA evidence where there was no accompanying statement of statistical probability, the Pennsylvania Supreme Court in Crews stated:

> Appellant objects to presentation of the physical portion of the analysis without a statistical analysis to sharpen the focus of the evidence, arguing that the physical test results are meaningless without statistical conclusions. We disagree. Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact. The factual evidence of the physical testing of the DNA samples and the matching alleles, even without statistical conclusions, tended to make appellant's presence more likely than it would have been without the evidence, and was therefore relevant. To be relevant, evidence need not be conclusive. Asked to evaluate the meaningfulness of evidence of a DNA match without an accompanying statement of statistical probability, appellant's DNA expert likened such testimony to testimony that "I saw a blue Chevrolet run over this dog." Identifying the car as a blue Chevrolet does not specifically identify the offending car, but it is useful, admissible identification evidence. In the same way, the relevant, though inconclusive, DNA evidence was

> admissible in this case; its weight and persuasiveness were properly matters for the jury to determine.

640 A.2d at 402-403.

Therefore, the DNA evidence was an admissible piece of circumstantial evidence which the Court as the fact-finder had the duty to weigh along with all of the other pieces of direct and circumstantial evidence.

Accordingly and for the reasons set forth above, the Court denies Defendant's motion for a new trial.

Lastly, Defendant claims that the gun located in the kitchen was not in close proximity to the cocaine found in the coat hanging on the bathroom door and accordingly the drug mandatory at 42 Pa. C.S.A. § 9712.1 should not be applied.

Clearly, the gun was found in close proximity to the vast quantity of heroin found in the same kitchen cabinet. They were next to each other.

With respect to the cocaine and heroin found in the coat hanging on the bathroom door, the gun was in close proximity. As described by the numerous witnesses, the apartment was a small one bedroom apartment. Upon entering the front door, there was a basically empty living room. To the left of the living room was a bedroom and bathroom. The coat was found hanging on the door that separated the bathroom and the bedroom. To the right of the living room was a small dining room and kitchen. The weapon was located in a kitchen closet. Under these circumstances, controlling case law compels a finding that the gun was located in close proximity to the controlled substances. Commonwealth v. Hawkins,

45 A.3d 1123 (Pa. Super. 2012)(the presence of both a controlled substance and a firearm in the same residence satisfies the close proximity requirement of 42 Pa.C.S. §9712.1).

Accordingly, Defendant's motion for reconsideration of sentence fails.

Turning to the Commonwealth's motion to modify sentence, the Commonwealth argues that the appropriate mandatory minimum sentence for possession with intent to deliver heroin should have been 8 years, consisting of 5 years for possessing a firearm in close proximity to the heroin and 3 years for possessing at least 2 grams of heroin when Defendant had another conviction for possession with intent to deliver at the time of sentencing, that being his conviction in count 7 for possession with intent to deliver cocaine. The Commonwealth relies on the case of Commonwealth v. Rush, 959 A.2d 945 (Pa. Super. 2008). The Commonwealth contends that the parties had discussed Rush quite sometime before the date of sentencing, but they inadvertently failed to make the Court aware of this case and, if they had done so, the Court would have imposed an eight year minimum sentence in this case.

After reviewing Rush, the Court is constrained to agree with the Commonwealth. Although the Court tends to agree with the dissent that one of the convictions should be treated as a first offense, the Court is required to follow the majority decision in Rush until it is overruled by a decision of the Pennsylvania Supreme Court or is superseded by an amendment to 18 Pa.C.S.A.§7508.

The Court notes that the maximum sentence for possession with intent to deliver heroin still would be 15 years in this case. While there is a statutory provision that

provides for the doubling of the maximum sentence for a second or subsequent offense, see 35 P.S. §780-115, the definition of a second offense in that section requires a conviction prior to the commission of the current offense, whereas section 7508 of the Crimes Code (18 Pa.C.S.A. §7508) only requires a conviction at the time of sentencing for the enhanced mandatory minimum sentence to apply. Therefore, pursuant to Rush, the Court must consider the conviction for possession with intent to deliver cocaine as a previous conviction for purposes of the drug trafficking mandatory minimums contained in section 7508, but the Court cannot consider that same conviction as a prior offense for purposes of determining the maximum sentence under section 780-115.

In light of the foregoing, the Court will grant the Commonwealth's motion to modify sentence and enter an order imposing a sentence of 8-15 years of incarceration and a mandatory fine of $10,000 on Count 4 possession with intent to deliver heroin.[1]

cc: Kenneth Osokow, Esquire (ADA)
Nicole Spring, Esquire (APD)
Work File
Gary Weber, Esquire (Lycoming Reporter)

[1] The Court notes that when it held an argument on these motions, Defendant participated via videoconferencing and agreed that the Court could simply issue an amended sentencing order without bringing Defendant back before the Court for re-sentencing.

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-499-2010**
vs.	**:**	**OTN# S0149321**
	:	
PAUL COLEMAN,	**:**	**Order denying Defendant's post sentence**
Defendant	**:**	**motion, granting the Commonwealth's motion to**
	:	**modify sentence, and amending Defendant's**
	:	**sentence for Count 4**

O R D E R

AND NOW, this ___ day of August 2012, following a hearing and argument, the Court **DENIES** Defendant's post sentence motion and **GRANTS** the Commonwealth's motion to modify sentence. The sentence of the Court with respect to Count 4, possession with intent to deliver heroin, an ungraded felony, is that the Defendant pay the costs of prosecution, pay a mandatory fine in the amount of $10,000 and undergo incarceration in a state correctional institution, the minimum of which is **eight years and the maximum of which is 15 years**. This Sentence includes the five year mandatory for the gun proximity (42 Pa.C.S. §9712.1), as well as the **three** year mandatory for the weight of the heroin (18 Pa.C.S. §7508(a)(2)(i)), which shall run consecutive to each other, for the total sentence of **eight** to 15 years. This sentence shall run consecutive to the Sentence imposed with respect to Count 10.

The aggregate sentence imposed by the Court in this case is a period of state incarceration, the minimum of which is **13 years** and the maximum of which is 25 years.

In all other respects, the sentencing order dated March 21, 2012 shall remain

in full force and effect.

By The Court,

_____

Marc F. Lovecchio, Judge

cc: Cost Clerk
APO
District Attorney (KO)
Public Defender (NS)
Victim/Witness Coordinator
Warden
Williamsport Police Department
Sheriff
SCI-Camp Hill
PBPP
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