

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR- 1090-2015
 :
 ANTHONY BARASKY, :
 Defendant : Omnibus Pretrial Motion

OPINION AND ORDER

Defendant is charged by Information filed on July 24, 2015 with one count of criminal conspiracy to possess with intent to deliver crack cocaine, one count of possession of crack cocaine, one count of possession with intent to deliver crack cocaine and one count of possession of drug paraphernalia.

Defendant filed an omnibus pretrial motion on August 3, 2015 alleging that the Commonwealth has failed to present a prima facie case with respect to all of the charges. More specifically, Defendant contends that the Commonwealth has failed to present “any evidence pertaining to the element of possession.”

A hearing in this matter was held on November 24, 2015. Trooper Tyson Havens of the Pennsylvania State Police testified that he was on duty June 3, 2015 in the city of Williamsport in an unmarked vehicle.

He noticed a vehicle pass by him. Trooper Havens saw the passenger and recognized him as an individual he believed was Donte Butler. Trooper Havens decided to follow the vehicle because Mr. Butler was known to Trooper Havens as a “drug dealer.”

The driver of the vehicle, who was later identified as Rasheem Johnson, eventually committed a traffic infraction. Accordingly, Trooper Havens stopped the vehicle.

Trooper Havens made contact with the passenger, who Trooper Havens still believed was Donte Butler. The individual was nervous, would not look at Trooper Havens, and specifically said that he “ain’t Butler.”

Trooper Havens obtained the passenger’s identification. At that point Trooper Havens realized that the passenger was not Mr. Butler, but Defendant Anthony Barasky. Trooper Havens had “dealt with” Mr. Barasky on a number of occasions on “the street in the past.” Trooper Havens testified that Mr. Barasky was normally “confrontational, mouthy or disrespectful.” According to Trooper Havens, he made a number of arrests years ago and when “no drugs were on the scene”, Mr. Barasky would be very confrontational and “come up and say something disrespectful.” Therefore, to gauge the situation, Trooper Havens was purposefully antagonistic towards Defendant. Although Defendant was getting angry and continued to appear nervous, he did not “strike out.” As a result, Trooper Havens testified that he “knew something was in the car.”

The driver advised Trooper Havens that he could go ahead and search the vehicle. The occupants of the vehicle were removed. There was what appeared to be a 20 oz. unopened can of “Arizona Iced Tea” in a cup holder in the center console between the front seats. Trooper Havens picked up the can and thought that it was a “hide-a-can.” He gave the can to Trooper Adam Kirk, who had arrived to assist Trooper Havens.

Trooper Kirk testified that the iced tea can was a hide-a-can. He opened the hidden compartment and inside was a clear plastic bag containing a chalky powder, which field-tested positive for cocaine.

With respect to the ownership of the vehicle, the driver, Mr. Johnson, initially claimed that it was his cousin's car and then apparently changed his story and claimed that it was his girlfriend's car. After he was taken into custody, Mr. Johnson admitted that the cocaine in the iced tea can was his. When Mr. Johnson was searched incident to his arrest, the troopers found a cell phone and \$620.00 in cash.

Defendant was not the driver of the vehicle or the owner. There was no evidence that Defendant was given permission to drive the vehicle or to have it in his possession. There was no use or distribution paraphernalia found on Defendant or in the vehicle except on Mr. Johnson's person. The crack cocaine was hidden in the Arizona Iced Tea can and obviously was not in plain view. There was no evidence that the cocaine had recently been accessed or consumed by Defendant or Mr. Johnson. Defendant did not provide any false information to the troopers or attempt to flee.

The Commonwealth asserts that it proved constructive possession of the controlled substance by Defendant by virtue of two facts: (1) Defendant was present in the vehicle and could access the can, which was between Defendant and Mr. Johnson; and (2) as testified to by Trooper Havens, Defendant's "disposition screamed he had possession." In other words, Defendant was nervous and was non-confrontational despite being antagonized.

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 proven through showing that the defendant exercised conscious dominion over the substance. See *Commonwealth v. Ocasio*, 619 A.2d 352, 354 (Pa. Super. 1993).

In a case such as this where contraband is not found on the defendant's person, the Commonwealth must establish constructive possession of the contraband. *Commonwealth v. Haskins*, 677 A.2d 328, 330 (Pa. Super. 1996), appeal denied, 692 A.2d 563 (Pa. 1997). 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 (Pa. 1983)(citations omitted).

In *Commonwealth v. Mudrick*, 507 A.2d 1212 (Pa. 1986), the Pennsylvania Supreme Court described the concept as follows: "Constructive possession 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. "An intent to maintain a conscious dominion may be inferred from the totality of the circumstances...[and], circumstantial evidence may be used to establish a defendant's possession of drugs or contraband." *Commonwealth v. Valette*, 613 A.2d 548, 550 (Pa. Super. 1992) (quoting *Macolino*, 469 A.2d at 134). In addition, multiple people may be found to constructively possess contraband in situations where the

contraband is found in an area of joint control and equal access. *Haskins*, 679 A.2d at 330. However, mere presence or close proximity to the controlled substance is not enough to establish constructive possession. *Valette*, supra; *Commonwealth v. Keblitis*, 456 A.2d 149 (Pa. 1983); *Commonwealth v. Spencer*, 621 A.2d 153 (Pa. Super. 1993); *Commonwealth v. Juliano*, 490 A.2d 891 (Pa. Super. 1985).

The proper means to attack the sufficiency of the Commonwealth's evidence pretrial is through the filing of a petition for writ of habeas corpus. *Commonwealth v. Marti*, 779 A.2d 1177, 1178 n. 1 (Pa. Super. 2001). At a habeas corpus hearing, the issue is whether the Commonwealth has presented sufficient evidence to prove a prima facie case against the defendant. *Commonwealth v. Williams*, 911 A.2d 548, 550 (Pa. Super. 2006). "A prima facie case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of a crime and that the accused is probably the perpetrator of that crime." *Commonwealth v. Packard*, 767 A.2d 1068, 1070 (Pa. Super. 2001). "Stated another way, a prima facie case in support of an accused's guilt consists of evidence of evidence that, if accepted as true, would warrant submission of the case to a jury." *Id.* at 1071.

When reviewing a petition for a writ of habeas corpus, the court must view the evidence and all reasonable inferences to be drawn from the evidence in a light most favorable to the Commonwealth. *Commonwealth v. Santos*, 876 A.2d 360, 363 (Pa. 2005). A prima facie case merely requires evidence of each of the elements of the offense charged, not evidence beyond a reasonable doubt. *Marti*, 779 A.2d at 1180.

Considering all of the circumstances, the court cannot conclude that Defendant probably constructively possessed the cocaine. There are no circumstances involved in the case which permit drawing an inference that Defendant intended to exercise control over the controlled substance.

Defendant was neither the driver nor the owner of the vehicle. There was no evidence that he was even permitted to drive the vehicle.

The controlled substance also was not plainly visible. It was hidden in a secret compartment in what appeared to be a can of Arizona Iced Tea. There was no evidence that Defendant's fingerprints or DNA were on the can.

There was no evidence whatsoever that Defendant had accessed the controlled substance by using it or selling a portion of it. Nothing was found on Defendant which would indicate using or selling any controlled substance, let alone the controlled substance at issue. There was nothing found in the vehicle or on the Defendant that shows the controlled substance was recently used by anyone in the vehicle, let alone Defendant. Defendant did not possess a cell phone, a large sum of money, scales, or any other indicia of drug dealing. He also did not possess any paraphernalia to use the cocaine, such as a spoon, a needle or a syringe. Moreover, the driver of the vehicle, who possessed a cell phone and \$620 in cash, admitted that the cocaine was his.

Concisely put, the Commonwealth contends that Defendant's demeanor, along with his access to the controlled substance, is sufficient to prove constructive possession. The Commonwealth argues that because Defendant was nervous and non-

confrontational despite being purposefully agitated, that this evidences consciousness of guilt. The Commonwealth attempts to bolster this argument by Defendant's conduct at some point in the past.

The court cannot accept this argument. While Defendant was in close proximity to the controlled substance, the Commonwealth did not present any evidence to show that he had accessed or intended to access the controlled substance in the hidden compartment of the Arizona Iced Tea can. The court cannot accept that when an individual who previously had contacts with police officers at some point in the past and acted a certain way "when drugs were not present", and who presently acts the opposite of such, reasonably infers that the individual not only knows that drugs are present but intends to exercise control over the drugs. There are far too many variables that cannot be accounted for which could be inferred from Defendant's conduct.

Accordingly, Defendant's petition for a habeas corpus shall be granted with respect to counts 2, 3 and 4. Possession, however, is not an element with respect to count 1, conspiracy to possess with intent to deliver.

With respect to the charge of conspiracy, a person is guilty of such if "with the intent of promoting or facilitating its commission, he agrees with such other person that they....will engage in conduct which constitutes such crime" and he or one of his co-conspirators commits an overt act in pursuance of the conspiracy. 18 Pa. C.S.A. § 903 (a)(1), (e).

In paragraph 27 of his motion, Defendant asserts "there is no evidence that

there was any kind of agreement between Defendant and Johnson to possess the container.”
The court agrees. The Commonwealth not only failed to present any evidence that Defendant agreed with Johnson that they would engage in conduct that would constitute the crime of possession with intent to deliver a controlled substance, it failed to address the conspiracy charge at all in its evidence or its arguments. Accordingly, the court will also grant Defendant’s petition with respect to count 1, conspiracy.

ORDER

AND NOW, this ___ day of December 2015, following a hearing and argument on Defendant’s omnibus pretrial motion seeking habeas corpus relief, the motion is **GRANTED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Anthony Ciuca, Esquire (ADA)
Kirsten Gardner, Esquire (APD)
Gary Weber, Esquire
Work file