

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR- 1536-2015
 :
 DARNELL COTTON, :
 Defendant : Omnibus Pretrial Motion

OPINION AND ORDER

By Information filed on September 25, 2015, Defendant is charged with receiving stolen property, firearms not to be carried without a license, and possession of drug paraphernalia.

Defendant filed an omnibus pretrial motion on October 26, 2015 which included a motion to dismiss count 1 (receiving stolen property), a motion in limine, a motion to sever, and a motion to file an additional pretrial motion upon completion of discovery. A hearing was held on December 9, 2015. Prior to testimony being taken and without objection from the Commonwealth, Defendant orally amended his omnibus pretrial motion to include a motion to dismiss counts 2 and 3. The court will construe Defendant's written and oral motions to dismiss as petitions for habeas corpus. The court will address those petitions first.

At the December 9, 2015 hearing, Officer Jason Dockey of the Williamsport Bureau of Police (WBP) testified. As well, the Commonwealth admitted Exhibit 1 which is a transcript of the preliminary hearing held on September 8, 2015. The following facts were gleaned from both the testimony of Officer Dockey and the transcript of the preliminary

hearing.

Officer Dockey was on duty on August 29, 2015 patrolling in a marked unit. At approximately 7:45 a.m., he was dispatched to the area of the Timberland Apartments, the 500 block of Lycoming Street in the city of Williamsport, for “shots fired.” Upon investigating the incident, he spoke with several witnesses. Witnesses stated that a black male and a black female were arguing in the parking lot and that shortly afterwards a white van came down the street “firing shots.” One witness, identified as Sally Fuentes, heard a disturbance and then heard “shots.” She indicated that a white van with a red decal on the back “might be involved.” She further indicated that the white van drove away. Officer Dockey also spoke with Fajjah Burks who admitted being involved in the “fight” with her boyfriend, Ricky Moore. She stated that he drives a white van and is normally in the 400 block of Louisa Street near where his mother lives. Officer Dockey searched the general area of the alleged shooting and found a spent .45 caliber casing in the street.

Based upon the information he received from the witnesses, Officer Dockey traveled to 427 Louisa Street. He arrived there approximately 45 minutes after the first dispatch. He saw a white van that was parked on the side of the roadway. He traveled about five feet from the van. The windows were down and he could not see any occupants.

He passed by the van, traveled around the block and then took up a surveillance position waiting for backup. While traveling around the block, he lost sight of the van. Within a minute after he took up his surveillance position and stopped, the van drove off.

As the van started to drive away, Officer Dockey immediately observed a large red sticker on the back as described by Ms. Fuentes. Officer Dockey immediately conducted a stop of the vehicle.

There were two occupants. Defendant was the driver and Ricky Moore was the front passenger. Defendant attempted to get out but was ordered to immediately return. While Defendant was doing this, Mr. Moore was “diving back and forth” as if hiding something in the back seat. Both occupants were removed from the vehicle and it was searched.

Three spent .45 caliber casings similar to the one found at the scene were observed in the van. One was in plain view on the driver’s side floorboard, another was in plain view in the center console cup holder, and a third was on the floor behind the front passenger seat.

The second row of seats had “the appearance of a bench” but had two separate seats. A .45 caliber Glock pistol was located under the seats “in the middle.” It was not plainly visible. A loaded magazine for the pistol was located behind the center console to the “left center more behind the driver seat.”

Finally, a cigarette box that contained a small amount of marijuana was found in the sliding driver’s side rear door. The box was not plainly visible.

Defendant was not the owner of the van. Defendant did not say anything nor exhibit any behaviors indicative of him knowing about the presence of the casings, gun, magazine, or marijuana.

Several hours after the stop, Officer Dockey viewed a surveillance video of the area where the shooting allegedly occurred. A white van traveling on the street slowed down and then stopped. It stopped “exactly” where the spent casing was found. A brief puff of smoke was seen coming from the driver’s side. One person, subsequently identified as Ricky Moore who was wearing the same clothes as when he was stopped on Louisa Street, was seen “getting out of” the driver’s side door of the van, then returning and driving away.

The .45 caliber Glock pistol found in the van was registered but previously reported as being stolen. No testimony was presented as to when the gun was stolen or reported stolen.

If a defendant wishes to challenge the sufficiency of the evidence that was adduced during a preliminary hearing, the defendant may file a pretrial petition for a writ of habeas corpus.” *Commonwealth v. Claffey*, 80 A.3d 780, 788 (Pa. Super. 2013), citing *Commonwealth v. Landis*, 448 A.3d 432, 444 (Pa. Super. 2012). The Commonwealth’s duty at the habeas corpus stage is to present a prima facie case. *Id.* “A *prima facie* case consists of evidence showing the existence of each material element of the charged offenses and probable cause to believe that the defendant committed the crime(s) such that if the evidence was presented at trial, the court would be warranted in submitting the case to the factfinder.” *Id.*

In other words, a “prima facie case consists of evidence, read in a 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) (citations omitted). A prima facie case merely requires evidence of each element of the offense charged, not evidence beyond a reasonable doubt. *Commonwealth v. Santos*, 583 Pa. 96, 101, 876 A.2d 360, 363 (2005).

With respect to all three counts of the Information, Defendant contends that the Commonwealth cannot prove for prima facie purposes the required element of possession. Specifically, Defendant contends that the Commonwealth has failed to prove that Defendant intentionally received or retained the moveable property of another, that he carried a firearm in any vehicle or that he possessed drug paraphernalia.

The Commonwealth concedes that if it cannot prove that Defendant constructively possessed the firearm and drug paraphernalia that it would not be able to sustain its prima facie burden with respect to all three counts.

Possession can be established by showing either actual or constructive possession. Actual possession is established by showing that the defendant had the item on his person, while constructive possession can be proven through showing that the defendant exercised conscience dominion over the item. *Commonwealth v. Macolino*, 503 Pa. 201, 469 A.2d 132, 134 (1983).

In a case such as this where the items were not found on Defendant's person, the Commonwealth must establish constructive possession of the items. *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."

Macolino, supra (citations omitted).

In *Commonwealth v. Mudrick*, 510 Pa. 305, 507 A.2d 1212 (1986), the Pennsylvania Supreme Court described the concept of constructive possession 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.” 507 A.2d at 1213 “An intent to maintain a conscious dominion may be inferred from a 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 an item in situations where the item is found in an area of joint control and equal access. *Haskins*, 677 A.2d at 330. However, mere possession or close proximity to the item is not enough to establish constructive possession. *Commonwealth v. Keblitis*, 456 A.2d 149 (Pa. 1983); *Commonwealth v. Spencer*, 621 A.2d 153 (Pa. Super. 1993); *Valette*, supra; *Commonwealth v. Juliano*, 490 A.2d 891 (Pa. Super. 1985).

Considering all of the circumstances, the court cannot conclude that Defendant probably constructively possessed the .45 caliber Glock pistol or the marijuana. There are no circumstances involved in this case which permit drawing an inference that Defendant intended to exercise control over the items.

While Defendant was the driver of the vehicle, there was no evidence that he was the registered owner. While the vehicle was probably used in connection with the prior

shooting, there is no evidence that Defendant was involved in the shooting or that he was even present when it occurred.

While cartridges were plainly visible and a magazine may have been visible, the firearm and marijuana were clearly not plainly visible. Each was secreted in the van.

Officer Dockey did not arrive at Louisa Street until 45 minutes after the incident allegedly occurred near the Timberland Apartments. When he passed by the van, no one was in it. He admitted that he lost sight of the van when he traveled around the block to take up a position to watch the van. Once he parked his vehicle, less than a minute passed by and then the van left. He did not see anyone entering or leaving the van during this minute period of time.

The Commonwealth asks the court to draw an inference that the occupants must have been hiding from Officer Dockey when he initially passed by. Such an inference cannot be drawn and would not be reasonable under the circumstances. The van was parked near Defendant's mother's house. There was certainly enough time between when Officer Dockey passed the van until he returned, for individuals to enter the van. There is no evidence whatsoever that any occupant of the vehicle, let alone Defendant, saw Officer Dockey or knew that Officer Dockey was searching for the white van.

There was no evidence that Defendant's fingerprints or DNA were on the pistol or the cigarette box where the marijuana was located. There was no evidence whatsoever that Defendant had accessed the pistol or controlled substance by using them. Nothing was found on Defendant which would indicate that he was using or had used the

weapon or that he had used or sold any controlled substance, let alone the controlled substance at issue. There was nothing in the vehicle or on Defendant that showed that the controlled substance was recently used by anyone in the vehicle, let alone Defendant.

While Defendant was in close proximity to the controlled substance and the pistol, the Commonwealth did not present any evidence to show that he had accessed or intended to access either item.

Alternatively and with respect to Count 1, receiving stolen property, Defendant also contends that the evidence was insufficient for prima facie purposes to prove that Defendant knew that the gun had been stolen or believed that it had probably been stolen.

Limiting the court's consideration of this issue to the evidence of record and all reasonable inferences arising therefrom as well as viewing the evidence in the light most favorable to the Commonwealth, the court agrees with Defendant.

In order for the Defendant to be convicted of receiving stolen property, the Commonwealth must prove that he acquired possession of the gun with knowledge or belief that it was probably stolen. *Commonwealth v. Nero*, 58 A.3d 802, 807 (Pa. Super. 2012), quoting *Commonwealth v. Young*, 35 A.3d 54, 63 (Pa. Super. 2011), appeal denied. 48 A.3d 1249 (Pa. 2012), appeal denied. 72 A.2d 602 (Pa. 2013).

Obviously, the Commonwealth acknowledges that there is no direct proof that Defendant knew for a fact that the handgun was stolen. Instead, the Commonwealth contends that the evidence is sufficient to prove that Defendant believed that it was probably stolen.

However, the only evidence that the Commonwealth presented was the fact that the Defendant was arguably in possession of the gun and that it had previously been stolen. This is clearly insufficient. *Commonwealth v. Robinson*, 2015 PA Super 238, 2015 Pa. Super. LEXIS 750 (November 19, 2015).

Because the court has granted Defendant's request for habeas corpus relief, the court need not address Defendant's remaining motions.

ORDER

AND NOW, this ___ day of December 2015, following a hearing, the court GRANTS Defendant's petitions for habeas corpus with respect to Counts 1, 2 and 3. In light of this ruling and the fact that the Commonwealth has thirty (30) days to appeal, Defendant's bail is modified to \$25,000 ROR and he shall be released from incarceration. If no timely appeal is filed, the clerk of courts is directed to mark these charges dismissed.

By The Court,

Marc F. Lovecchio, Judge

cc: Tony Ciuca, Esquire (ADA)
Robert A. Hoffa, Esquire (APD)
Gary Weber, Esquire, Lycoming Reporter
Suzanne Fedele, Clerk of Courts
Work file