

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : CR-1878-2014
: :
v. : :
: : 1252 MDA 2016
DAVID CARTER, : :
Defendant : CRIMINAL APPEAL

OPINION AND ORDER

Issued Pursuant to Pennsylvania Rule of Appellate Procedure 1925 (a)

This Court issues the following Opinion and Order pursuant to P.R.A.P. 1925 (a). This is an appeal from an Order imposing sentence upon Defendant, David Carter, on July 9, 2015.

(Order, 7/9/15)¹ Mr. Carter raises two issues on appeal. The first issue is the appropriateness of his sentence, contending essentially that he should have been sentenced in the mitigated range.² The second issue is the sufficiency of the evidence to support the conviction.³ For the reasons stated on the record and in the sentencing Order, and those set forth in the Court's previous 1925 (a) Opinion dated October 2, 2015, and the following opinion, the Court respectfully requests that the sentence and verdict be affirmed.

¹On July 31, 2016 the Order was amended to reflect the correct minimum sentence of five years instead of six years which was erroneously listed on the Order. N.T., 7/9/15 at 17:14.

The procedural background of the case was set forth in the 1925 (a) Opinion and Order dated October 2, 2015. On December 29, 2015 the Superior Court dismissed Carter's initial appeal for failure to file a brief. (Superior Court Docket No. 1309 MDA 2015). Carter timely petitioned for post-conviction relief. By Order dated July 1, 2016, Carter's right to appeal was reinstated nunc pro tunc. Carter filed a notice of appeal on July 25, 2016.

² As discussed, *infra*, the sentence was at the lowest end of the standard range (5 years) for Count 1, with the sentence for Count 2 to run concurrently.

³ On July 25, 2016, Carter filed a concise statement raising the following two issues.

1. *The Honorable Court abused its discretion when the court sentenced the Appellant to a manifestly excessive sentence when it failed to properly consider the factors listed under 42 Pa.C.S. §9721(b), specifically, the mitigating factors of the Appellants' medical issues and his wife's need for a firearm for protection due to prior assaults.*
2. *The Commonwealth failed to provide sufficient evidence that Appellant violated 18 Pa. C.S. 6105 (a) (1) when it failed to show that Appellant actually or constructively possessed the firearm.*

THE COURT SENTENCED APPROPRIATELY AND WELL WITHIN THE GUIDELINES

Sentencing is within “the sound discretion of the sentencing judge and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. Commonwealth v. Antidormi, 84 A.3d 736, 760 (Pa.Super. 2014), *appeal denied*, 95 A.3d 275 (Pa. 2014). *See also*, Commonwealth v. Rodda, 723 A.2d 212, 214 (Pa. Super. 1999)(en banc).⁴ An abuse of discretion is not merely an error in judgment. “Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.” Antidormi, *supra*, 84 A.3d at 760, *citing*, [Commonwealth v.] Robinson, 931 A.2d [15] [(Pa. Super. 2014)] at 26.

When imposing a sentence, the sentencing court must consider the factors set out in 42 Pa.C.S.A. § 9721(b), that is, the protection of the public, gravity of offense in relation to impact on victim and community, and rehabilitative needs of the defendant.... And, of course, the court must consider the sentencing guidelines. Commonwealth v. Fullin, 892 A.2d 843 (Pa. Super. 2006) at 847-48 (citations omitted).

In the present case, the Court sentenced Carter well within the sentencing guidelines and considered the factors set out in 42 Pa.C.S.A. § 9721(b).⁵ The sentence was at the lowest end of the standard range (5 years) for Count 1, with the sentence for Count 2 to run concurrently. Mr. Carter’s prior record score was 5. *See*, Notes of Transcript, July 9, 2015, (N.T.) at 2:15. The Firearms (-persons not to possess: convicted of enumerated felony (loaded/ammo available)) conviction carries an offense gravity score (OGS) of 10. 204 Pa. Code § 303.15. The standard

⁴ As there is no absolute right to appeal, the Appellate Court conducts a threshold inquiry as to whether defendant’s appeal of the discretionary aspects of a sentence raises a substantial question that the sentence is inappropriate. 42 Pa. C.S. § 9781(b).

⁵ Upon motion of the Commonwealth at the time of sentencing, all charges not disposed of or which did not merge for the purpose of sentencing were dismissed.

range sentence is five (5) to six (6) years (60 to 72 months). 204 Pa. Code § 303.16(a). The aggravated or mitigated range is one year in addition or below the standard range respectively. The court sentenced Carter to serve a minimum of five (5) years and maximum of ten (10) years incarceration in a State Correctional Institution. As such, the Court sentenced at the lowest end of the standard range, rejecting the Commonwealth's argument for a sentence in the aggravated range, seven years, N.T., 7/9/15, at 2:11-12, and the Defendant's argument for a sentence in the mitigated range, fewer than five years.

As to Count 2, Possession with Intent to Deliver (marijuana) (PWID), the Court sentenced Carter to serve a minimum of twelve months and a maximum of twenty-four months. This falls within the guideline range of six to sixteen months, in light of the OGS of 3. 204 Pa. Code § 303.15; (GPQ 04-2013 form, page 1). Moreover, the Court sentenced Carter pursuant to the exact terms of plea agreement: "GP to PWID MJ for concurrent sentence to same docket Ct 1. Person not to possess." (GPQ 04-2013 form, page 1). The sentence ran concurrently to the sentence on the firearms count.

The Court respectfully submits that the sentence was appropriate. This Court considered the presentence investigation report (PSI), which it explicitly stated in its Order. (N.T., 7/9/15), at 2:8-9; Order, 7/9/15). The Court considered the mitigating and aggravating factors presented at the sentencing hearing on July 9, 2015. The Court considered the protection of the public, the gravity of offense in relation to impact on the community, the rehabilitative needs of the defendant and the sentencing guidelines as required by 42 Pa.C.S.A. § 9721(b). In the Court's Order imposing sentence, this Court noted the following.

The Court has considered not only the testimony here in court today and the arguments of counsel but also the presentence investigation and specifically the part that indicated previous drug issues and previous firearm charges. The Court believes that drugs are a

significant danger and problem in our community as are firearms. The Court notes that there has been no real remorse expressed. Order, 7/9/15 at 1.

Lastly, this Court observed the demeanor of Mr. Carter at the sentencing hearing and his lack of remorse or responsibility.

Mr. Carter chose to possess a loaded .22 caliber semi-automatic pistol on a couch cushion within his reach at his residence while also possessing drugs with the intent to deliver them, knowing that he was a person not to possess firearms, that children would be visiting the residence, and that he was subject to home visits by parole agents. The sentence was appropriate.

SUFFICIENCY OF THE EVIDENCE.

The scope of review on appeal for sufficiency of the evidence “is limited to considering the evidence of record, and all reasonable inferences arising therefrom, viewed in the light most favorable to the Commonwealth as the verdict winner.” Commonwealth v. Rushing, 99 A.3d 416, 420-421 (Pa. 2014), *citing*, Commonwealth v. Diamond, 83 A.3d 119, 126 (Pa. 2013); Commonwealth v. Robinson, 581 Pa. 154, 864 A.2d 460, 478 (Pa. 2004); Commonwealth v. Solano, 906 A.2d 1180, 1186 (Pa. 2006); Commonwealth v. Chapney, 832 A.2d 403, 408 (Pa. 2003). The standard of review for sufficiency is well settled as follows.

The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. Commonwealth v. Velez, 51 A.3d 260, 263 (Pa. Super. 2012), *quoting*, Commonwealth v. Mobley, 14 A.3d 887, 889-890 (Pa. Super. 2011).

“[M]ere disagreement with the credibility determinations made by the fact finder, or discrepancies in the accounts of the witnesses, does not warrant the grant of appellate relief, for

"[i]t is within the province of the fact finder to determine the weight to be accorded each witness's testimony and to believe all, part, or none of the evidence introduced at trial."

Commonwealth v. Johnson, 2006 PA Super 265, 910 A.2d 60 (Pa. Super. 2006), *citing*, Commonwealth v. Randall, 2000 PA Super 212, 758 A.2d 669, 674 (Pa.Super. 2000), *appeal denied*, 564 Pa. 707, 764 A.2d 1067 (2000) (*citing* Commonwealth v. Molinaro, 429 Pa. Super. 29, 631 A.2d 1040, 1042 (Pa.Super. 1993)).

18 Pa. C.S. § 6105 defines the crime of persons not to possess, use, manufacture, control, sell or transfer firearms. "A person whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth." 18 Pa.C.S. § 6105 (a)(1). 18 Pa.C.S. § 6105 (c) (2) defines other persons not to possess as "[a] person who has been convicted of an offense under the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act [.]” When there is a stipulation as to the disqualification, “the only issue is whether the Commonwealth proved beyond a reasonable doubt that appellant was in possession or control of” the firearm in question. “If so, then the Commonwealth satisfied its burden under Section 6105(a)(1).” Commonwealth v. Sanes, 2008 PA Super 175, 955 A.2d 369, 372- 373(Pa. Super. 2008). The burden can be met by actual possession or constructive possession. Id. (citation omitted).

'Constructive possession is the ability to exercise conscious control or dominion over the illegal substance and the intent to exercise that control.' Commonwealth v. Kirkland, 2003 PA Super 279, 831 A.2d 607, 610 (Pa.Super.2003), *appeal denied*, 577 Pa. 712, 847 A.2d 1280 (2004) (*citing* Commonwealth v. Macolino, 503 Pa. 201, 469 A.2d 132 (1983)). '[T]wo actors may have joint control and equal access and thus both may constructively possess the contraband.' Haskins, *supra* at 330. Commonwealth v. Haskins, 450 Pa.Super. 540, 677 A.2d 328, 330 (1996), *appeal denied*, 547 Pa. 751, 692 A.2d 563 (1997). The intent to exercise conscious dominion can be inferred from the totality of the circumstances.' Kirkland, *supra* at 610.

In Sanes, supra, the Superior Court determined that the appellant did constructively possess the firearms at issue. The court examined the totality of the circumstances when concluding that the appellant had both the ability to exercise conscious control or dominion over the firearms and the intent to exercise that control. In concluding that the evidence was sufficient to support the firearms conviction, the Court noted that “appellant lived in the residence, knew exactly where the firearms were, and led police to them.” Sanes, supra, 955 A.2d at 374. In Sanes, one of the firearms was registered to the appellant’s girlfriend with whom he resided. The firearm registered to the girlfriend was inside a box in the closet of the room where appellant and the girlfriend slept. The other was in the pocket of an adult sized leather jacket hanging in the children’s bedroom.

In the present case, the parties stipulated that the Defendant was a person prohibited by law from possessing or controlling a firearm because he was convicted of a felony offense which is enumerated as a conviction under 18 Pa.C.S. § 6105 (c) (2). N.T. 4/21/15 at 78-79. Therefore, the only issue is whether Mr. Carter was in possession or control of the .22 caliber semi-automatic firearm in question. There was an abundance of evidence supporting the finding that Mr. Carter was in possession or control of the firearm in question.

The following evidence was adduced at trial. On October 18, 2014, parole agents conducted a home visit to Mr. Carter’s residence at 1306 Scott Street, Williamsport. When the parole agents entered the house, Mr. Carter was laying on the couch where a loaded .22 caliber semi-automatic firearm was later recovered by agents. N.T., 4/21/15, at 14:19-20, 19:20-25, 20:1, 28:21-23, 29:20-2, 31, 36:24, 37:3, 37:17-20, 24, 29:7-8, 80:3-6, 90:4. The semi-automatic was recovered “on top of the middle cushion” (N.T., 4/21/15, at 31, 36:24) with a throw pillow on top of it. N. T., 4/21/15, at 37:3. Specifically, the loaded semi-automatic was recovered from

a spot where Mr. Carter's "rear end" had "laid on the couch." N.T., 4/21/15, at 98. The gun was loaded. N.T., 4/21/15, 37:24, 39:7-8. Mr. Carter's girlfriend of three years, Heather Hersh, had purchased the gun. N.T., 4/21/15, at 103. Ms. Hersh testified that the gun was hers and she put the gun on the couch cushion because her grandchildren might otherwise see her with it. The Court did not find Ms. Hersh's testimony credible. Specifically the Court did not find her testimony credible that Hersh put the loaded .22 caliber semi-automatic firearm on the first cushion of the couch because her grandchildren were entering the residence. N.T., 4/21/15 at 99. Mr. Carter told the parole agents "exactly where to go on the couch to get the gun." N.T. 4/21/15 at 19:9-18, 28:8-11 (see also, N.T. 4/21/15 at 80, 8-9, 81:14. Nobody else had access to the gun because Mr. Carter was on top of it. N.T., 4/21/15, 80:3-6.

Examining the totality of the circumstance, the above provides an abundance of evidence in support of the finding that Mr. Carter possessed and controlled the firearm. Carter was in close proximity to the firearm; it was within his reach when the parole agents entered his home. Mr. Carter was the only individual observed on the couch or in arms reach of the firearm. Mr. Carter told the parole agents "exactly where to go on the couch to get the gun." N.T. 4/21/15 at 19:9-18, 28:8-11 (see also, N.T. 4/21/15 at 80, 8-9, 81:14), even though the firearm was not in plain view. The firearm was much closer in proximity to Mr. Carter than either of the firearms were to the appellant in Sanes.

For these reasons, and those provided in this Court's Order imposing sentence on July 9, 2015, this Court respectfully requests that the sentence be affirmed.

BY THE COURT,

September 20, 2016
Date

Richard A. Gray, J.

cc: District Attorney's Office (KO/NI)
Public Defender's Office (JB)
Prothonotary (LG)
(Superior & 1)