

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA	: No. CR-2172-2016
	:
vs.	:
	:
	:
WILLIAM R. WEST, JR.,	: Omnibus Pretrial Motion
Defendant	:

OPINION AND ORDER

Defendant is charged by Information filed on or about December 23, 2016 with, among other counts, criminal conspiracy to possess with intent to deliver, criminal use of a communication facility, and related crimes. Additionally, by Order dated March 13, 2017, the Commonwealth was granted leave to file an Amended Information adding a possession with intent to deliver a controlled substance charge. While no written amended Information was subsequently filed, the court granted a subsequent oral request to amend the Information to add count 8, possession with intent to deliver a controlled substance, an ungraded felony. Additionally through an Order entered on July 13, 2017, the court granted the Commonwealth leave to amend the Information to add count 9, possession of a small amount of marijuana with the intent to distribute it but not to sell it in violation of 35 P.S. § 780-113 (31), an ungraded misdemeanor.

Defendant filed a Petition for Habeas Corpus and orally amended the Petition to request habeas corpus relief with respect to the additional counts. The Petition relates to count 1, criminal conspiracy to possess with intent to deliver controlled substances; count 2, criminal use of a communication facility; count 3, possession of a controlled substance; count 8, possession with intent to deliver a controlled substance; and count 9, possession of a small amount of marijuana for distribution.

The hearing in this matter was held on July 13, 2017. Because the recording of the preliminary hearing was not available, the Commonwealth presented testimony from its witnesses.

Trooper Tyler Morse of the Pennsylvania State Police was on patrol in the city of Williamsport in a marked unit on October 3, 2016. He has been employed by the Pennsylvania State Police since June of 2012 and is currently assigned to the Vice and Narcotics Unit. He has extensive training and experience in investigating and prosecuting control substance offenses.

At approximately 12:18 p.m. he observed a greenish-blue 2010 Ford Taurus turn out of the Shamrock Grill parking lot onto West Edwin Street. He noticed the tint on the windows appeared to be illegal. He followed the vehicle north onto Campbell Street and then west onto Memorial Avenue. Almost simultaneously, as the vehicle started to park along the north side of Memorial Avenue near the intersection of Second Avenue, Trooper Morse initiated a traffic stop.

He approached the vehicle and spoke with the driver who was identified as Defendant. He had known Defendant from at least two prior interactions. There were two other individuals in the vehicle. Corey Flournoy was identified as the front seat passenger. Defendant's minor daughter was in the rear of the vehicle.

The vehicle was registered to Defendant and his mother. A warrant check was run on the PSP Warrant database. The database indicated that there was an outstanding warrant for Mr. Flournoy's arrest.

Mr. Flournoy was taken into custody by Williamsport Police Officer Brian

McGee, who was assisting. Mr. Flournoy was searched incident to his arrest. This search uncovered two cell phones as well as \$740.00, all in \$20.00 bills, and some change.

Trooper Morse resumed his investigation. He first measured the window tint. The front driver and passenger windows measured at 18 % while the rear driver and passenger windows measured at 29 %. Both of these percentages were above that permissible by law. He discovered as well that the vehicle had an expired inspection and emissions certification.

While Trooper Morse was resuming his investigation, PSP Trooper Tyson Havens arrived as further backup. While Trooper Morse was speaking with Defendant, who was still seated in the vehicle, both Trooper Morse and Trooper Havens noticed the odor of raw marijuana coming from the vehicle. Defendant indicated that he did not know Mr. Flournoy very well; he was giving him a ride from the Shamrock.

The troopers asked Defendant for consent to search the vehicle. He denied such consent. Nonetheless, based on alleged probable cause, the troopers searched the vehicle. While the search was proceeding, Trooper Morse noted that Defendant was acting very nervous and kept trying to look past him to see what was being found if anything.

Between the seats was a center console. In front of the center console was a cup holder. The Pennsylvania State Police found \$7.00 in the cup holder. In the center console, they found \$741.00, six different pills, and a blue Samsung flip phone.

When asked about the ownership of these items, Defendant indicated that the pills were "sex pills" (three were subsequently identified as Cialis) and, that of the money, only \$7.00 was his. According to Trooper Morse, Defendant explained that the \$7.00 was the

change he received when he just previously took his child to Burger King to get some food. According to Trooper Morse, on at least five different occasions while they were speaking, Defendant denied that the additional money found in the center console was his. Later, Defendant claimed that all of the money in the vehicle was his. Specifically, Defendant said that the "\$700.00" was from his "business."

The troopers also noted several non-contraband items in the vehicle including cologne dispensers, air fresheners and masking agents.

They decided to search Defendant and found two bags of marijuana in Defendant's left shoe. The one bag was a dime bag while the other was a bit larger. The dime bag had a marking on it while the other did not.

The vehicle was subsequently taken into impound. The troopers obtained a search warrant and "a few days later" searched the vehicle pursuant to the search warrant. Among other things, the police found "marijuana shake" or little pieces of marijuana bud in front of both the front and passenger seats on the floor. More significantly, there was a Burger King bag found in the back passenger seat. Inside the bag was a french-fry container. Inside the container was a larger plastic distribution bag. Inside the distribution bag were six clear ziplock dime bags of marijuana with a Hershey Kiss emblem and one larger bag containing approximately 1/8 of an ounce of marijuana.

All of the phones that were located on Mr. Flournoy and in the console were searched for information. Each of the phones revealed surreptitious drug transaction conversations.

Mr. Flournoy subsequently admitted that all of the items found in the vehicle

were his except for the marijuana found on the Defendant and the flip phone found in the center console.

Trooper Robert Williamson also of the Pennsylvania State Police testified as well. He testified consistent with Trooper Morse.

In addition, he noted that there was no evidence that was seized or located to support an argument that the marijuana was being ingested by either Defendant or Mr. Flournoy. Among other things, there were no smoking devices and no wrapping paper or cigar wrappers. Neither of the individuals were under the influence of anything. There were no signs of usage let alone intoxication.

Furthermore, in the center console, the troopers found a Dentek bottle with an unknown white substance as well as aluminum foil.

Defendant contends that the evidence is insufficient to hold him for court with respect to count 1, criminal conspiracy, count 2, criminal use of a communication facility, count 3, possession of controlled substance (the marijuana found in the Burger King bag), count 8, possession with intent to deliver (the marijuana found in the Burger King bag) and count 9, possession of a small amount of marijuana for distribution (the marijuana found in Defendant's shoe).

With respect to count 1, Defendant argues that there is insufficient evidence to show an agreement. With respect to count 2, Defendant argues that there is insufficient evidence to show he "used a communication facility." With respect to counts 3 and 8, Defendant contends that the evidence is insufficient to show possession. Finally, with respect to count 9, Defendant argues that the evidence was insufficient to show that he intended to

distribute any marijuana.

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

A conspiracy, of course, can be proven by circumstantial evidence. In this case, the court holds that for prima facie purposes the Commonwealth has sufficiently proven

a conspiracy.

Mr. Flournoy was found with two cell phones, approximately \$740.00 in cash and admits to possessing six dime bags and approximately 1/8 of an ounce of marijuana found in a distribution bag located in a Burger King bag found in defendant's vehicle. Defendant admitted to going to Burger King earlier.

Mr. Flournoy's cell phone contains numerous messages that can be interpreted as drug transactions. The blue flip phone found in the center console of Defendant's vehicle within his control also contains numerous messages that can be interpreted as drug transactions. Two of the messages involved transactions the same day as the stop and arrest.

Mr. Flournoy denied ownership of the blue flip phone. While he admitted he was in possession of a significant amount of marijuana, he arguably was selling it in dime bags. Defendant was found with a dime bag albeit with a different emblem, and other marijuana. Defendant was found with \$740.00 as well. Moreover, there was marijuana shake found between both parties on the floor. An inference can be made that they were passing the marijuana to each other.

The court notes that defendant previously admitted that there was sufficient evidence to prove for prima facie purposes possession with intent to deliver.

Defendant next challenges the criminal use of a communications count alleging that the evidence was insufficient to show that Defendant had used the phone. Again, based on circumstantial evidence, the court cannot agree. The phone was in Defendant's vehicle. He had clear access to it. He had clear access to the marijuana in the

Burger King bag as well as the marijuana on him. He had several hundred dollars which could not be explained. He acted nervously and deceitfully evidencing consciousness of guilt. Finally, at or near the time of the alleged drug transactions which were discovered on the phone, Defendant was found with another individual under circumstances indicating that they were in fact selling the marijuana on them. There was no smell of smoked marijuana and absolutely no indication that it was being used by the occupants. Furthermore, there were masking agents present in the vehicle. An inference can be made that they were attempting to hide the odor of the raw marijuana that was being sold.

With respect to Defendant's possession argument, because the Burger King bag was not found on Defendant's person, the Commonwealth must satisfy the burden of proving possession by proof of constructive possession. *Commonwealth v. Valette*, 531 Pa. 384, 613 A.2d 548, 550 (1992). "Constructive possession requires proof of the ability to exercise conscious dominion over the substance, the power to control the contraband, and the intent to exercise such control." *Commonwealth v. Perez*, 931 A.2d 703, 708 (Pa. Super. 2007)(quoting *Commonwealth v. Bricker*, 882 A.2d 1008, 1014 (Pa. Super. 2005)). "[C]onstructive possession may be established by the totality of the circumstances." *Commonwealth v. Muniz*, 5 A.3d 345, 349 (Pa. Super. 2010)(quoting *Commonwealth v. Thompson*, 779 A.2d 1195, 1199 (Pa. Super. 2001)).

In reviewing the totality of the circumstances and considering the evidence in a light most favorable to the Commonwealth, the evidence is more than sufficient to establish Defendant's constructive possession of the marijuana found in the Burger King bag.

The marijuana was found in a Burger King bag. Defendant admitted to going

to Burger King and purchasing some food. Marijuana was found in the front of Defendant's seat on the floor. Defendant was nervous, evasive, and deceitful when answering questions. He changed his mind with respect to the questions involving the money that was located in the center console. The car, registered in Defendant's name, was full of masking agents. There was no evidence found that the marijuana was used by anyone else in the vehicle. Defendant had marijuana in his shoe. The cell phone found in the center console evidenced drug dealing activity.

Finally, Defendant's assertion that Mr. Flournoy admitted to possessing the marijuana found in the Burger King bag is not determinative. 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. *Commonwealth v. Johnson*, 26 A.3d 1078, 1094 (Pa. 2011); *Commonwealth v. Haskins*, 677A.2d 328, 330 (Pa. Super. 1996), *appeal denied*, 692 A.2d 563 (Pa. 1997).

Defendant's final argument with respect to count 9 also fails. The evidence as set forth above is sufficient for prima facie purposes to prove that the marijuana possessed by the defendant was possessed with the intent to distribute it.

ORDER

AND NOW, this ____ day of July 2017 following a hearing and argument, Defendant's omnibus pretrial motion is **DENIED** to the extent it seeks a petition for writ of habeas corpus with respect to any of the counts.

With respect to Defendant's motion for JNET information, said information shall be provided as requested within thirty (30) days of today's date.

With respect to Defendant's motion for a 404 (b) notice, said notice must be provided by the Commonwealth no later than the pretrial date.

With respect to the Defendant's motion to reserve right, said motion is **GRANTED.**

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire ADA
Trisha Hoover Jasper, Esquire
Gary Weber, Lycoming Reporter
The Honorable Marc F. Lovecchio