

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CP-41-CR-447-2021**
 v. :
 :
 HAROLD TINDAL, : **OMNIBUS MOTION**
 Defendant :

OPINION AND ORDER

Harold Tindal (Defendant) was charged with Robbery¹, Persons not to Possess a Firearm², and Simple Assault³. The charges arise from an incident alleged to have occurred on March 22, 2021. However, all charges except for Count 2: Persons not to Possess a Firearm were withdrawn by the Commonwealth at the preliminary hearing. Defendant filed an Omnibus Pretrial Motion on June 16, 2021. This Court held a hearing on the motion on July 20, 2021. The parties requested to file briefs only on the habeas corpus issue. Defendant submitted his brief on December 16, 2021, and the Commonwealth responded on January 24, 2022. In his Omnibus motion, Defendant first argues that the Commonwealth has not provided sufficient evidence to satisfy the *prima facie* burden at the preliminary hearing on Count 2 and that count should be dismissed. Second, Defendant submits a motion for additional discovery⁴. Third, Defendant requests the suppression of statements purportedly made by Defendant contained in discovery for not being knowing, intelligent, or voluntary⁵. Lastly, Defendant submits a motion reserving the right to file additional pretrial motions following the receipt of discovery.

Preliminary Hearing and Testimony

¹ 18 Pa.C.S. § 3701(a)(1)(ii).

² 18 Pa.C.S. § 6105(a)(1).

³ 18 Pa.C.S. § 2701(a)(3).

⁴ The request for additional discovery was addressed at the time of the hearing. The Commonwealth agreed to provide the discovery requested not yet provided to defense counsel.

⁵ At the hearing on this motion, defense counsel indicated that the suppression motion would have to be decided at another time following their receipt of the alleged statements.

The Commonwealth provided an audio recording of the preliminary hearing, marked as Commonwealth's Exhibit 1. The Defendant prepared a transcript of the preliminary hearing, marked as Defendant's Exhibit 1. Defendant also provided the application for the sale of the firearm in question, marked as Defendant's Exhibit 2. At the preliminary hearing, Agent Jeremy Brown (Brown) of the Williamsport Bureau of Police testified on behalf of the Commonwealth. Brown was dispatched to investigate an incident on March 22, 2021. N.T. 4/1/2021, at 1. The incident was reported as a robbery that had just occurred at 144 ½ West Fourth Street, Apartment 3, which was the residence of the suspect, the suspect's girlfriend, and Ms. Green (Green). Id. The occupants of the residence had evacuated the apartment by the time Brown arrived. Id. Brown testified that they received consent from Green to search the apartment "for the gun that she claims might have been in the ceiling tiles." Id. If not found in the ceiling tiles, Green informed police that it could be in the safe. Id. at 5. Three (3) officers conducted the search but failed to find a firearm hidden within the ceiling tiles. Id. at 1. However, Brown stated that, in the process of searching the apartment, one of the agents discovered drug paraphernalia. Id. Following this discovery, the agents "halted the consent search and obtained a...search warrant." Id.

Upon the issuance of the search warrant, the Lycoming County Narcotics Enforcement Unit (NEU) executed the warrant on the apartment. Id. at 2. Pursuant to the search warrant, NEU located a safe that contained a black handgun and approximately an ounce of marijuana. Id. The safe was found in the bedroom shared by Green and Defendant. Id. at 4. Brown further testified that he had contact with Defendant and Defendant indicated to him that the firearm belonged to his friend who had left the gun at the apartment a few months ago. Id. at 2. Defendant was taken into custody for the robbery and subjected to a search incident to arrest.

Id. Brown stated that Defendant had acknowledged ownership of a lanyard and a set of keys. Id. On that lanyard “was a key to the actual safe that contained the handgun and marijuana. That key was used to open the safe.” Id. Green also identified the safe as belonging to Defendant. Id. Brown stated that he spoke with the owner of the firearm who confirmed that he left the gun with Defendant because he was moving to a place where he could not bring the firearm with him. Id. at 5. Brown conceded that police did not find any additional or replicated keys to the safe. Id. Brown noted that, after reviewing Defendant’s criminal history, Defendant was convicted in 2016 of an offense that prohibits him from possessing a firearm. Id. at 3.

Discussion

Habeas corpus Motion

At the preliminary hearing stage of a criminal prosecution, the Commonwealth need not prove a defendant's guilt beyond a reasonable doubt, but rather, must merely put forth sufficient evidence to establish a *prima facie* case of guilt. Commonwealth v. McBride, 595 A.2d 589, 591 (Pa. 1991). A *prima facie* case exists when the Commonwealth produces evidence of each of the material elements of the crime charged and establishes probable cause to warrant the belief that the accused likely committed the offense. Id. Furthermore, the evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to be decided by the jury. Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa. Super. 2001). To meet its burden, the Commonwealth may utilize the evidence presented at the preliminary hearing and may also submit additional proof. Commonwealth v. Dantzler, 135 A.3d 1109, 1112 (Pa. Super. 2016). “The Commonwealth may sustain its burden of proving every element of the crime...by means of wholly circumstantial evidence.” Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001); *see also* Commonwealth v. Jones, 874 A.2d

108, 120 (Pa. Super. 2016). The weight and credibility of the evidence may not be determined and are not at issue in a pretrial habeas proceeding. Commonwealth v. Wojdak, 466 A.2d 991, 997 (Pa. 1983); *see also* Commonwealth v. Kohlie, 811 A.2d 1010, 1014 (Pa. Super. 2002). Moreover, “inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case.” Commonwealth v. Huggins, 836 A.2d 862, 866 (Pa. 2003).

Defendant challenges the Commonwealth’s case against him on Count 2: Persons not to Possess a Firearm. Specifically, Defendant believes that the Commonwealth is unable to establish Defendant ever possessed, used, controlled, or sold the firearm, which is a critical element for the challenged offense. When contraband is not found on a defendant's person, the Commonwealth must establish “constructive possession,” that is, the “power to control the contraband and the intent to exercise that control.” Commonwealth v. Valette, 613 A.2d 548, 550 (Pa. 1992); *see also* Commonwealth v. Gutierrez, 969 A.2d 584, 590 (Pa. Super. 2009). As with any other element of a crime, constructive possession may be proven by circumstantial evidence. Commonwealth v. Macolino, 469 A.2d 132, 134-35 (Pa. 1983). The requisite knowledge and intent necessary for constructive possession may be inferred from a totality of the circumstances. Commonwealth v. Parker, 847 A.2d 745, 750 (Pa. Super. 2004). Constructive possession can be established in one or more actors where the item at issue is in an area of equal access. Commonwealth v. Murdrick, 507 A.2d 1212, 1214 (Pa. 1986).

Pursuant to 18 Pa.C.S. § 6105(a)(1),

[a] person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or 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.

Id. In his brief, Defendant argues that the firearm was not found on Defendant's person, but rather was found in a locked safe. Although Defendant possessed a key to that safe, Defendant asserts that law enforcement were not able to rule out multiple keys that would unlock that safe. Defendant also asserts that Brown even spoke to the owner of the firearm who admitted that he could not take the firearm with him to his new home and therefore left it at Defendant's residence. Defendant was not the only person living in the apartment and, as a result, other people had access to the safe. Defendant believes that the possession of a key to a safe does not rise to an intent to possess the firearm in question. Defendant therefore contends that the Commonwealth has failed to establish his constructive possession of the firearm, and therefore, the charge must be dismissed.

Defendant cites to Commonwealth v. Chenet, 373 A.2d 1107 (Pa. 1977) to support his argument. In Chenet, the Pennsylvania Supreme Court overturned defendant's conviction of possessing a controlled substance, stating that the marijuana found in his trailer was located in the living room, kitchen, and outside area, all of which were "equally accessible" to defendant's roommate and the roommate's girlfriend. Id. at 1108. The Court cited to Commonwealth v. Fortune, 318 A.2d 327, 328 (Pa. 1974) wherein the Court wrote "the fact of possession loses all persuasiveness if persons other than the accused had equal access...to the place in which the property was discovered..." Id. (quoting Commonwealth v. Davis, 280 A.2d 119, 121 (Pa. 1971).

The Commonwealth argues that the evidence presented is sufficient for a *prima facie* case. Brown's testimony established that NEU found a safe in Defendant's bedroom and that Defendant was wearing a lanyard that had a key to the safe attached to it. That safe contained a

firearm and a small amount of marijuana. The Commonwealth believes that Defendant had dominion over the firearm because he possessed the key to its holding place. The Commonwealth maintains that “constructive possession may be found in one or more actors where the item in issue is in an area of joint control and equal access.” Commonwealth v. Johnson, 26 A.3d 1078, 1094 (Pa. 2011). The Commonwealth also cites to Commonwealth v. Keller, 823 A.2d 1004, 1011 (Pa. Super. 2003) that stated the Commonwealth is not limited to the evidence presented at the preliminary hearing and may present “additional evidence at the habeas corpus stage in its effort to establish at least *prima facie* that a crime has been committed and that the accused is the person who committed it.” Id. (quoting Commonwealth v. Jackson, 809 A.2d 411, 416 (Pa. Super. 2002)). To that effect, the Commonwealth asserted in their brief that on November 18, 2021, the Commonwealth received DNA lab results from the buccal swab of Defendant, the pistol, and magazines and ammunition. Commonwealth’s Brief, at 5. The forensic scientist determined that the Defendant can be included as a potential contributor to the mixed profile on the firearm and on the magazines and rounds of ammunition. Id.

In consideration of the totality of the evidence presented at the preliminary hearing, this Court finds that the Commonwealth established constructive possession and met their *prima facie* burden for Count 2. The Commonwealth’s burden is significantly lower at this stage of the proceedings and the evidence presented confirmed that Defendant was found with a key to the safe and that safe contained a firearm. Defendant is prohibited from possessing firearms from a previous conviction in 2016. Viewing the evidence in the light most favorable to the Commonwealth as required, this Court holds that the Commonwealth established Defendant’s constructive possession of the firearm and therefore, Count 2 shall not be dismissed.

Conclusion

The Court finds that the Commonwealth satisfied their *prima facie* burden on Count 2. Therefore, Count 2 shall not be dismissed.

ORDER

AND NOW, this 3rd day of March, 2022, based upon the foregoing Opinion, it is **ORDERED AND DIRECTED** that Defendant's Petition for Habeas corpus is **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA
Robert Hoffa, Esq.
Law Clerk (JMH)