

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

**COMMONWEALTH OF
PENNSYLVANIA**

vs.

**JAMES HOWARD VAN NESS,
Defendant**

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NO. CR-830-2020

PCRA

OPINION

On November 22, 2022, Peter T. Campana, Esquire, filed a Petition for Post Conviction Collateral Relief under the Post Conviction Relief Act (PCRA) on behalf of the Defendant.¹ Argument was held on February 28, 2023, after which the Court granted the Commonwealth two weeks to file a brief/response to the Petition. By stipulation of counsel for the Commonwealth and Defendant, the deadline to file a brief/response was extended to March 24, 2023. The Commonwealth's brief was timely filed on March 23, 2023.

I. Background

The Defendant was charged with one count of Possession of a Controlled Substance by an Inmate²; one count of Possession of a Small Amount of Marijuana³; one count of Possession of Drug Paraphernalia⁴; one count of Driving Under the Influence of a Controlled Substance⁵; and four summary offenses. The Defendant failed to appear for his jury trial on November 5, 2021, and was convicted, in absentia, of Possession of a Controlled Substance by an Inmate, Possession of a Small Amount of Marijuana, and Possession of Drug

¹ The Petition was erroneously filed to Lycoming County Docket #981-2019. An Order was entered on February 28, 2023, transferring the Petition to the correct docket number.

² 18 Pa.C.S. §5123(a.2)

³ 35 P.S. §780-113(a)(31)

⁴ 35 P.S. §780-113(a)(32)

Paraphernalia. On January 6, 2022, the Defendant was sentenced on Count 1, Possession of a Controlled Substance by an Inmate, to a period of incarceration of 24 to 48 months in a State Correctional Institution. All other sentences were to run concurrent to the sentence imposed on Count 1. The Defendant was represented during pretrial and trial proceedings by the Lycoming County Public Defender's Office. No direct appeal was taken following the judgment of sentence.

The Defendant's PCRA Petition alleges that the conviction and sentence resulted from a violation of the United States Constitution and the Pennsylvania Constitution which, under the circumstances in the particular case so undermined the truth determining process that no reliable adjudication of guilt or innocence would have taken place. Specifically, the Defendant argues that the evidence submitted by the Commonwealth is insufficient to sustain the jury's verdict on Count 1 of the Information. Further, the Defendant's PCRA Petition submits that trial counsel was ineffective in failing to make a motion for judgment of acquittal at the close or the Commonwealth's case or immediately after the jury rendered its verdict on the charge of Possession of a Controlled Substance by an Inmate because the evidence on that offense was legally insufficient to sustain the jury's guilty verdict.

II. Discussion

The crux of the Defendant's argument is that the Defendant was charged and convicted of 18 Pa.C.S. §5123(a.2), which states "[a] prisoner or inmate commits a felony of the second degree if he unlawfully has in his possession or

⁵ 75 Pa.C.S. §3802(d)(2)

under his control any controlled substance in violation of section 75 P.S. §780-113(a)(16) of the Controlled Substance, Drug, Device and Cosmetic Act. For purposes of this subsection, no amount shall be deemed de minimis.” The Defendant argues that subsequent to his arrest for driving under the influence, he was committed to the county prison, after which a search was conducted and a small amount of marijuana was found in his possession. The amount of marijuana found on the Defendant at the prison was “3.09 grams, plus or minus .01 grams.” (N.T. 11/5/21, pp.67). Defendant argues that possession less than 30 grams of marijuana does not constitute a violation of 75 P.S. §780-113(a)(16) but rather is a violation of §780-113(a)(31), and cites *Commonwealth v. Gordon*, 897 A.2d 504 (Pa. Super. 2006) and *Commonwealth v. Tisdale*, 100 A.3d 216 (Pa. Super. 2014) in support of his position. The Defendant makes this argument despite the §5123(a.2) expressly states that a *de minimis* amount of a controlled substance subjects a prisoner to a conviction under that provision. Defendant argues that his trial counsel was ineffective in failing to request a judgment of acquittal on Count 1, challenging the sufficiency of the evidence and there was no reasonable basis for doing so. The Petition requests the Court enter a judgment of acquittal on the charge of Possession of a Controlled Substance by a Prisoner and discharge the Defendant from confinement because he did not possess a controlled substance “in violation of §780-113(a)(16) of the Controlled Substance, Drug, Device and Cosmetic Act.”

In its brief, the Commonwealth agrees with Defendant’s distinction between a “small amount” and other amounts, but argues that Defendant fails to raise an issue of arguable merit under the conviction. This Court agrees and

finds the present case analogous to *Commonwealth v. Gerald*, 47 A.3d 858 (Pa. Super. 2012), wherein the Appellant argued that the evidence was insufficient to sustain a conviction for contraband because his underlying small amount of marijuana violation is not a statutorily listed predicate under the contraband statute. In *Gerald*, the Superior Court conducted a statutory interpretation before concluding that the contraband statute, 18 Pa.C.S. §5123(a.2), does not require a conviction under the predicate offense, but only a *violation* of the predicate offense. The Court found “[t]he obvious intent of the Legislature in 18 Pa.C.S.A. §5123(a.2) is the prevention of inmates obtaining any controlled substance in any amount whatsoever; in other words, the contraband statute seeks absolute abstinence by inmates.” *Id.* at 862. Here, as in *Gerald*, Defendant’s conduct in possessing *any* amount of marijuana while an inmate, even where the amount is so small as to qualify under Section 780-113(a)(31), is still a violation of Section 780-113(a)(16), even if conviction cannot be obtained under that section because of *Gordon*.

A violation of law is not synonymous with conviction, nor does it necessarily mandate conviction. *Id.* at 861. Therefore, one can be convicted under 18 Pa.C.S. §5123(a.2) even if one possesses a small amount of marijuana as outlined in 75 P.S. §780-113(a)(31).

III. Conclusion

Based on the above discussion, the Court finds no basis upon which to grant the Defendant’s PCRA Petition and will enter an Order dismissing same.

ORDER

AND NOW, this 14th day of **April, 2023**, after argument by counsel and consideration of the Commonwealth's written material, Petitioner's PCRA Petition is hereby **DENIED**. Petitioner is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the county courthouse, with notice to the trial judge, the court reporter and the prosecutor. The Notice of Appeal shall be in the form and contents as set forth in Rule 904 of the Rules of Appellate Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.A.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Petitioner may lose forever his right to raise these issues.

By the Court,

Ryan M. Tira, Judge

RMT/jel

CC: DA (TB)
Peter T. Campana, Esquire
Gary L. Weber, Esq.