

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : No. 99-10,955  
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:   
vs. : CRIMINAL DIVISION  
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:   
JAMAL BENNETT, :   
Defendant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN  
COMPLIANCE WITH RULE 1925(a) OF  
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's Judgment of Sentence dated December 20, 1999 and entered December 22, 1999. The relevant facts are as follows. On April 9, 1999 at approximately 6:00 p.m. Gordon Hill, his girlfriend and their two (2) children went to 1248 West Fourth Street to collect Abdul Clark's belongings. N.T., October 20, 1999, at pp. 17, 22, 54-55. Mr. Clark had resided at 1248 West Fourth Street with Jamal Bennett (hereinafter "Defendant").<sup>1</sup> While collecting Mr. Clark's belongings, Mr. Hill and Defendant got into an argument. Id. at pp. 23, 31-32, 55, 63. When Mr. Hill suggested that they take the disagreement outside, Defendant went down in the cellar and returned with a rifle or shotgun. Id. at pp. 23, 56, 65-66. The weapon had a pump action, a brown stock and a black, single barrel. Id. at pp. 24. Defendant raised the barrel, pointed it at Mr. Hill, attempted to pump it and said something to the effect of "what's up now, bitch." Id. at pp. 23-26. Mr. Hill ran outside and called 911. Id. at p. 26.

The police received a dispatch of a gun pointing incident. Id. at p.74. They

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<sup>1</sup>Mr. Clark, the brother of Mr. Hill's girlfriend, had been incarcerated. N.T., October 20, 1999, at pp. 17,22.

proceeded to the area of 1248 West Fourth Street and spoke to Mr. Hill. Id. Mr. Hill told the police that Defendant pointed a weapon at him. Id. at p.75. The police then went to speak to Defendant. Id. at p.76. As they approached Defendant's residence, Defendant came out onto the porch. Id. The police explained they were there because they received a complaint that Defendant pointed a shotgun or rifle at Mr. Hill. Id. Defendant denied such an incident occurred and claimed there were no weapons in the house. Id. at pp. 76-77. The police asked Defendant if they could search the residence for weapons. Id. at p.77. After some negotiations, Defendant consented to such a search, provided he could go into the residence with the police. Id. at pp. 77-78.

The police and Defendant entered the residence. Id. at p. 78. The police first searched the living room and one of the bedrooms. Defendant assisted in the police by lifting couch cushions, while continuing to deny the incident and profess that there were no weapons on the premises. Id. When the police went in the kitchen to continue their search for weapons, Defendant mumbled something to the effect of he needed to go outside and check on the dog.<sup>2</sup> Id. at pp. 102-103.

Defendant walked out to the front porch and told the officers guarding the door that he needed to check on the dog. Id. at p. 116. Officer Wasilewski and Defendant then proceeded to the backyard. Id. Once he was alone with Officer Wasilewski in the backyard, Defendant fled the scene. Id. at pp. 116-117. Officer Wasilewski called for assistance and pursued Defendant on foot. Id. at pp. 117-118. She also yelled for Defendant to stop, but he did not heed her command. Id. at p.119. Officer Wasilewski lost sight of Defendant in the area of Cemetary

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<sup>2</sup>There was a dog barking when the police were in the residence with Defendant.

Street, so the police began to scour the area in search of him. Id. at pp.117, 134. Shortly thereafter, Officer Kreitz found Defendant hiding in a dumpster behind a bar on Cemetery Street. Id. pp.134-135. Defendant had a cellular phone, pager and \$91 on his person when he was apprehended. N.T., October 21, 1999, at p.34.

While other officers pursued Defendant, the officers in the residence continued to search for weapons. N.T., October 20, 1999, at p.81. In one of the bench seats in the kitchen, the police found cocaine residue on a plate. Id. at pp. 79-81, 103. The officers then ceased searching for weapons, secured the residence and sought a search warrant. Id. at pp. 81-82.

After obtaining the warrant, the police conducted a full search of the residence. During this search, they found marijuana, cocaine, plastic baggies, razor blades, two cellular phones, and photographs depicting Defendant and another individual pointing weapons. N.T., October 21, 1999, at pp.15-24. In the photographs, Defendant possessed long barreled weapons, such as a shotgun or rifle.

The police charged Defendant with simple assault, recklessly endangering another person, possession of a controlled substance (cocaine) and possession with intent to deliver a controlled substance (cocaine). A jury trial was held on October 20-21, 1999. The jury found Defendant guilty of all the charges.

On December 20, 1999, the Court sentenced Defendant to three and one-half (3½) years to eight (8) years incarceration for possession with intent to deliver cocaine, and a consecutive one (1) to (2) year term of incarceration for simple assault, for an aggregate sentence of four and one-half (4½) to ten (10) years.<sup>3</sup> The Court applied the school

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<sup>3</sup>The Court sentenced Defendant to a concurrent one (1) to (2) years for recklessly endangering another person. The possession of cocaine conviction merged with possession with

enhancement to the sentencing guidelines for possession with intent to deliver and the deadly weapon enhancement for simple assault. Defendant filed a timely appeal.

Defendant first asserts the Court erred by admitting a photograph depicting Defendant with a gun in his hands. This Court cannot agree. There is a two-step analysis for determining the admissibility of photographs.

First, a court must determine whether the photographs are inflammatory. If not, they may be admitted if they have relevance and can assist the jury's understanding of the facts. If the photographs are inflammatory, the trial court must decide whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

Commonwealth v. Hatcher, 746 A.2d 1142, 1143 (Pa.Super. 2000). The admission of evidence including photographs is within the discretion of the trial court. Id. at 1144. An abuse of discretion will be found "only when the essential evidentiary value of the photographs are clearly outweighed by the inflammatory effect the pictures will have upon the minds and passions of the jurors." Id.

The Court held a conference with counsel on the record regarding the admissibility of the photograph in question. N.T., October 20, 1999, at pp. 3-9. The Commonwealth offered two photographs depicting Defendant holding a shotgun that matched the victim's description of the weapon Defendant pointed at him. In one of the pictures, Defendant and the other individuals were making vulgar gestures. The Court precluded the Commonwealth from introducing this photo because it was concerned the picture would elicit negative feeling about Defendant from the jury. There was nothing inflammatory about the other photograph; it simply showed Defendant and another individual with weapons. The Court found the picture was

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intent to deliver for sentencing purposes.

relevant because it would demonstrate to the jury the type of weapon described by the victim and show that at one point in time Defendant possessed such a weapon. Defendant claimed that since the Commonwealth did not have a witness who could testify when the photograph was taken, the photograph should be precluded. Under the circumstances of this case, the Court found that this was an issue of the weight of the evidence, not its admissibility.

Defense counsel also claimed the prejudicial effect of the photo outweighed its probative value. The photograph, however, was not inflammatory. The only 'prejudice' to Defendant was the photograph was relevant and helped the Commonwealth's case.

Defendant next contends the evidence was insufficient to sustain his conviction for possession with intent to deliver cocaine. The Pennsylvania Superior Court has set forth the standard for deciding a sufficiency claim as follows:

When considering whether evidence introduced at trial is sufficient to sustain a conviction, this court must view all evidence and reasonable inferences therefrom in the light most favorable to the Commonwealth, as the verdict winner, and consider whether the trier of fact could have found that each element of the offense charged was supported by evidence and inference sufficient to prove guilt beyond a reasonable doubt. The Commonwealth may sustain its burden by proving the crime's elements with evidence which is entirely circumstantial and the trier of fact, who determines credibility of witnesses and the weight to give the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Brown, 701 A.2d 252, 254 (Pa.Super. 1997)(citations omitted).

In order to convict an individual of possession with intent to deliver, the Commonwealth must prove that the individual "possessed the controlled substance and had an intent to deliver that substance." Commonwealth v. Torres, 421 Pa.Super. 233, 237, 617 A.2d 812, 814 (1992). Possession can be shown through actual possession or constructive possession. Constructive possession exists where a defendant has power of control over the drugs and intends to exercise that control. Brown, 701 A.2d at 254. An intent to deliver can be

inferred from the quantity of the drugs possessed and other surrounding circumstances, such as a lack of paraphernalia for consumption. Id. at 237-38, 617 A.2d at 814. The court must consider all the facts and circumstances surrounding the possession of the controlled substance when determining whether it was possessed with the intent to deliver. Id.

The evidence presented at trial established that the cocaine found in the kitchen was possessed by Defendant with the intent to deliver it. The evidence established the following: (1) plates of cocaine, cocaine residue and razor blades were found in the bench seat and on the shelf in a cupboard of the kitchen, N.T., October 21, 1999, at pp. 15, 32; (2) the weight of the cocaine was three grams; (3) when the police approached the bench seat in the kitchen to search for weapons, Defendant excused himself for the alleged purpose of checking on the dog and fled the scene, N.T., October 20, 1999, at p. 103, 166-117; (4) two cellular phones and a package of razor blades were found in a bedroom of the residence (Room 5), N.T., October 21, 1999, at pp. 18-19; (5) razor blades with cocaine residue were found in the kitchen, N.T., October 21, 1999, at pp. 16, 32; (6) razor blades are commonly used to cut cocaine, N.T., October 21, 1999, at p. 19; (7) a cellular phone, pager and \$91 were found on Defendant's person, N.T., October 21, 1999, at p. 34; (8) cellular phones and pagers are often used by drug dealers to arrange drug transactions, N.T., October 21, 1999, at p.19; (9) a box containing Hefty sandwich bags, corners of bags, lighters, a small plastic bag with marijuana residue and a traffic citation in the name of Jamal Bennett were found in the top shelf of another bedroom closet (Room 7), N.T., October 21, 1999, at p.20; (10) lighters are commonly used to heat-seal plastic baggies of cocaine, N.T., October 21, 1999, at p. 21; (11) sandwich bags and corners of bags are used to package cocaine, N.T., October 21, 1999, at pp. 20-21; (12) Defendant's roommate, Adbul Clark, was in prison at the time of this incident and had been

there for months, N.T., October 21, 1999, at p. 68; and (13) no paraphernalia used to ingest cocaine was found in the residence, N.T., October 21, 1999, at p. 41. The totality of these circumstances including, but not limited to, the amount of cocaine, the packaging material located throughout the residence, the manner in which the cocaine was on the plate with the razor blades all indicate Defendant constructively possessed the cocaine in question and he did so with the intent to deliver it.

Defendant's final claim is that the Court erred in applying the deadly weapon enhancement because the evidence indicated that Defendant never pointed the weapon at the victim and there was no indication the weapon was loaded. These allegations are belied by the record. The victim stated Defendant obtained a shotgun and aimed it at his head. N.T., October 20, 1999, at pp. 26, 39. The victim's girlfriend testified that Defendant pumped the gun or attempted to pump the gun, raised it and pointed it at Gordon. N.T., October 20, 1999, at pp. 58, 67-68. Although there was no testimony to indicate whether there was a round in the chamber when Defendant pumped the shotgun, the deadly weapon enhancement applies to "[a]ny firearm, whether loaded or unloaded." 204 Pa.Code §303.10(a)(2)(i). When a deadly weapon is used during the commission of an offense, the Court has no discretion to refuse to apply the enhancement to the guidelines. Commonwealth v. Magnum, 439 Pa.Super. 616, 623, 654 A.2d 1146, 1149-50 (1995). Therefore, under the facts and circumstances of this case, the

Court appropriately applied the deadly weapon enhancement to Defendant's conviction for simple assault.

DATE: \_\_\_\_\_

By The Court,

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Kenneth D. Brown, J.

cc: Michael Dinges, Esquire (ADA)  
Kyle Rude, Esquire  
Law Clerk  
Superior Court (original & 1)  
Gary Weber, Esquire (Lycoming Reporter)  
Work file