IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. 99-10,464**
	:	
vs.	**:**	
	:	
	:	
DEVON THOMPSON,	**:**	
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 Order of December 21, 1999, wherein the Court denied the defendant's Post Sentence Motions.

The relevant facts are as follows: On March 18, 1999, at approximately 3:50 p.m., Officer Gary Whiteman of the Williamsport Police Department stopped a blue Ford Thunderbird in the 700 block of West Third Street in the City of Williamsport because the vehicle had an out-of-date inspection sticker. There were four (4) occupants in the vehicle, including the defendant Devon Thompson who was seated in the backseat on the driver's side of the vehicle. The driver of the vehicle was individual named Jamal Bennett.

When Officer Whiteman requested Mr. Bennett's driver' license registration and insurance, Mr. Bennett informed the officer that he didn't have a driver's license and the only documentation he had was title of the vehicle, which was in another individual's name. Officer Whiteman returned to his cruiser to obtain operator's information regarding Mr. Bennett and received information that there was an outstanding warrant for Mr. Bennett.

At this point, back up officers arrived, including Caption Foust and Officer Douglas. Officer Whiteman gave Caption Foust an overview of the situation. While Officer Whiteman went

back to dealing Mr. Bennett, Officer Douglas and Caption Faust were identifying the passenger. The defendant, one of the passengers, was released during the identification process. As the defendant was walking away, he kept looking back and reaching his right hand into his coat or sweatshirt.

Based on the information he received regarding the outstanding warrant for Mr. Bennett, Officer Whiteman informed Mr. Bennett he was going to be taken into custody. Mr. Bennett then asked the police to retrieve his cellular phone from the vehicle. When Caption Foust went to the vehicle to retrieve the phone, he observed a small baggie of suspected marijuana lying in the middle of the backseat almost in the crack between the bench and backrest. Since this was the area in which the defendant had been seated, a description of the defendant was broadcast over the radio so he could be taken into custody.

The defendant was apprehended approximately one and half blocks away. When he was taken into custody, the police found a baggie of marijuana, a pager and fifty-four dollars on his person. Mr. Bennett, the defendant and the other occupants of the vehicle were transported to City Hall while the police obtained a search warrant for the vehicle based on Caption Foust's observation of marijuana on the backseat. Before the police executed the search warrant, the defendant told the police the marijuana Caption Foust observed was his and they would find more marijuana that was also his shoved down in the crack at the back of the seat. When the police search the vehicle they found three or four baggies of marijuana[1] and a bag containing thirty-one straws of cocaine,

[1]There is some discrepancy in the record whether was a total of three bags of marijuana or four baggies of marijuana. The officer testified there were four baggies of marijuana however, Officer Foust's description of retrieving the bags would indicate there were three bags and the stipulation regarding the weight of each bag would indicate there were only three bags.

all in the same backseat area.[2]

The bags of marijuana contained .83 grams, one gram and 3.8 grams for a total of 5.63 grams. The thirty-one straws cocaine contained 2.84 grams.

The defendant was arrested and charged with possession with intent to deliver cocaine, possession of cocaine, possession of drug paraphernalia relating to the packaging material for the cocaine, possession of marijuana, and possession of drug paraphernalia consisting of the packaging materials for the marijuana. A jury trial was held August 18, 1999. The jury convicted the defendant of all charges. On November 23, 1999, the Court sentenced the defendant to incarceration in a State Correctional Institution for two to five (2-5) years for possession with intent to deliver cocaine, placed him on probation for one (1) year concurrent to the sentence imposed for possession with intent deliver, and ordered him to pay fines of $250 and $100 for possessing the cocaine and marijuana drug paraphernalia, respectively.[3]

On December 7, 1999, the defendant filed Post Sentence Motions alleging: 1) the Court erred in excluding evidence of the driver's drug conviction; 2) the evidence was insufficient to find constructive possession of the cocaine; 3) the verdict was against of the evidence with regard to constructive possession of the cocaine; and 4) the Court erred in imposing the mandatory sentence for an offense committed within one thousand feet of school. The Court denied the defendant's motions in its Order of December 21, 1999. It is from this Order that the defendant is appealing.

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[2]The police did not seize the baggie of marijuana that Caption Foust observed on the backseat until they executed the search warrant. Thus, one bag of marijuana was found on the seat and the others were down in the seat crack along with the bag of cocaine.

[3]The count of possession of cocaine merged with the possession with deliver cocaine.

The defendant first contends the Court erred in excluding from evidence the driver's conviction for possession with intent to deliver cocaine. The defense sought to introduce this evidence so that it could argue to the jury that the cocaine found in the backseat was the driver's cocaine and not the defendant's. The defense sought to introduce three separate drug offenses involving the driver: 1) a guilty plea of December 15, 1996 to possession with intent to deliver cocaine; 2) pending charges for two deliveries of cocaine that occurred in 1998; and 3) a pending charge for possession with intent to deliver cocaine and possession of drug paraphernalia that occurred on April 29, 1999. The Commonwealth objected to the introduction of this evidence and two separate sidebar discussions were held. See N.T., August 18-19, 1999, at pp. 23-26, 71-92. The Court analyzed the issue under Rule 404(b) of the Pennsylvania Rules of Evidence and referred to Packel and Poulin's Pennsylvania Evidence. The Court noted that other crimes or bad acts are not admissible to prove the character of a person or to show action in conformity. With respect to the 1996 and 1998 offenses, the Court found the defense offer more along the line of trying to show Mr. Bennett acted in conformity with what he did in 1996 and 1998 and the probative value of that evidence was less because it was not in close proximity to the current charges which occurred on March 18, 1999. The Court did, however, allow the defense to introduce evidence regarding the April 22, 1999 possession with intent to deliver and paraphernalia charges because the close proximity in time (roughly a thirty (30) day time frame) made the defense much more tenable. N.T., April 18, 1999, at pp. 86-88. Under these facts and circumstances, the Court does not believe it abused its discretion in excluding the 1986 and 1998 drug offenses of the driver. Further, in allowing evidence of the pending drug charges against the driver, Jamal Bennett, the Court gave the defense an enhanced opportunity to argue to the jury that the driver was responsible for the cocaine in the back seat of the car.

The defendant contends the evidence was insufficient to prove that he constructively possessed the cocaine found in the vehicle. Again, this Court cannot agree. In addressing a sufficiency of the evidence claim, the Court must determine whether the evidence and all reasonable inferences deducible therefrom viewed in the light most favorable to the Commonwealth as verdict winner are sufficient to establish all elements of the crime beyond a reasonable doubt. When contraband is not found on the defendant's person, the Commonwealth must show that the defendant had constructive possession of it. Commonwealth v. Haskins, 450 Pa.Super. 540, 543-45, 677 A.2d 328, 330 (1996). Our Supreme has defined construction possession as the power to control the contraband and the intent to exercise that control. Commonwealth v. Vallette, 431 Pa. 384, 388, 613 A.2d 548, 550 (1992). Constructive possession can be proven by circumstantial evidence and inferred from an examination of the totality of the circumstances. Commonwealth v. Clark, 746 A.2d 1128, 1136 (Pa.Super. 2000); Commonwealth v. Rippy, 732 A.2d 1216, 1220 (Pa.Super. 1999). Here, constructive possession can be shown from the following facts and circumstances: 1) the cocaine was found in the area where the defendant was seated in the vehicle; 2) the other individual seated in the backseat testified that the drugs were not hers and she observed the defendant putting his hands in his pockets then back toward the crack of the seat after the police arrived, N.T., August 18-19, 1999, at pp. 105-107; 3) when the defendant was initially released and walking away from the vehicle, he kept looking back toward the vehicle and reaching his hand into his coat or sweatshirt area which concerned Caption Foust, N.T., August 18-19, 1999, at p. 48; 4) the defendant admitted that the marijuana was his; and 5) the cocaine was found in the same place as the marijuana. This evidence was sufficient to establish the defendant constructively possessed the cocaine. Commonwealth v. Austin, 428 Pa.Super. 466, 475, 631 A.2d 625, 629 (1993) (evidence that the bag containing drugs was found at the feet of the defendant and the

defendant was touching the bag was sufficient to establish constructive possession); Commonwealth v. Cruz Ortega, 372 Pa.Super. 389, 393 n.1, 539 A.2d 849, 851 n.1 (1988) (evidence that the defendant was seen leaning over the seat before the vehicle was stopped and the cocaine was found under the seat in which the appellant was sitting was sufficient to establish access and control of the contraband).

The defendant also asserts the verdict was against the weight of the evidence with regard to constructive possession of cocaine. A weight of the evidence claim contends the verdict is a product of speculation or conjecture. Such a claim requires a new trial only verdict is so contrary to the evidence as to shock one's sense of justice. Commonwealth v. Woody, 451 Pa.Super. 324, 329, 679 A.2d 817, 819 (1996). Given the evidence set forth in our discussion of the sufficiency claim, the defendant's assertion is meritless.

Finally, the defendant avers the Court erred by determining that imposition of the mandatory sentence for offense committed within one thousand feet of a school was required under the facts of this case. Although the defendant did not dispute that the vehicle was stopped within one thousand feet of a school, he contends that the Commonwealth was required to show that he intended to deliver the drugs in the school zone and/or that mandatory should not be imposed because he was not voluntarily in the school zone as he was not the driver. The Court disagrees. The purpose of the mandatory sentence for delivery or possession with intent to deliver a controlled substance within one thousand feet of a school is to create a drug free zone around the schools of this Commonwealth. In Commonwealth v. Murphy, 405 Pa.Super. 452, 592 A.2d 750, 754 (1991), the Pennsylvania Superior Court rejected the appellant's claim that Commonwealth must prove that he intended to be within one thousand feet of a school. Although Murphy dealt with the school zone enhancement instead of the mandatory sentence, the relevant language is the same.

For the foregoing reasons, the Court denied the defendant's Post Sentence Motions.

DATE: _____

By The Court,

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Kenneth D. Brown, J.

cc: Michael Dinges, Esq., (ADA)
Nicole Spring, Esq. (APD)
Work file
Law Clerk
Superior Court (original & 1)
Gary Weber, Esquire (Lycoming Reporter)