IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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| COMMONWEALTH OF PENNSYLVANIA, | : | |
| | : | NO.: CR 126-2014 |
| vs. | : | CRIMINAL DIVISION |
| | : | |
| NAFIS FAISON, | : | |
| Defendant | : | POST-SENTENCE MOTION |

**O P I N I O N AND O R D E R**

AND NOW, this 10th day of July, 2015, following oral argument on Defendant's Post-Sentence Motion held on July 1, 2015, it is hereby ORDERED and DIRECTED that the motion is DENIED.

## I. Procedural Background

On January 28, 2014, the Commonwealth charged Defendant Nafis Faison ("Faison") with one felony count of possession with intent to deliver, three misdemeanor counts of possession of a controlled substance, one misdemeanor count of possession of drug paraphernalia, and one misdemeanor count of possession of a small amount of marijuana.[1] On the day of trial, the Commonwealth dropped one of the counts for possession of a controlled substance. On March 25, 2015, the court sentenced Faison to serve a period of incarceration in the State Correctional Institute, the minimum of which shall be five years and the maximum of which shall be ten years on count 1. The sentences on the remaining counts ran concurrent to count 1.

On April 1, 2015, Faison filed his Post-Sentence Motion. In this motion, Faison moved for a judgment of acquittal on the grounds that the Commonwealth failed to present sufficient evidence of Faisons' constructive possession of the cocaine. Faison also moved for a new trial

[1] 35 P.S. § 780-113(a)(30); 35 P.S. § 780-113(A)(16); 35 P.S. § 780-113(A)(32); 35 P.S. § 780-113(A)(16); 35 P.S. § 780-113(A)( (31)(i).

on the grounds that the verdict rendered was contrary to the weight of the evidence. The transcript was lodged on May 20, 2015. Faison and the Commonwealth filed comprehensive briefs on June 17 and 26, 2015 respectively. The Court held argument on July 1, 2015.

## II. Factual Background

This matter arises from police recovery of about 500 grams of cocaine in apartment #2 ("Apartment") at 2017 W. 4th Street in Williamsport ("Property") on December 12, 2013. N.T. 94; 108; 149; 159. The evidence at trial established the following. The Apartment belonged to Demetrius Simpson (Demetrius) who resided there with his 9 year old son. Notes of Testimony, October 30, 2014, (N.T.), at 19. Simpson's one year old daughter stayed with him about three days per week. Id. Simpson's son had his own room and his daughter stayed in the same bedroom as Simpson. N.T. at 31. On December 12, 2013, upon request, Simpson allowed Faison to spend the night at his apartment. N.T. at 21. When at his apartment, Faison typically stayed in the dining room and usually slept on the couch. N.T. at 29-30.

On December 12, 2013, Faison was the subject of a police investigation. Police learned that the Property was a possible location for Faison. N.T. 69, 71. Police surveilled the Property. N.T. 71; 87. Police observed individuals going in and out of the Apartment. N.T. 87. They appeared to stay only a few minutes. N.T. 94. According to Simpson, Faison had four visitors at the apartment on that date, two of whom Simpson knew; one stayed for 20-30 minutes, and another, Joshuea Colley ("Colley"), stayed for only 10-15 minutes.[2] After observing Colley leave the Apartment, Police performed a traffic stop and "terry frisk" on Colley. This revealed a clear plastic baggy containing cocaine in Colley's left front pocket and one Alprazolam pill in his front pocket of his jeans. N.T. 88; 91.

[2] Simpson left the Apartment for a period of about 20 minutes to pick up his son, while Faison watched Simpson's one year old daughter. N.T. at 31

Upon believing that Faison was in the Apartment, Police decided to make contact with the occupants of the second floor of the residence.[3] N.T. 72; 92. Police knocked and banged loudly on the door of the Apartment, and announced their presence. N.T. 96-97. "[C]haos erupted as the Defendant [Faison] jumped out a second floor window." N.T. 73:1-2. A loud crash or bang-like crash noise sounded from the front of the house. N.T. 93; 98.

Faison jumped out of the second floor bedroom window and fled the Apartment. N.T. 73. The only remaining individuals police found in the apartment were Simpson and his 9 year old son. N.T. 92-93. Trooper Lancer Thomas heard police yell that there was a runner. N.T. 102. The runner was Faison. N.T. 104. No other runners were observed. N.T. 104. Tpr. Thomas chased Faison. After a foot chase, police apprehended Faison. N.T. 104; 132. Police conducted a search of Faison incident to arrest and found $3,879.00 on Faison's person, a small plastic pill type bottle containing three oxycodone pills and a small bag of marijuana. N.T. 132-138. Police recovered $3,879.00 in his front left pocket in the following denominations: eleven one hundred dollar bills, nine fifty dollar bills, one-hundred sixteen twenty dollar bills. In the right pocket there was one five dollar bill and four one dollar bills. N.T. 138.

Police searched the Apartment and found large quantities of drugs. In the dining room / living room area, police found a black backpack sitting on the couch. Inside the black backpack, police discovered a grocery bag with 179.16 grams of cocaine, another package with 319.86 grams of cocaine and a scale containing cocaine residue. N.T. 145; 147; 179. Police also found a tan jacket hanging on the dining room table which contained 13.65 grams of cocaine in the front right pocket of the jacket. N.T. 159. Faison had been staying in the dining room area and

[3] After being placed in handcuffs, Colley admitted that Faison had been at the Apartment. N.T. 90. Trooper Kenneth Fishel observed Faison on the balcony of what appeared to be the third floor. N.T. 71.

typically slept on the coach where the backpack was found. Police found the backpack on the same couch where an iPhone was charging. The telephone number for the iPhone was the same number listed as a contact for "Nore New" on Simpson's phone. Simpson identified Faison as "Nore." Simpson testified that the backpack, jacket and iPhone did not belong to him or his children. Simpson allowed others to stay at his Apartment on other occasions, and those people would usually sleep on the couch. However, there was no testimony that anyone other than Faison was staying the night on December 12, 2013.

## III. Discussion

This Court finds that the evidence was sufficient to support the verdict of guilty and that the guilty verdict in this case was not against the weight of the evidence.

**Sufficiency of the Evidence**

The scope of review on appeal for sufficiency of the evidence "is limited to considering the evidence of record, and all reasonable inferences arising therefrom, viewed in the light most favorable to the Commonwealth as the verdict winner." Commonwealth v. Rushing, 99 A.3d 416, 420-421 (Pa. 2014), *citing*, Commonwealth v. Diamond, 83 A.3d 119, 126 (Pa. 2013); Commonwealth v. Robinson, 581 Pa. 154, 864 A.2d 460, 478 (Pa. 2004); Commonwealth v. Solano, 906 A.2d 1180, 1186 (Pa. 2006); Commonwealth v. Chapney, 832 A.2d 403, 408 (Pa. 2003). The standard of review for sufficiency is well settled and provided in case-law as follows.

> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from

the combined circumstances. Commonwealth v. Velez, 51 A.3d 260, 263 (Pa. Super. 2012), *quoting*, Commonwealth v. Mobley, 14 A.3d 887, 889-890 (Pa. Super. 2011).

With this standard in mind, this Court must review the sufficiency of the evidence with respect to the offense of possession of a controlled substance with intent to deliver.

**Intent to Deliver**

In pertinent part, 35 P.S. § 780-113(a)(30) prohibits the possession with intent to deliver a controlled substance. Id. "[T]o prevail on a charge of possession of a controlled substance with intent to deliver, the Commonwealth must prove, beyond a reasonable doubt, that the accused possessed a controlled substance and that the accused had the intent to deliver the controlled substance." Commonwealth v. Taylor, 2011 PA Super 270, 33 A.3d 1283, 1288 (Pa. Super. 2011) Intent to deliver may be proven by circumstantial evidence. Such circumstantial evidence includes the "method of packaging," "form of the drug,"" behavior of the defendant," "the presence of paraphernalia" and "the presence of inordinately large sums of cash." See, Commonwealth v. Jones, 2005 PA Super 166, 874 A.2d 108, 120 (Pa. Super. 2005); *quoting,* Commonwealth v. Kirkland, 831 A.2d 607, 611 (Pa. Super. 20030), and Commonwealth and Faison's briefs, at 8 and 7 respectively. Intent to deliver may also be "inferred from the quantity of the drugs possessed and other surrounding circumstances, such as lack of paraphernalia for consumption." Jones, supra, *quoting*, Commonwealth v. Torres, 421 Pa. Super. 233, 617 A.2d 812, 814 (Pa. Super. 1992), appeal denied, 535 Pa. 618, 629 A.2d 1379 (1993).

In the present case, the circumstantial evidence was more than sufficient to establish that the drugs in the Apartment were possessed with the intent to deliver. The quantity of drugs possessed, almost 500 grams of cocaine, provides circumstantial evidence of intent. Moreover, a scale with residue provides circumstantial evidence of intent. The method of packaging and the absence of paraphernalia for personal use also provide circumstantial evidence of intent. The

cash found on Faison and his jumping out the window from a location with 500 grams of cocaine also provide circumstantial evidence of intent. Moreover, the Commonwealth provided an expert as to intent. Trooper Brett Herbst, an expert in possession and distribution of illegal narcotics, in essence testified that the amount of drugs, 500 grams of cocaine, would be for distribution. N.T. 173. And, it was packaged in a consistency for distribution. N.T. 173. The almost $4,000 in cash found on Mr. Faison, along with the amount of cocaine that was found within the residence that he escaped or jumped from, Corporal Lombardo's testimony, people coming to and leaving the residence after a short period of time, Colley being found with cocaine shortly after leaving the residence, caused Tpr. Herbst to opine that someone was distributing narcotics from that residence during that time frame. N.T. 174. Thus, assuming Faison had constructive possession of the drugs, there is more than sufficient evidence that the drugs were possessed with the intent to deliver.

**Constructive Possession**

In the present case, the drugs in the backpack and jacket were not found on Faison's person. As a result, the Court must consider whether there was sufficient evidence to establish Faison's constructive possession of those drugs. "When contraband is not found on the defendant's person, the Commonwealth must establish constructive possession…." Commonwealth v. Jones, 2005 PA Super 166, 874 A.2d 108, 120 (Pa. Super. 2005) *quoting*, Commonwealth v. Haskins, 450 Pa. Super. 540, 677 A.2d 328, 330 (Pa. Super. 1996), appeal denied, 547 Pa. 751, 692 A.2d 563 (1997). Our Supreme Court has explained that "[c]onstructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession

as "conscious dominion." Commonwealth v. Mudrick, 510 Pa. 305, 308, 507 A.2d 1212, 1213 (1986), *citing*, Commonwealth v. Davis, 444 Pa. 11, 15, 280 A.2d 119, 121 (1971). See also, Jones, supra, *quoting*, Commonwealth v. Kirkland, 2003 PA Super 279, 831 A.2d 607, 610 (Pa. Super. 2003), appeal denied, 577 Pa. 712, 847 A.2d 1280 (2004) (*citing* Commonwealth v. Macolino, 503 Pa. 201, 469 A.2d 132 (1983)).

The Supreme Court "defined "conscious dominion" as "the power to control the contraband and the intent to exercise that control." Mudrick, supra, *citing*, Macolino, supra. Constructive possession may be established by the totality of the circumstances. Mudrick, supra, 507 A.2d at 1213; *see also*, Jones, supra, *quoting*, Kirkland, supra at 610. "Two actors may have joint control and equal access and thus both may constructively possess the contraband." Jones, supra, *quoting*, Haskins, supra at 330. In Commonwealth v. Carroll, 507 A.2d 819 (Pa. 1986) the Supreme Court stated that in Macolino, supra, it " held that constructive possession may be inferred if the contraband is located in an area under the joint exclusive control of the defendant and his spouse." Carroll, supra, 507 A.2d at 821. "Joint control will not prevent a finding of constructive possession in one of the individuals and that the factfinder could have concluded that appellee exercised conscious dominion over the cocaine." Carroll, supra, 507 A.2d at 821, *citing*, Macolino, supra.

With this in mind, however, it is important to note that "mere presence of one person, among a group at a scene of contraband, is not a strong factor indicative of guilt." Commonwealth v. Juliano, 490 A.2d 891, 894 (Pa. Super. 1985)(citations omitted). In Juliano, an individual and another individual were at the airport when the first individual met a third person who had arrived on a Delta flight. The first two individuals went to the Delta baggage claim area and left with a green satchel-type bag. They were observed driving out of the airport

parking area and picked up the person who came in on the flight and appellant, Thomas Juliano. Police stopped the car occupied by the four of them. The green satchel had been "sitting on the floor in front of the left rear seat which appellant had been occupying." The green satchel contained 2002 white tablets of counterfeit methaqualone. Juliano, supra, 490 A.2d at 893.

After reviewing the totality of the circumstances, the Superior Court held "that the circumstantial evidence of appellant's guilt was insufficient to prove him guilty beyond a reasonable doubt of knowingly or intentionally possessing a counterfeit controlled substance." Juliano, supra. Appellant was not implicated by reports to the police, as others in the car had been, and Appellant had not been seen carrying the satchel as others had been. "In addition, when the police stopped the car, appellant made no furtive movements toward the bag and did not attempt to escape." Juliano, supra. At 508 and 894. "Indeed, the only evidence tying appellant to the illegal drug transaction were his appearance with DiBona at the Sheraton Hotel, his presence in the car with the three men, and the fact that the green bag was found near where he had been sitting in the car." Id.

In Commonwealth v. Bostick, 2008 PA Super 233, 958 A.2d 543 (Pa. Super. 2008), the appellant challenged the denial of his pre-trial motion to suppress and the sufficiency of the evidence with respect to his conviction for possession with intent to sell convictions of possession with intent to deliver a controlled substance (PWID) 1 and conspiracy. The Court affirmed.

In Bostwick police engaged in surveillance and observed the appellant involved with hand to hand transactions in which he would receive money and then provide small items, which turned out to be sealed packets of a heroin/fentanyl mixture, stamped "High class the best." Appellant was observed periodically putting items in a vehicle and periodically entering property

at 3018 N. 8th Street. Upon seeing the police, Appellant fled. When captured, police recovered $746 from his "person, in the following denominations: twenty-five $ 20 bills; sixteen $ 10 bills; ten $ 5 bills; and thirty-six $ 1 bills." Police found $1,500 in cash in the vehicle and drugs at the property, including sealed packets of a heroin/fentanyl mixture, stamped "High class the best." Police found indicia of residency at the property belonging to other individuals as well as Appellant's Pennsylvania Identification and a welfare letter addressed to him. A witness testified that she rented the property and that Appellant visited occasionally but did not reside there. An expert testified that the drugs in the house were possessed with the intent to deliver. As to the motion to suppress, the Court concluded that Appellant was more than a casual visitor "who had both a subjectively and objectively reasonable expectation of privacy in the searched premises." Bostwick, supra, 958 A.2d 543. The Superior Court adopted the reasoning of the trial court with respect to both convictions for PWID which noted in part Appellant's involvement with two separate transactions, his going in and out of property where the drugs were found, his attempt to flee upon seeing police, and his possession of a large amount of cash. Bostwick, supra, 958 A.2d 561.

The present matter contrasts significantly with Juliano. In Juliano, the 3 people other people found in the car with the green satchel containing drugs had been implicated by reports to police, had been seen possessing the green satchel and/or had been on a flight when the green satchel was seen after being picked up from a baggage claim area for that flight. The Appellant made no furtive movements or try to escape

In the present case, by stark contrast, Faison was one of two adults at the residence containing about 500 grams of cocaine at the time police banged on the door and announced themselves. N.T. 92-93. Faison fled by jumped out the second floor window. N.T. 73:1-2.

Faison was the only one seen running from the property. N.T. 104. After a foot chase, Faison was captured and found to have almost $4,000 of cash on his person. A tan jacket containing drugs was hanging on a chair in the dining area of the Apartment. Faison had been seen wearing a tan jacket. N.T. 27. The tan jacket did not belong to Simpson or his young children. Nobody else was at the apartment when the police banged on the door. The black backpack was found unzipped with a large amount of cocaine on the couch where Faison stayed, next to an Apple iPhone that was charging. The backpack did not belong to Simpson or his children. Neither did the iPhone. Indeed the telephone number for the iPhone was the same number Simpson had for Faison under a nickname. Nobody else was at the apartment when police entered. Nobody else fled.

The present case has some similar circumstantial evidence as found in Bostwick. Like the appellant in Bostwick, Faison fled from police, Faison had been seen in the Apartment where the drugs were found, and Faison possessed a large amount of cash. Similar to Bostwick, where police observed hand to hand transactions, here police observed people going in and out of the Apartment and one was found to possess cocaine.

There was more than sufficient evidence for the jury to find that Faison constructively possessed the drugs with the intent to deliver them.

**Weight of the Evidence**

"A weight of the evidence claim concedes that the evidence is sufficient to sustain the verdict, but seeks a new trial on the ground that the evidence was so one-sided or so weighted in favor of acquittal that a guilty verdict shocks one's sense of justice." Commonwealth v. Lyons, 622 Pa. 91; 79 A.3d 1053, 1067 (Pa. 2013*), citing*, Commonwealth v. Widmer, 560 Pa. 308, 318-20, 744 A.2d 745, 751-52 (2000); Commonwealth v. Champney, 574 Pa. 435, 443-44, 832 A.2d

403, 408-09 (2003). "Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence." Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 751-52 (Pa. 2000) (footnote and citations omitted).

The jury verdict in the present case is in full accord with the evidence and the Court's sense of justice. Faison was one of two adults present at an apartment in which almost 500 grams of cocaine was found. When police announced themselves and banged on the door, Faison jumped out the second floor window and ran. Police chased him down. He had almost $4,000 in cash on him along with some pills and marijuana. The backpack with the drugs was found on the couch where Faison was most likely going to sleep that night. It was next to his iPhone which was found charging. The backpack was open. It did not belong to Simpson or his children. Faison had been seen wearing a tan jacket. A tan jacket was at the apartment with cocaine in the pocket. It did not belong to Simpson or his children. Circumstantial evidence strongly suggests that at least one of the people going in and out of the apartment had purchased drugs at the Apartment when only Faison and Simpson were there. The jury's verdict does not shock the Court's sense of justice, it comports with it.

## IV. Conclusion

Based upon the foregoing, this Court finds no reason upon which to grant Defendant's Post-Sentence Motion. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), Defendant is hereby notified of the following: (a) the right to appeal this order within thirty (30) days of its date to the Pennsylvania Superior Court; "(b) the right to assistance of counsel in preparation of the appeal; (c) the rights, if…indigent, to appeal *in forma pauperis* and to proceed

with assigned counsel as provided in Rule 122; and (d) the qualified right to bail under Rule 521(B)." Pa. R. Crim. P. 720(B)(4).

**O R D E R**

AND NOW, this **10th** day of **July, 2015**, it is ORDERED and DIRECTED that Defendant's Post-Sentence Motion is hereby DENIED based upon the reasons stated above.

BY THE COURT,

July 10, 2015
Date

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Richard A. Gray, J.

cc: DA (NI)
PD (JB)