

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

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| COMMONWEALTH OF PENNSYLVANIA | : | |
| | : | CR-1017-2021 |
| | : | |
| vs. | : | |
| | : | CRIMINAL DIVISION |
| DENNIS PRIETO, JR., | : | |
| Defendant | : | |

OPINION AND ORDER

I. Introduction

Following an incident that occurred on July 9, 2021, Defendant, Dennis Prieto, Jr., was charged with Persons Not to Possess, Use, Manufacture, Control, Sell, or Transfer Firearms pursuant to 18 Pa.C.S.A. § 6105(a)(1), Firearms Not to be Carried Without a License pursuant to 18 Pa.C.S.A. § 6106, and Tampering with or Fabricating Physical Evidence pursuant to 18 Pa.C.S.A. § 4901(1). A preliminary hearing was held on July 20, 2021 before MDJ Christian Frey at which time the arresting officer, Officer Andrew Stevens testified. All charges were bound over for trial. Defendant filed a Petition for Habeas Corpus on September 22, 2021 seeking to dismiss all charges brought against him, as well as a Motion to Reserve Right. A hearing and argument was scheduled for December 1, 2021 at which time the parties agreed that the Petition could be decided on the preliminary hearing transcript. After a review of the transcript, the Court finds that the Commonwealth has established a *prima facie* case Persons Not to Possess a Firearms charge and the Tampering with Physical Evidence charge, but not the Firearms Not to be Carried Without a License charge.

II. Factual Background

At the preliminary hearing, Officer Stevens, a Williamsport Bureau Police Officer, testified that on July 9, 2021 at approximately 10:37 p.m., he was on duty with Officer Caschera, traveling westbound in the 2100 block of West Fourth Street in an unmarked police car with the windows down. *See July 20, 2021 Hearing Transcript at Page 2, Lines 16-23 and page 6, Line 7.* Both officers were in full uniform and Officer Stevens was driving. *See July 20, 2021 Hearing Transcript at Page 6, Lines 3-9.* Officer Stevens smelled burnt marijuana and observed two males standing next to one another, one of them lighting a blunt. *See July 20, 2021 Hearing Transcript at Page 2, Line 25 to Page 3, Line 3.* Officer Stevens drove past the two males, parked, exited the vehicle, and approached the them. *See July 20, 2021 Hearing Transcript at Page 3, Lines 3-6.*

When Officer Stevens was approximately ten (10) feet away, he observed one of the males, later identified as the Defendant, “toss something into a bush.” *See July 20, 2021 Hearing Transcript at Page 3, Lines 6-8 and Page 7, Lines 2-5.* At no point did Officer Stevens initiate the cruiser’s lights or siren or otherwise announce himself as a police officer prior to seeing Defendant toss the item into the bush. *See July 20, 2021 Hearing Transcript at Page 6, Line 11 to Page 7, Line 1.* However, there are streetlights present along the street where the two males were standing. *See July 20, 2021 Hearing Transcript at Page 5, Lines 2-3.*

After instructing the two males to sit down on the curb, Officer Stevens looked in the spot where he observed Defendant throw something and found a silver handgun “right next to the bush where he was standing at.” *See July 20, 2021 Hearing Transcript at Page 3,*

Lines 11-12 and 18-20. Officer Stevens admitted that he did not see either male possess a firearm as he drove past and that he did not see Defendant throw the firearm specifically but that there was nothing else in or around the bush where the firearm was located. *See July 20, 2021 Hearing Transcript at Page 3, Lines 23-24 and Page 7, Lines 6-8.*

Additionally, the fact that the bush and ground were “soaked” due to the rain and the handgun was dry led Officer Stevens to believe that the handgun is what Defendant threw into the bushes. *See July 20, 2021 Hearing Transcript at Page 3, Line 24 to Page 4, Line 3.* Officer Stevens also testified that Defendant has a prior felony conviction of aggravated assault from Florida, which prohibits him from possessing a firearm. *See July 20, 2021 Hearing Transcript at Page 4, Lines 9-11.*

III. Discussion

When a Defendant chooses to test whether the Commonwealth has sufficient evidence to establish a *prima facie* case that he or she has committed a crime, the proper means is a motion for habeas corpus. *Com. v. Dantzler*, 135 A.3d 1109, 1112 (Pa. Super. 2016), citing *Com. v. Carroll*, 936 A.2d 1148, 1152 (Pa. Super. 2007). “To demonstrate that a *prima facie* case exists, the Commonwealth must produce evidence of every material element of the charged offense(s) as well as the defendant's complicity therein” and may do so by utilizing evidence presented at the preliminary hearing as well as submitting additional proof. *Id.*

It is well settled that the preliminary hearing is not a trial and the Commonwealth need not establish Defendant's guilt beyond a reasonable doubt at that stage. *Com. v. McBride*, 595 A.2d 589, 591 (Pa. 1991). Rather, the Commonwealth bears the burden of

establishing a *prima facie* case “that a crime has been committed and that the accused is probably the one who committed it.” *Id.*; Pa.R.Crim.P. 141(d). Additionally, the weight and credibility of the evidence are not factors for the Court to consider. *Com. v. Marti*, 779 A.2d 1177, 1180 (Pa. Super. 2001); *see also Com. v. Huggins*, 836 A.2d 862, 866 (Pa. 2003) (holding that “[t]he evidence need only be such that, if presented at trial and accepted as true, the judge would be warranted in permitting the case to go to the jury”). “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.” *Com. v. Owen*, 580 A.2d 412, 414 (Pa. Super. 1990).

Here, Defendant was charged with the following: Persons Not to Possess, Use, Manufacture, Control, Sell, or Transfer Firearms; Firearms Not to be Carried Without a License; and Tampering with or Fabricating Physical Evidence. For the reasons set forth below, the Court finds that the Commonwealth has established a *prima facie* case for all charges except Firearms Not to be Carried Without a License.

**a. Persons Not to Possess, Use, Manufacture, Control, Sell, or Transfer
Firearms**

Pursuant to Section 6105(a)(1), a person commits the crime of “persons not to possess, use, manufacture, control, sell or transfer firearms” when he or she “has been convicted of an offense enumerated in subsection (b),¹ within or without this Commonwealth, regardless of the length of sentence” and “possess[es], use[s], control[s],

¹“The following offenses shall apply to subsection (a): Section 2702 (relating to aggravated assault).” 18 Pa.C.S.A. § 6105(b).

sell[s], transfer[s] or manufacture[s] a firearm in this Commonwealth.” 18 Pa.C.S.A. § 6105(a)(1).

Defendant does not contest that he has a prior aggravated assault conviction in Florida. The primary contention here is whether Defendant had possession of the firearm that Officer Stevens found in the bushes.

Illegal possession of a firearm may be established by constructive possession, which must be established when contraband is not found on the defendant’s person. *Com. v. McClellan*, 178 A.3d 874, 878 (Pa. Super. 2018), citing *Com. v. Valette*, 613 A.2d 548 (Pa. 1992). The Court has defined constructive possession as “the power to control the contraband and the intent to exercise that control.” *Valette*, 613 A.2d at 550. “Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not.” *Com. v. Mudrick*, 507 A.2d 1212, 1213 (Pa. 1986). Additionally, constructive possession may be proven by circumstantial evidence. *Com. v. Macolino*, 469 A.2d 132, 134 (Pa. 1983).

Here, Defendant argues that there is no evidence that he was in actual possession of the firearm because it was not found on his person. Similarly, there is not enough evidence to establish that he was in constructive possession because firearms are often found in the bushes in the section of the street where the firearm was found. Additionally, contrary to Officer Stevens’ testimony, Defendant argues that the fact that the firearm was dry actually supports a conclusion that the firearm had already been underneath the bushes prior to the rain. Had the firearm fallen through the bush while it was wet, it would follow that the firearm was also wet.

However, while Defendant sets forth persuasive arguments, they are nevertheless arguments for consideration by a jury. In viewing the evidence in a light most favorable to Commonwealth, and accepting all evidence as true, a jury could reasonably find that Defendant at least constructively possessed the firearm found in the bushes. Officer Stevens testified that he saw Defendant “toss” something into the bushes when he was ten (10) feet away from him. In that same area, a firearm, and nothing else, was found. These facts are sufficient for a jury to decide the issue of possession and therefore, the Commonwealth has established a *prima facie* case for this charge.

b. Firearms Not to be Carried Without a License

Pursuant to Section 6106(a)(1), a person commits the crime of “firearms not to be carried without a license” when he “carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter.” 18 Pa.C.S.A. § 6106(a)(1). A number of exceptions to this rule exist pursuant to subsections (b) and (c); however, Defendant has not argued and there is no evidence that any of them apply here.

Since Defendant is prohibited from possessing a firearm pursuant to 18 Pa.C.S.A. § 6105, *supra*, it follows that he is similarly prohibited from obtaining a license to carry a concealed firearm. The Court has also held that Defendant constructively possessed the firearm, *supra*. The issue, then, is whether that firearm was “concealed on or about his person.”

The Supreme Court has recently held that the purpose of prohibiting a person from carrying an unlicensed concealed firearm is to “apprise citizens of the fact that an individual

is carrying deadly force, thereby lessening the chance that such individual could take his adversary, or anyone else, at a fatal disadvantage.” *Com. v. Montgomery*, 234 A.3d 523, 536 (Pa. 2020). Similarly, the Superior Court has stated that “section 6106 serve[s] to protect the public from persons who carry concealed firearms for unlawful purposes, an important governmental interest” *Com. v. McKown*, 79 A.3d 678, 690 (Pa. Super. 2013).

This issue appears to be one of first impression in Pennsylvania. Trial courts have previously held that a firearm located in a pocket of an overcoat or in a briefcase which the defendant was carrying constituted “on or about” the person. *Com. v. Gentile*, 21 Pa. D. & C.2d 626, 628–29 (Luz. Co. Quar. Sess. Jan. 1, 1960); *Com. v. Reynolds*, 4 Pa. D. & C. 262 (Franklin Co. Quar. Sess. Jan. 1, 1923). The closest case factually speaking that this Court could find is *In Re R.N.*, but nevertheless finds that the facts are distinguishable to the instant case.

During a car chase, the police observed the minor defendant throw two items from the passenger side window prior the vehicle crashing. *In re R.N.*, 951 A.2d 363, 365 (Pa. Super. 2008). The officer was approximately ten (10) feet away when he saw defendant throw the items and identified one of the items to be a metal object. *Id.* Following the incident, a firearm was recovered in close proximity to where it was thrown out of the window as the car was crashing and no other metal objects were found in the vicinity of the crash. *Id.* at 365. Based on these facts, the Superior Court held that there was sufficient evidence to establish that the defendant did in fact possess the firearm and throw it out of the window. *Id.* at 370. The Court, however, did not discuss the concealment of that firearm

because pursuant to the statute, and because defendant was a minor, he was prohibited from possessing it whether it was concealed or not.

Other Courts, however, have analyzed and decided this issue. In *State v. Prigge*, 907 N.W.2d 635 (Minn. 2018), the issue before the Court was whether a pistol, which was located in the center console of a vehicle, was carried “on or about the person’s clothes or person.” In defining “on” and “about,” the Supreme Court of Minnesota, using the dictionary definition, found that “on” means “contact with or extent over (a surface) regardless of position” and “about” means “approximately; near; and in the area or vicinity . . .” *Id.*, citing to *The American Heritage Dictionary of the English Language* 5 and 1230 (5th ed. 2011). The Court ultimately held that “on or about one’s person” means “(1) physically moving the pistol; or (2) having the pistol in one’s personal vicinity while moving,” meaning that the pistol is within arm’s reach. *Id.* In so reasoning, the Court held that the handgun found in defendant’s center console was “on or about” his person. *Id.* See also *Ensor v. State*, 403 So.2d 349 (Fla. 1981) (holding that “on or about the person’ means physically on the person or readily accessible to him.”).

Here, the firearm was not found, nor seen by Officer Stevens, on Defendant’s person. If it is to be believed that Defendant “tossed” the firearm into the bushes, then it is impossible to know whether or not Defendant was concealing the weapon prior to tossing it. After he “tossed” it into the bushes, the firearm was no longer within the Defendant’s reach. A firearm that is out of a person’s reach no longer “apprise[s] citizens of the fact that an individual is carrying deadly force,” because the individual is in fact no longer carrying it and cannot even easily and immediately access it. Further, the Pennsylvania Superior Court

has held that the Commonwealth must prove that a defendant has the mens rea to conceal a firearm. *Com v. Scott*, 176 A.3d 283, 291 (Pa.Super. 2017). As the Commonwealth has not even put forth testimony that the Defendant had the firearm concealed, the Commonwealth would not be able to establish that Defendant had the mens rea to conceal it.

This Court finds the holdings of the Minnesota and Florida Supreme Courts persuasive in that “about” means within arm’s reach.” Here, the firearm was clearly not. It is true that the firearm was concealed after it was in the bushes, but its location in the bushes cannot be considered “on or about” the Defendant’s person. For these reasons, the Court finds that the Commonwealth has not established a *prima facie* case for this charge.

c. Tampering with or Fabricating Physical Evidence

Pursuant to Section 6105(a)(1), a person commits the crime of “tampering with or fabricating physical evidence” when he “alters, destroys, conceals or removes any record, document or thing with intent to impair its verity or availability in such proceeding or investigation” if he believes “that an official proceeding or investigation is pending or about to be instituted” 18 Pa.C.S.A. § 4910(1). In order to establish this offense, the Commonwealth must prove the following three elements: (1) the defendant knew that an official proceeding or investigation was pending [or about to be instituted]; (2) the defendant altered, destroyed, concealed, or removed an item; and (3) the defendant did so with the intent to impair the verity or availability of the item to the proceeding or investigation. *Com. v. Yasipour*, 957 A.2d 734, 745 (Pa. Super. 2008) (internal citations omitted).

Accepting all facts as true, it is clear that Defendant concealed the firearm when he “tossed” it into the bushes. It follows, then that he did so to prevent someone from finding it.

The only other person around that he would not want to find it was Officer Stevens. The primary contention here is whether Defendant believed that an official investigation was about to be instituted. Officer Stevens testified that he and Officer Caschera were in an unmarked police vehicle and that he never activated the lights or sirens on the vehicle. However, Officer Stevens *was* in full uniform and armed when he approached the Defendant and the other male. He observed Defendant “toss” the firearm into the bushes only upon his approach. This fact is enough for a jury to reasonably infer that, upon Defendant seeing Officer Stevens approach in his uniform, he believed that Officer Stevens would initiate an investigation. The Commonwealth has established a *prima facie* case on the tampering with evidence charge.

IV. Conclusion

For the reasons set forth above, Defendant’s Petition for Habeas Corpus is granted with regard to Firearms Not to be Carried Without a License and therefore, that charge is dismissed. The Petition is denied with respect to all other charges.

ORDER

AND NOW, this 19th day of **January, 2022**, for the reasons set forth above, it is **ORDERED AND DIRECTED** that Defendant's Petition for Habeas Corpus is hereby **DENIED** as it relates to Persons Not to Possess, Use, Manufacture, Control, Sell, or Transfer Firearms and Tampering with or Fabricating Physical Evidence. The Petition is **GRANTED** as it relates to Firearms Not to be Carried Without a License, and Count 2 is hereby dismissed. Defendant's Motion to Reserve Right is **GRANTED**.

By the Court,

Ryan M. Tira, Judge

RMT/ads

CC: DA

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MDJ Frey

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