



IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
 :
 v. : No. CP-14-CR-1610-2008
 :
 HOBSON MCKOWN :

Attorney for the Commonwealth
Attorney for the Defendant

Carolyn Larrabee, Esquire
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OPINION IN RESPONSE TO MATTERS COMPLAINED OF ON APPEAL

KISTLER, J.

On September 10, 2008, Mr. McKown was arrested for one count of possession of a small amount of marijuana and one count of possession/use of drug paraphernalia. An Omnibus Pre-Trial Hearing was held on January 8, 2009. Upon agreement of the Commonwealth, this Court dismissed Count 1, Possession of a small amount of marijuana because it was determined that the substance originally believed to be marijuana was not a controlled substance. Additionally, Mr. McKown raised several challenges to the various aspects of the search and seizure of his residence in his Omnibus Pre-Trial Motion to Suppress. This Court denied Mr. McKown's Omnibus Pre-Trial Motion to Suppress in this Court's Opinion and Order dated April 28, 2009.

On August 20, 2009, following a non-jury trial, Mr. McKown, was found guilty of count two, Possession of Drug Paraphernalia, by this Court. Mr. McKown was sentenced by this Court to a probationary sentence for six months on September 17, 2009. On October 2, 2009, Mr. McKown filed his Notice of Appeal and on October 26, 2009, Mr. McKown filed a timely Statement of Matters Complained of on Appeal.

Mr. McKown raises seven matters complained of on appeal which the Court has

reproduced below:

1. *The suppression court erred in finding that the defendant consented to the warrantless entry and search of his residence for firearms by deputy sheriffs and that said consent was made freely and voluntarily and not the product of duress or coercion.*
2. *The suppression court erred in finding the defendant's consent to a bail condition requiring the immediate surrender of firearms in his possession permitted the deputy sheriffs to enter and search his residence without a warrant.*
3. *The suppression court erred in finding that the magisterial district judge had jurisdiction to modify the defendant's bail after the case had been bound over to the Court of Common Pleas and that said modification requiring the surrender of firearms did not violate the defendant's constitutional rights but was instead issued in accordance with the rules of criminal procedures requiring the setting and modification of bail.*
4. *The suppression court erred in finding that law enforcement were not required to obtain a warrant prior to entering and searching the defendant's residence as mandated by the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution based upon "exigent circumstances."*
5. *The suppression court erred in finding that the search warrant for defendant's residence contained sufficient probable cause to justify issuance even though the veracity and basis of knowledge of persons supplying hearsay information was no provided to the issuing authority.*
6. *The trial court erred[sic] finding that the Commonwealth had presented sufficient evidence of "chain of custody" to permit the court to consider the state police forensic lab test results evidencing the residue of marijuana in a pipe allegedly taken from the defendant's residence.*
7. *The trial court erred in finding that the Commonwealth had presented sufficient evidence to prove [sic] a beyond a reasonable doubt that the defendant "possessed" "drug paraphernalia" as those terms are defined by statute and case law.*

See Statement Of Matters Complained of on Appeal, 10/26/09.

In regard to issue 1, 2, 4, and 5 of Mr. McKown's Statement of Matters Complained of on Appeal, this Court respectfully submits that its Opinion and Order dated April 28, 2009,

adequately addresses the aforementioned issues. Each of the remaining matters will be discussed in turn; however, this Court maintains that all issues resolved by it before and during trial were proper.

FACTUAL BACKGROUND

On the day of Mr. McKown's arrest, Mr. McKown had originally been taken to the Centre County Courthouse for a preliminary hearing on a separate matter. Upon the conclusion of the preliminary hearing, the Commonwealth requested that the court modify Mr. McKown's bail and prohibit Mr. McKown from possessing any firearms. Magisterial District Judge Leslie A. Dutchcot modified Mr. McKown's bail to include a special condition that he was not able to possess any firearms.

Mr. McKown proceeded to the Sheriff's Department to make arrangements to comply with the surrender of his firearms. Upon learning that sheriff's deputies would accompany him into his home in order to secure the firearms, Mr. McKown attempted to negotiate an alternate time or way in which the weapons could be surrendered. The sheriff's deputies refused to wait until a later time in which to enforce the order and explained to Mr. McKown that, as the surrender of his firearms was a condition of his bail, failure to comply with this condition would likely result in his bail being revoked.¹

Mr. McKown then agreed to comply with his bail conditions and accompany the sheriff's deputies to his residence to retrieve the firearms. Mr. McKown's residence is a mobile home trailer divided into two living units. Upon arriving at Mr. McKown's residence, the sheriff's deputies were met by a middle aged female who the police later discovered was Mr. McKown's

¹ At the Omnibus Pre-Trial hearing, the deputies testified that it is standard practice of their department to accompany a defendant into his home and have the defendant point out where the weapons are located. The purpose of this is two fold; first this practice prevents defendants from bringing weapons to the police station and secondly, by having the defendant accompany the deputies into the house and show them where the weapons are, this saves the deputies time.

mother. The sheriff's deputies asked the female to stay outside the residence while they collected the guns.

As Mr. McKown and the sheriff's deputies were walking towards the residence, Mr. McKown began to once again ask the sheriff's deputies if they could make an alternate arrangement to collect the firearms and slowed his pace as the group approached the residence. At approximately thirty feet from the residence, Mr. McKown stopped walking and stood still, looking extremely nervous. At this moment, the sheriff's deputies became concerned that there was something in the trailer which was dangerous. The sheriff's deputies asked Mr. McKown if there was anything in the residence that could harm or hurt them. Mr. McKown responded that there was not but the sheriff's deputies remained unconvinced.

As a result of Mr. McKown's nervous behavior, the sheriff's deputies handcuffed Mr. McKown and retrieved the house key from his left front pocket. Deputy Albright walked up the steps and opened the door a few inches in order to peer inside. Upon looking into the residence, Deputy Albright observed a sign which read, "I do not consent to this search." Stacked near the sign were six ammunition cans. Upon viewing the ammunition cans, Deputy Albright opened the door further and observed a computer desk with a set of wire cutters, voltage meter, circuit boards, phone cords and hard drives. There was also another ammunition can next to the door and three mouse traps stacked on top of each other on the kitchen counter.

Deputy Albright had seven years experience as a K-9 handler of an explosive detection dog and 200+ hours of explosives and IED (Improvised Explosive Device) training. He recognized the aforementioned objects as components used in the construction of explosives or IEDs. Deputy Albright backed out of the residence and contacted the local bomb tech, Officer White. Shortly before Officer White arrived, Mr. McKown was placed in the back of a police cruiser while handcuffed and transported to a holding cell. Upon arriving at the residence,

Officer White agreed that if he were to encounter any IEDs or booby traps he would render them safe and contact the appropriate federal employees and obtain a search warrant for IED components and explosives. Officer White then entered the residence without a warrant. During the search, Officer White observed items which are used to manufacture components of IEDs. In addition to searching the open areas for bombs, Officer White opened kitchen cabinets in order to allow the officers to retrieve the firearms in safety. Officer White opened these areas because the size of an IED could be as small as a thumb. In a kitchen cabinet were several shipping envelopes and a cloth bag. Officer White looked inside the bag and recognized a pipe which he believed was used to smoke marijuana. In one of the envelopes, Officer White felt what he believed to be another pipe used to smoke marijuana. Officer White also observed a green substance which he believed was marijuana. The substance was later determined not to be a controlled substance.

Officer White immediately notified the other officers of what he found and then completed his search of the area for explosives. No items were found which presented a danger to law enforcement. Based on Officer White's observations, Detective Martin obtained a search warrant for the pipe and substance which was believed to be marijuana. The pipe was later determined to contain marijuana residue.

DISCUSSION

III. The suppression court erred in finding that the magisterial district judge had jurisdiction to modify the defendant's bail after the case had been bound over to the Court of Common Pleas and that said modification requiring the surrender of firearms did not violate the defendant's constitutional rights but was instead issued in accordance with the rules of criminal procedures requiring the setting and modification of bail.

Contrary to Mr. McKown's statement that this Court made a finding that the magisterial district judge had jurisdiction to modify Mr. McKown's bail; the Court notes that this issue was never raised in any motions filed with this Court. The Court has made a careful review of the

record and determines that the only mention of jurisdiction occurred at the Omnibus Pre-Trial hearing. The brief discussion regarding jurisdiction can be found on pages 61-62 of the Omnibus Pre-Trial Hearing Transcript. During this discussion Mr. McKown's attorney stated that the first argument in his brief will be whether Judge Dutchcot had jurisdiction to modify Mr. McKown's bail. This was basically the extent of the discussion Mr. McKown's attorney made regarding jurisdiction. When this Court received Mr. McKown's brief on February 23, 2009, the issue of jurisdiction was never mentioned anywhere in the brief. Due to this omission, this Court believed that Mr. McKown had chosen not to pursue the issue of jurisdiction and there was no possible way for the Court to decide the issue without some guidance or discussion by counsel since this Court was not present at the bail hearing.

This Court relies on Motions and Briefs in order to know what issues need to be addressed. The fleeting utterance made by an attorney may or may not be remembered by a judge months down the line. However, those issues contained and addressed in a motion or an accompanying brief will be addressed by this Court because they are preserved in a more lasting form. In this instance the Court is regrettably unable to give the Honorable Superior Court guidance because the issue was never fully developed at any stage of the litigation in which this Court was involved. The effect of this omission by Mr. McKown's attorney essentially asks the Superior Court to become a Court of original jurisdiction and therefore amounts to a violation of Pa.R.A.P. 302(a). As a result, the Court respectfully submits that the issue of jurisdiction should be considered waived.

VI. The trial court erred[sic] finding that the Commonwealth had presented sufficient evidence of "chain of custody" to permit the court to consider the state police forensic lab test results evidencing the residue of marijuana in a pipe allegedly taken from the defendant's residence.

This Court respectfully submits that this matter was also never fully developed at the trial

court level and therefore should be considered waived as well. This Court is unable to provide the Superior Court with a page number because the transcript has not yet been paid for. Nevertheless, this Court has reviewed the tape of the trial and will note that Mr. McKown's counsel made no objection to the chain of custody of any of the exhibits or testimony. Mr. McKown's counsel did mention in his closing argument that he was unsure whether the Commonwealth had provided a satisfactory chain of custody for the drug paraphernalia. However this Court would submit that mentioning chain of custody in a closing argument is not the proper time or means to raise this type of objection. This Court notes that the Commonwealth successfully moved that all its exhibits be made a part of the record without an objection from Mr. McKown's attorney. The Court believes that failure to raise a proper and prompt objection once again violates Pa.R.A.P. 302(a) and therefore this issue should be considered waived.

In the event the Honorable Superior Court does not determine that the issue has been waived, this Court believes that the testimony of Nicole Blaskovitch, the Penn State Police forensic scientist who conducted tests on the marijuana pipe and Detective Martin, who packaged the pipe and sent the marijuana pipe to the lab are sufficient to establish a proper chain of custody.

VII. The trial court erred in finding that the Commonwealth had presented sufficient evidence to prove [sic] a beyond a reasonable doubt that the defendant "possessed" "drug paraphernalia" as those terms are defined by statute and case law.

The appellate review of a claim challenging the sufficiency of the evidence is as follows:

"The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's

guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [finder] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Rivera, 2009 WL 3417920 (Pa.Super.,2009).

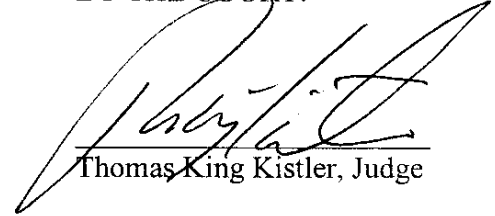
Although the Court is without the ability to provide the honorable Superior Court page numbers as a reference since the transcript of the trial has not been paid for, the Court did listen to the tapes of the proceeding. The marijuana pipe was discovered by Officer White in Mr. McKown's residence, in a cabinet located above and to the right of Mr. McKown's stove. "Where the contraband a person is charged with possessing is not found on the person of the defendant, the Commonwealth is required to prove constructive possession." Commonwealth v. Walker, 874 A.2d 667, 667 (Pa.Super.,2005)(citing Commonwealth v. Kirkland, 831 A.2d 607, 611 (Pa.Super.2003), appeal denied, 847 A.2d 1280 (2004)). "Constructive 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." We subsequently defined "conscious dominion" as "the power to control the contraband and the intent to exercise that control." To aid application, we have held that constructive possession may be established by the totality of the circumstances." Id. at 677-678.

This Court determined that the Commonwealth had met there burden of establishing constructive possession because it was shown that the marijuana pipe was located in Mr. McKown's portion of the trailer home, in a cabinet above his stove. The marijuana pipe was well within his power to control the contraband and exercise control over it at any time.

Therefore this Court respectfully submits that it did not err in determining that the evidence was sufficient to prove beyond a reasonable doubt that Mr. McKown had constructive possession of the marijuana pipe.

Based on the foregoing reasons, this Court respectfully believes that it did not err in denying Mr. McKown's Pre-Trial Motions and in this Court's verdict of guilty. This Court hopes that this Opinion aids the Honorable Superior Court in this matter.

BY THE COURT:



Thomas King Kistler, Judge

Date: 11.5.09