

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

COMMONWEALTH OF PENNSYLVANIA :
Appellee :
Vs. : No. CR-1592-2016
LINETTE LESHER, :
Appellant :

Michael S. Greek, Esquire Counsel for Plaintiff
Matthew Mottola, Esquire Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - November 21, 2018

An appeal has been taken by Appellant, Linette Leshner (hereinafter "Leshner"). She challenges the sufficiency of the evidence presented at her bench trial where the Court found her guilty. She also challenges the finding that the search of her vehicle, which lead to the discovery and seizure of a marijuana cigarette and pill bottle was consensual. For the reasons stated herein, the Court respectfully requests the Honorable Superior Court deny the appeal and affirm this Court's decision to convict the appellant and sentence her accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

On October 1, 2016, Officers from Mahoning Township and Lehighton Borough were dispatched to the Giant parking lot in

Mahoning Township at approximately 11:30 a.m. for an erratic driver call.¹

After speaking to several witnesses about what prompted the call to the police, Meek engaged Leshar who was seated in her vehicle talking on the phone. When questioned by Meek as to what was going on, she kept telling Meek that individuals were following her and that Meek knew what she was talking about to which Meek responded in the negative. Meek also testified that Leshar seemed confused and as a result he (Meek) was not sure if Leshar was under the influence of a controlled substance or alcohol or was suffering from a mental health issue. Meek had her exit the vehicle for purposes of having Leshar perform field sobriety tests. Based upon Leshar's performances of those tests, she was placed under arrest. Arrangements were then made to have a D.R.E. evaluation done. Leshar was eventually transported to the Lehighton Borough Police Department to await the drug recognition expert evaluation.²

Leshar filed a suppression motion on May 24, 2017. At the

¹ Officer Tyler Meek (hereinafter "Meek") of Mahoning Township was first to arrive at the scene in the parking lot at Giant, a local grocery store. Once there Meek called for assistance from the neighboring borough of Lehighton. Shortly thereafter, Officers Robert Defuso (hereinafter "Defuso") and Gabriel Szozda (hereinafter "Szozda") arrived and provided assistance at the scene and thereafter.

² Because Meek was called to a fatal motor vehicle accident before this incident had concluded, he asked that Leshar be transported to the Lehighton Borough Police Department and have the drug recognition expert conduct the evaluation on Leshar. Based upon that evaluation, he did not recommend that Leshar be taken for a blood test for purposes of determining whether Leshar had any controlled substances in her blood that impaired her ability to operate a vehicle safely, thus the reason no D.U.I. charges were filed against Leshar.

hearing on that motion, Officer Defuso testified that upon arrival on scene he stood by Leshar's vehicle while Meek investigated the incident through interviews with other witnesses.³ Once Meek approached Leshar's vehicle and requested that she exit the vehicle, Defuso asked Leshar if there was anything in her vehicle that should not be. Leshar responded that there should not be and gave consent to search it by stating "You can check if you want."⁴ Defuso then instructed Szozda to conduct a search of Leshar's vehicle.⁵ During the course of this search, Szozda located, in the center console, an orange pill bottle. Upon opening the pill bottle, Szozda observed white paper wrapped around what appeared to be the remnants of a marijuana cigarette. Szozda seized this pill bottle and its contents and eventually provided it to Meek.

Leshar testified that Defuso was the first officer on the scene and that it was Defuso who took her car keys. She also testified at the trial, revealing for the first time that while she occasionally smokes marijuana, the pill bottle with the marijuana cigarette in it located in the console of her vehicle,

³ Defuso also indicated that while conversing with Leshar while she was still in the vehicle, she "wasn't making sense" to him. He suspected also that Leshar may be under the influence of a controlled substance or suffering from a medical issue.

⁴ At both the suppression hearing and at trial, Defuso's testimony on this issue was consistent. Leshar, on the other hand, testified that no one ever asked her for her consent to search the vehicle and in fact protested this point to Meek when she observed the search being performed.

⁵ It was determined through Meek's testimony that he ran the registration to this vehicle and it came back registered to Leshar.

did not belong to her. She intimated that her then on again off again boyfriend, Brandon Buck, smoked marijuana also and sometimes uses her vehicle. She testified that she told Officers at the station that the marijuana cigarette belonged to Buck.

Meek was called as a rebuttal witness for the sole purpose of testifying that there was never any mention at the police station of the marijuana cigarette belonging to Brandon Buck nor anything in any reports related to this incident and that this, the day of the trial, was the first time he had ever heard of that claim.

As a result of the suppression hearing, Leshner's motion was denied. The case proceeded to a bench trial where this Court found Leshner guilty after a bench trial on the charges of Possession of a Small Amount of Marijuana (35 Pa.C.S. §780-113(A)(31)) and Possession of Drug Paraphernalia (35 Pa.C.S. §780-113 (A)(32)). Sentencing was scheduled and eventually occurred on September 7, 2018. At that time, Leshner was sentenced to a one (1) year probationary sentence on the paraphernalia charge and subject to pay a fine on the possession of small amount of marijuana offense.

On September 27, 2018, Leshner filed the instant appeal and on September 28, 2018, this Court issued an order pursuant to Pennsylvania Rule of Appellant Procedure 1925(b), directing Leshner to file a concise statement of matters complained of on appeal. On October 2, 2018, Leshner filed her concise statement. In that

statement she raised two (2) issues as follows:

1. Whether the Trial Court erred by denying Ms. Leshher's suppression motion by finding that Ms. Leshher provided an unequivocal, specific, and voluntary consent to search her vehicle?
2. Whether the evidence was sufficient to establish that Ms. Leshher had conscious dominion over the marijuana cigarette and pill bottle to establish that she possessed these items?

LEGAL DISCUSSION

Leshher has raised two (2) separate and distinct issues here on appeal. In the first issue, she claims that the Trial Court erred in finding that her "consent" to search her vehicle was unequivocal, specific and voluntary. On the second claim she argues that the evidence presented by the Commonwealth was insufficient to establish that she had conscious dominion over the marijuana cigarette and pill bottle found in the vehicle she was driving as a result of the search. This Court will address each claim seriatim.

Defendant's Suppression Motion:
The Appropriateness of this Court's Finding that Defendant
Provided Unequivocal, Specific, and Voluntary Consent to Search
Her Vehicle

Appellate Court Suppression Standard of Review.

The Superior Court explicitly has delineated the well-settled nature of an appellate court's standard of review when addressing a suppression court's denial of a motion to suppress. The Superior Court has held:

"In an appeal from the denial of a motion to suppress our role is to determine whether the record supports the suppression court's factual findings and the legitimacy of the inferences and legal conclusions drawn from those findings. In making this determination, we may consider only the evidence of the prosecution's witnesses and so much of the defense as, fairly read in the context of the record as a whole, remains uncontradicted. When the factual findings of the suppression court are supported by the evidence, we may reverse only if there is an error in the legal conclusions drawn from those factual findings."

See *Commonwealth v. Lohr*, 715 A. 2d 459, 461 (Pa.Super. 1998) quoting *Commonwealth v. Carlson*, 705 A.2d 468, 469 (Pa.Super. 1998).

Defendant's Consent to a Warrantless Search of Her Vehicle.

As a general matter, under the Fourth Amendment to the United States Constitution or Article I, Section 8 of the Pennsylvania Constitution, "[a] search or seizure is not reasonable unless it is conducted pursuant to a search warrant issued by a magistrate upon a showing of probable cause." See *Commonwealth v. Edwards*,

735 A.2d 723, 725 (Pa.Super. 1999) citing *Commonwealth v. Blasioli*, 685 A.2d 151, 156 (Pa.Super. 1996).⁶

A defendant's consent may constitute an exception to the warrant requirement. The Superior Court has noted that:

"One exception to the warrant requirement is when a person voluntarily consents to the search. In order for consent to be valid, it must **unequivocal, specific, and voluntary**, it must also be given **free from coercion, duress, or deception**. The voluntariness of consent is a question of fact that is determined by looking at the totality of the circumstances."

See *Commonwealth v. Edwards*, 735 A.2d at 725 (emphasis added) (internal citations omitted).

The Commonwealth bears the burden to prove that a defendant voluntarily consented to a warrantless search. See *Commonwealth v. Acosta*, 815 A.2d 1078, 1083 (Pa.Super. 2003). To establish voluntariness, the Commonwealth must prove the consent was "the product of an essentially free and unconstrained choice - not the result of duress or coercion, express or implied, or a will overborne - under the totality of the circumstances." See *Commonwealth v. Mack*, 796 A.2d 967, 970 (Pa. 2002) quoting *Commonwealth v. Strickler*, 757 A.2d 884, 901 (Pa. 2000).

⁶ The Fourth Amendment to the United States Constitution states "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See U.S. Const., Amend. IV. Article 1, Section 8 of the Pennsylvania Constitution provides that "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures." See Pennsylvania Const., Art. I, §8.

The United States Supreme Court, in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), "rejected the argument that the constitutional guarantee against unreasonable searches and seizures required the application of the knowing and intelligent waiver requirement, which is used to analyze the relinquishment of other constitutional protections." See *Commonwealth v. Edwards*, 735 A.2d at 725. "Further, the Court also rejected the idea that 'the Court's decision in the *Miranda* case requires the conclusion that knowledge of a right to refuse is an indispensable element of a valid consent.'" See *Commonwealth v. Edwards*, 735 A.2d at 725 citing *Schneckloth v. Bustamonte*, 412 U.S. at 246, 93 S.Ct. at 2058, 36 L.Ed.2d. at 874.⁷

The United States Supreme Court, in *Schneckloth*, "specifically found that requiring that a person be informed of the right to refuse before requesting his consent has been 'universally repudiated by both federal and state courts.'" See *Commonwealth v. Edwards*, 735 A.2d at 727 citing *Schneckloth v.*

⁷ The United States Supreme Court also "established that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." See *Commonwealth v. Edwards*, 735 A.2d at 725 citing *Schneckloth v. Bustamonte*, 412 U.S. at 248-249, 93 S.Ct. at 2059, 36 L.Ed.2d. at 875. "Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing voluntary consent." See *Commonwealth v. Edwards*, 735 A.2d at 725 citing *Schneckloth v. Bustamonte*, 412 U.S. at 248-249, 93 S.Ct. at 2059, 36 L.Ed.2d. at 875.

Bustamonte, 412 U.S. at 231, 93 S.Ct. at 2049, 36 L.Ed.2d. at 865. In Pennsylvania, "a person need not be informed of his right to refuse consent to a warrantless search in order for the consent to be found voluntary, but that such knowledge will be considered when assessing the totality of the circumstances surrounding he search." See *Commonwealth v. Edwards*, 735 A.2d at 726. This applies independently to the Pennsylvania Constitution insofar as the Pennsylvania Supreme Court "has yet to pronounce that under Article I, §8 of the Pennsylvania Constitution a person is entitled to be informed of the right to refuse consent to a warrantless search prior to giving consent." *Commonwealth v. Edwards*, 735 A.2d at 729.

With respect to the circumstances of the search at issue in the instant matter, the Commonwealth, as is delineated in the factual and procedural recitation *supra*, presented at the suppression hearing ample and credible testimony to support this Court's finding that Defendant gave her voluntary, specific, an unequivocal consent to search her vehicle. Defendant provided her voluntary, specific, and unequivocal consent in a wholly unsolicited fashion in the absence of a police request that they be permitted to search her vehicle. Defendant's consent can be

described accurately as an unsolicited invitation for the police to search her vehicle.⁸

The Sufficiency of the Evidence to Establish that
Defendant Possessed Conscious Dominion Over the Marijuana
Cigarette and Pill Bottle at Issue in this Matter

Appellate Court Pa.R.A.P. 1925(b) Substantive Standard of Review.

The Pennsylvania Superior Court has described its standard of review as:

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 [that of] 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

⁸ In *Edwards supra*, the police were alerted to a complaint of loud noise and underaged drinking. Upon arrival at the specified location, he could hear loud music and people singing from within the home and they could observe through a window several people including the defendant drinking from a cup containing a red liquid. They were ultimately allowed in the home by one of the occupants but did not proceed further until the owner greeted them. Upon conversing with the owner, the officers asked if there was any beer in the house to which the owner stated that she did not think so but that the officers could "go ahead and check." Upon entering the residence, the officers found several bottles of red malt liquor beer. This fact scenario is uniquely similar to the case at bar insofar as while the police inquired as to the existence of anything "illegal," they did not ask for consent to perform a search but rather were invited to search by the defendant herself.

sustain its burden of proving every element 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 trier 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.

See Commonwealth v. Irvin, 134 A.2d 67-75-76 (Pa.Super. 2016) (citation omitted).

Defendant in this matter questions "[w]hether the evidence was sufficient to establish that Ms. Lesher had conscious dominion over the marijuana cigarette and pill bottle to establish that she possessed these items." *See Concise Statement of Errors Complained of on Appeal at ¶2.*

It is well settled 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. ***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.

See Commonwealth v. Hopkins, 67 A.3d 817, 820 (Pa.Super. 2013) (emphasis added). *See also Commonwealth v. Kinard*, 95 A.3d 279,

292 (Pa.Super. 2014 quoting *Commonwealth v. Brown*, 48 A.3d 426,
430 (Pa.Super. 2012)).

"[T]he power and intent to control the contraband does not need to be exclusive to the defendant," as "constructive possession may be found in one or more actors where the item [at] issue is in an area of joint control and equal access." See *Commonwealth v. Vargas*, 108 A.3d 858, 869 (Pa.Super. 2014) (citation omitted). "[W]here more than one person has equal access to where drugs are stored, presence alone in conjunction with such access will not prove conscious dominion over the contraband." See *Id.* at 869 citing *Commonwealth v. Davis*, 480 A.2d 1035, 1045 (Pa. 1984) (emphasis omitted). Nonetheless:

"although 'mere presence' at a crime scene cannot alone sustain a conviction for possession of contraband... a jury need not ignore presence, proximity and association when presented in conjunction with other evidence of guilt. Indeed, presence at the scene where drugs are being processed and packaged is a material and probative factor which the jury may consider."

See *Commonwealth v. Vargas*, 108 A.3d at 869 (citation omitted).

"[T]he Commonwealth must introduce evidence demonstrating either [the defendant's] participation in the drug related activity or evidence connecting [the defendant] to the specific room or areas where the drugs were kept." See *Id.*

The Commonwealth's considerable and credible evidence presented at the bench trial in this matter, taken in the light

most favorable to the Commonwealth as verdict winner, established that Defendant, as sole present operator of the vehicle registered exclusively in her name, possessed both the power and intent to control the contraband at issue in this case. See *Commonwealth v. Best*, 120 A.3d 329 (Pa.Super. 2015) (Appellant had conscious dominion over marijuana found in center console, immediately beside and within reach of Appellant driver, in his vehicle which he solely occupied); *Commonwealth v. Muniz*, 5 A.3d 345 (Pa.Super. 2010) (Occupant of apartment constructively possessed drugs found during police search where defendant constituted sole occupant of apartment and other identifying documents found in bedroom where contraband discovered). No reason exists to disturb the verdict in this matter. Further, at no time in this matter were the officers ever told by the defendant that the pill bottle containing the marijuana cigarette belonged to Lesher's boyfriend and that according to Meek the first and only time they ever heard that was at trial. Unless Lesher was intent on "taking the rap" for the boyfriend at the time of the stop (which explains why she never said anything at that time), it is disingenuous to think her story holds any truth when she testifies on it at trial.

CONCLUSION

For the reasons stated herein, the Court respectfully requests the Honorable Superior Court deny the appeal and affirm

this Court's decision to convict the appellant and sentence her accordingly.

BY THE COURT:



Joseph J. Matika, J.

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