

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-330

COMMONWEALTH

vs.

LUIS RESTO.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial in the Superior Court, the defendant was convicted of trafficking in heroin,¹ G. L. c. 94C, § 32E (c), and possession with intent to distribute a class B substance (fentanyl), G. L. c. 94C, § 32A (a). Concluding that the evidence was sufficient to support the challenged element of possession as to both convictions, and that the defendant's trial counsel was not ineffective in failing to renew his motion for a required finding of not guilty at the close of the evidence, we affirm.

Discussion. 1. Sufficiency of the evidence of possession.

"To show constructive possession, the Commonwealth must show that the defendant knew of the existence of the item and had the

¹ Eighteen grams or more, but less than thirty-six grams.

ability and intent to exercise dominion and control over it."

Commonwealth v. Santana, 95 Mass. App. Ct. 265, 268 (2019).

"Proof of possession of a controlled substance may be established by circumstantial evidence, and the inferences that can be drawn therefrom." Commonwealth v. LaPerle, 19 Mass. App. Ct. 424, 426 (1985).

In the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), the evidence at trial established that on December 15, 2016, the defendant lived alone in a three-bedroom third-floor apartment at 139 Lawrence Street in Clinton. On that day, the police executed a search warrant for the defendant's apartment. Before executing the warrant, the police stopped the defendant, showed him a copy of the search warrant, and told him that they were looking for heroin in the apartment. The defendant, who had acknowledged his Miranda warnings, told the police that he "had just got[ten] rid of [fifty] bags of heroin" and that "there was no heroin." See Miranda v. Arizona, 384 U.S. 436 (1966). Searching the defendant, the police found \$1,010 in his pocket, as well as a Department of Transitional Assistance (DTA) card in

another person's name.² The police did not find any drugs on the defendant.

When the police entered the apartment, they saw the defendant's Visa card, bank account identification card, credit union card, and a letter addressed to the defendant on the kitchen table. In the same room, the police found a digital scale and a plastic egg containing two packages, one containing 86.4 grams of fentanyl and the other holding 38.9 grams of a mixture of heroin and fentanyl, all hidden in a cereal box.³

The police searched the entire apartment. They found no other drugs but did find additional indicia of drug distribution (a respirator mask, plastic baggies, and another large sum of cash) in the defendant's bedroom. Additionally, the police found two more DTA cards belonging to individuals whom the police knew did not live in the apartment, although it is not clear where in the apartment those cards were found.

The defendant's knowledge of the drugs found in the apartment could be fairly inferred from his admission to drug distribution, the evidence that he was the only person living in

² The jury could have found that possession of such a card by someone other than the named beneficiary was consistent with drug distribution.

³ The Commonwealth presented evidence that digital scales are often used by drug dealers to ensure the accuracy of their transactions, and that the amounts of the drugs found were consistent with distribution, rather than personal use.

the apartment in which the drugs were found, and the discovery of drug distribution equipment and supplies in both the defendant's bedroom and the kitchen, including the digital scale hidden with the drugs themselves. See Commonwealth v. Hamilton, 83 Mass. App. Ct. 406, 412 (2013) (finding defendant's being "primary occupant of the apartment" "significant" to conclusion that defendant constructively possessed cocaine found in apartment); Commonwealth v. Alcantara, 53 Mass. App. Ct. 591, 597 (2002) (defendant who admits possession of drugs may be linked to other quantities of similar drugs). Cf. Commonwealth v. Clarke, 44 Mass. App. Ct. 502, 506-507 (1998) (where contraband found in bedroom to which neither defendant nor his possessions were linked, evidence insufficient to establish constructive possession).

The same evidence, particularly coupled with the defendant's indication that there was no heroin to be found, and with the defendant's having left his personal effects, including a credit card, in the kitchen area of the apartment, was sufficient to show that the defendant had control of both the area in which the drugs were kept and of the drugs themselves. See Commonwealth v. Pratt, 407 Mass. 647, 652 (1990), quoting Commonwealth v. Rarick, 23 Mass. App. Ct. 912, 912 (1986) (even in context of shared dwelling, jury may properly infer constructive possession "from evidence that the contraband was

found in proximity to personal effects of the defendant in areas of the dwelling . . . to which other evidence indicates the defendant has a particular relationship").

Finally, the evidence -- particularly the defendant's admission to distribution of heroin, the presence in the defendant's room and the kitchen of items used in the processing and packaging of drugs for sale, the presence of two bulk packages of saleable drugs, and the large sums of money in the defendant's pocket and in his room -- all support the conclusion that the defendant intended to exercise control over the drugs found in the kitchen. See Commonwealth v. Brzezinski, 405 Mass. 401, 410 (1989), quoting Commonwealth v. Albano, 373 Mass. 132, 134 (1977) (to prove constructive possession, "presence, supplemented by other incriminating evidence, 'will serve to tip the scale in favor of sufficiency'"). See also Alcantara, 53 Mass. App. Ct. at 597 (presence of defendant's identifiable possessions in bathroom and adjacent bedroom sufficient circumstantial evidence of dominion and control over drugs hidden in bathroom); Rarick, 23 Mass. App. Ct. at 912 (contraband in proximity to personal effects supports inference of possession). Cf. Commonwealth v. Brown, 34 Mass. App. Ct. 222, 225-226 (1993) (absent clear link of participation in drug dealing operation, knowledge of and proximity to operation not sufficient for inference of intent or control). The evidence

was sufficient to establish the defendant's constructive possession of the drugs found in the kitchen of his apartment.

2. Ineffective assistance. The defendant argues that trial counsel was ineffective for failing to renew his motion for a required finding of not guilty at the close of all of the evidence. Even assuming, without deciding, that trial counsel's failure to renew the motion fell below the minimum standards articulated in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), our conclusion that the evidence of constructive possession was sufficient to sustain the defendant's convictions is fatal to the defendant's ineffective assistance claim. See Commonwealth v. Comita, 441 Mass. 86, 91 (2004) (to prevail on ineffective assistance of counsel claim, defendant must demonstrate likelihood that such motion would be successful).

Judgments affirmed.

By the Court (Wolohojian,
Englander & Hand, JJ.⁴),



Clerk

Entered: April 7, 2021.

⁴ The panelists are listed in order of seniority.