

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 17th day of August, 2017.

Brando Clifton Carter, Appellant,

against Record No. 161102
Court of Appeals No. 1445-15-2

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the Court of Appeals.

I.

On January 29, 2015, a grand jury indicted Brando Clifton Carter (Carter) for (i) possessing with the intent to distribute cocaine in violation of Code § 18.2-248; (ii) possessing a firearm while possessing with intent to distribute cocaine in violation of Code § 18.2-308.4; (iii) conspiracy to possess with intent to distribute cocaine in violation of Code § 18.2-256; and (iv) possession of a firearm by a convicted felon in violation of Code § 18.2-308.2, all in connection with an incident that occurred on May 3, 2014 in Prince George County. On April 9, 2015, the Circuit Court of Prince George County conducted a bench trial on these charges, as well as related charges against two codefendants, Dejuan Roy (Roy) and Derrick Williams (Williams).

The arresting officer testified that, on May 3, 2014, at 1:20 a.m., he stopped a vehicle after watching it “weaving in and out of its lane,” and that the vehicle did not try to elude the stop. Roy was driving, Carter was in the front passenger seat, and Williams was in the rear seat.

Roy, who was visibly intoxicated, told the officer that his girlfriend had leased the vehicle and that neither his name, nor that of Carter or Williams, was on the lease. The officer placed Roy under arrest for driving under the influence. Although there were no indications of contraband or drugs, pursuant to police department policy the officer needed to conduct an inventory of the vehicle in preparation for the towing of the vehicle because the lessee of the vehicle was not present. The officer asked Carter and Williams to step out of the vehicle so that he could conduct the inventory.

After obtaining consent, the officer searched Carter's and Williams's persons. He found nothing "of note" on Carter. However, upon searching Williams, he discovered "two large stacks of cash, U.S. currency divided by denomination, in each of his left and right front pockets," totaling \$3,792.

During the inventory of the vehicle, the officer searched the glovebox, a "standard" glovebox with an opaque door that must be released in order to look inside.* The glovebox contained a semi-automatic handgun and a bag containing four individual smaller baggies, each of which contained crack-cocaine.

After the officer advised Carter and Williams of their *Miranda* rights, the officer asked about the firearm and cocaine. Carter was arrested and charged.

At trial, no responses to the officer's questions at the scene or any other statements made by Carter or either of the other defendants regarding the cocaine or firearm were offered or admitted into evidence. Expert testimony established that the quantity and packaging of the

* There was no evidence regarding whether the glovebox was locked or unlocked, but the circuit court later stated: "I take it that it was unlocked" because they are "normally unlocked," and Carter did not object to that conclusion.

cocaine was inconsistent with personal use. However, the expert opined that the fact that the firearm and cocaine “were found in the vicinity of a third party holding \$3,792 in cash” would not, without more, indicate possession that was inconsistent with personal use. The Commonwealth also introduced Carter’s prior felony conviction.

In overruling Carter’s motion to strike, the circuit court stated that the totality of the circumstantial evidence “is sufficient for the Court to find that [each defendant] had dominion and control and knowledge of the drugs.”

Neither Carter nor Roy put on evidence. Williams’s girlfriend testified that she had recently settled a personal injury claim and that she gave Williams \$4,000 in cash two days before the incident, to take care of her children and make car payments on her behalf while she was out of town for several weeks. Williams renewed his motion to strike, which the court denied.

The circuit court found all three men guilty of possession with intent to distribute cocaine and conspiracy to commit that same offense. In addition, the court found Carter guilty of possessing a firearm while possessing cocaine with intent to distribute, and being a felon in possession of a firearm. It explained,

When I look at the totality of it and the circumstances, I do find that they -- that each of them knew the drugs were in the car. And the conspiracy in my mind, as I said, they’re each playing an element. And one is the driver, one holding the cash, one in control of the drugs and the gun.

Carter appealed to the Court of Appeals, assigning as error (i) that the circuit court erred in denying his motion to suppress the evidence found in the glove compartment; (ii) that the evidence was insufficient to prove that he possessed the cocaine with the intent to distribute, and therefore was also insufficient to support the related firearms charges; and (iii) that the evidence

was insufficient to prove conspiracy. The Court of Appeals denied Carter’s appeal as to the first two assignments of error, but granted Carter’s appeal as to the conspiracy charge.

Upon considering the conspiracy conviction on its merits, the Court of Appeals reversed Carter’s conviction on that charge in an unpublished opinion. *Carter v. Commonwealth*, Record No. 1445-15-2, 2016 Va. App. LEXIS 193 (July 12, 2016). In reversing that conviction, the Court of Appeals held:

Here, the evidence, in its totality, fails to demonstrate anything beyond the fact that appellant was the front seat passenger in a car containing cocaine in the glove box, packaged into small baggies indicating distribution, with another occupant having over \$3,000 in divided denominations. The record is devoid of any statements or actions to support a finding that there was an agreement between appellant and any other person. On appeal, this Court considers cases challenging the sufficiency of the evidence under a standard of review that is difficult to satisfy. . . . With this standard in mind, there is simply no evidence in the record to support the trial court’s inference that appellant was “the one in control of the drugs and the gun” in a conspiracy involving the other persons in the [vehicle].

Id. at *10-11.

This Court granted Carter an appeal regarding whether the Court of Appeals erred in affirming the circuit court’s ruling that the evidence presented at trial was sufficient to convict Carter on the charges of possession with intent to distribute cocaine, possessing a firearm while possessing with intent to distribute cocaine, and possession of a firearm by a convicted felon.

II.

“When examining a challenge to the sufficiency of the evidence, an appellate court must review the evidence in the light most favorable to the prevailing party at trial and consider any reasonable inferences from the facts proved.” *Viney v. Commonwealth*, 269 Va. 296, 299, 609 S.E.2d 26, 28 (2005). “The judgment of the trial court is presumed to be correct and will be

reversed only upon a showing that it is ‘plainly wrong or without evidence to support it.’” *Id.* (quoting Code § 8.01-680).

Carter’s remaining three convictions rest on whether he possessed the cocaine and firearm. *See* Code §§ 18.2-248; 18.2-308.2; 18.2-308.4. Constructive, rather than actual, possession of contraband is sufficient to uphold these convictions. *Smallwood v. Commonwealth*, 278 Va. 625, 629-30, 688 S.E.2d 154, 156 (2009). “[T]he issue [of what constitutes constructive possession] is largely a factual one.” *Ritter v. Commonwealth*, 173 S.E.2d 799, 807, 210 Va. 732, 743 (1970). To establish constructive possession, the Commonwealth must present evidence of acts, statements, or conduct by the defendant, or other facts and circumstances, proving that the defendant was aware of the presence and character of the item and that the item was subject to his dominion and control. *See Bolden v. Commonwealth*, 275 Va. 144, 148, 654 S.E.2d 584, 586 (2008).

“[C]ircumstantial evidence is competent and is entitled to as much weight as direct evidence provided that the circumstantial evidence is sufficiently convincing to exclude every reasonable hypothesis except that of guilt.” *Dowden v. Commonwealth*, 260 Va. 459, 468, 536 S.E.2d 437, 441 (2000); *see also Rogers v. Commonwealth*, 242 Va. 307, 319, 410 S.E.2d 621, 628 (1991) (“[A]ll necessary circumstances must be consistent with guilt, must be inconsistent with innocence and [must] exclude every reasonable hypothesis of innocence.”).

Here, the Commonwealth had to produce evidence demonstrating beyond a reasonable doubt that Carter knew the cocaine and firearm were in the glove compartment, and that those items were subject to his dominion and control. It failed to do so. The only circumstantial evidence that would support that finding is Carter’s proximity to the glove compartment in which the items were found. That proximity is not sufficient. *See Bolden*, 275 Va. at 148, 654 S.E.2d

at 586 (holding that “the Commonwealth does not meet its burden of proof simply by showing the defendant’s proximity to the firearm”); Code § 18.2-250 (“[O]wnership or occupancy of premises or vehicle upon or in which a controlled substance was found shall not create a presumption that such person either knowingly or intentionally possessed such controlled substance.”).

Even viewing the evidence in the light most favorable to the Commonwealth, it established only that one man was driving his girlfriend’s rented vehicle while under the influence of alcohol; that there was a firearm and cocaine in the closed, opaque glovebox of that rented vehicle; that Carter was a passenger in that vehicle and seated closest to the glovebox; and that another passenger possessed a large sum of cash. These are not sufficient facts or circumstances to draw the legal conclusion that Carter was aware of the presence and character of the firearm or cocaine, or that either was subject to his dominion and control.

The circuit court’s holding rested on an inference of concerted action among Roy, Carter and Williams to justify the inference that they all knew of the presence and nature of the firearm and cocaine. The circuit court reasoned that someone in the vehicle must have known about the cocaine and firearm, and therefore inferred that they all did. This inference was without evidentiary support. *See generally Payne v. Graves*, 32 Va. (5 Leigh) 561, 572 (1834) (rejecting a conclusion reached by the “process of assuming a first position, and then piling inference upon inference”).

Moreover, the Court of Appeals subsequently held that the evidence was insufficient to establish conspiracy. Absent a conspiracy, it does not matter if *someone* in the vehicle knew about the contraband; the Commonwealth had to prove that *Carter* knew. *Cf. Barber v. Commonwealth*, 5 Va. App. 172, 178, 360 S.E.2d 888, 891 (1987) (“When a conspiracy has been

proven, ‘the acts and declarations of any of the conspirators, in furtherance of the object of the conspiracy, are admissible evidence against each and all of them.’”) (quoting *Sands v. Commonwealth*, 62 Va. (21 Gratt.) 871, 895 (1872)). It did not.

III.

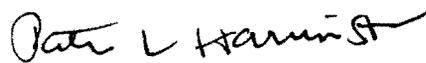
The evidence was insufficient to establish that Carter had constructive possession of the firearm and cocaine. Therefore, the circuit court was plainly wrong in finding him guilty of the instant charges, and the Court of Appeals erred in affirming those convictions.

Accordingly, we reverse the judgment of the Court of Appeals affirming Carter’s convictions of possessing with the intent to distribute cocaine in violation of Code § 18.2-248, possessing a firearm while possessing with intent to distribute cocaine in violation of Code § 18.2-308.4, and possession of a firearm by a convicted felon in violation of Code § 18.2-308.2, vacate Carter’s convictions on those charges, and dismiss the indictments against him.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Prince George County.

A Copy,

Teste:

A handwritten signature in black ink, appearing to read "Peter L. Hammit". The signature is written in a cursive style with a prominent initial "P" and a long, sweeping underline.

Clerk