No. 0822228 SMALLWOOD

VIRGINIA:

In the Court of Appeals of Virginia on Thursday *the* 16th *day of* October, 2008.

William Scott Smallwood, Appellant,

against Record No. 1070-08-2
Circuit Court No. CR07000057-00

Commonwealth of Virginia, Appellee.

From the Circuit Court of Cumberland County

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. and II. Appellant contends the evidence is insufficient to support his conviction for possession of a firearm by a convicted felon.

"On appeal, 'we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.'" Archer v. Commonwealth, 26 Va. App. 1, 11, 492 S.E.2d 826, 831 (1997) (quoting Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987)).

So viewed, the evidence proved that on July 27, 2007, appellant was stopped at a checking detail by Deputy Frankie Lampkin. He was driving a car owned by Crystal Barnett, who sat in the front passenger seat. When Lampkin learned appellant's license had been suspended, he instructed appellant to pull to the side of the road. At that time, the police observed a firearm in plain view in the car's center console between the front seats. Appellant admitted he was aware the gun was in the car. Barnett testified the gun was hers and that appellant did not handle it.

Appellant asserts the Commonwealth failed to demonstrate the weapon was "subject to his dominion and control." Specifically, he argues that he "could not have exercised dominion and control over the gun when the gun was under the dominion and control of Ms. Barnett at all times."

To obtain a conviction for possession of a firearm by one previously convicted of a felony, the Commonwealth must establish both that appellant possessed a firearm and that he had previously been convicted of a felony. Code § 18.2-308.2.

> A conviction for the unlawful possession of a firearm can be supported exclusively by evidence of constructive possession; evidence of actual possession is not necessary. "To establish constructive possession of the firearm by [the] defendant, 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 firearm and that the firearm was subject to his dominion and control."

Bolden v. Commonwealth, 275 Va. 144, 148, 654 S.E.2d 584, 586 (2008) (quoting Rawls v. Commonwealth, 272 Va. 334, 349, 634 S.E.2d 697, 705 (2006)) (citations omitted).

The possibility that Barnett owned and possessed the firearm herself does not, by itself, represent a theory of innocence, since "'possession need not always be exclusive. The defendant may share it with one or more.'" Blake v. Commonwealth, 15 Va. App. 706, 708, 427 S.E.2d 219, 221 (1993) (citations and internal quotation marks omitted).

Appellant admitted he was aware of the character and presence of the firearm. It was located in his immediate reach beside the driver's seat in the center console. Although Barnett may have owned the gun, it was still subject to appellant's dominion and control by virtue of its proximity to him and his knowledge of its presence. The Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was guilty of possession of a firearm by a convicted felon.

III. Appellant also argues the "trial court erred in determining that [his] prohibition from possessing a firearm overrode Ms. Barnett's Second Amendment right to possess a firearm."

At no point, however, did appellant make before the trial court the argument he makes on appeal. "The Court of Appeals will not consider an argument on appeal which was not presented to the trial court." Ohree v. Commonwealth, 26 Va. App. 299, 308, 494 S.E.2d 484, 488 (1998). See Rule 5A:18. Accordingly, Rule 5A:18 bars our consideration of this question on appeal.

> Although Rule 5A:18 allows exceptions for good cause or to meet the ends of justice, appellant does not argue that we should invoke these exceptions. See e.g., Redman v. Commonwealth, 25 Va. App. 215, 221, 487 S.E.2d 269, 272 (1997) ("In order to avail oneself of the exception, a *defendant must affirmatively show* that a miscarriage of justice has occurred, not that a miscarriage might have occurred." (emphasis added)). We will not consider, *sua sponte*, a "miscarriage of justice" argument under Rule 5A:18.

Edwards v. Commonwealth, 41 Va. App. 752, 761, 589 S.E.2d 444, 448 (2003) (*en banc*).

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The trial court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Jason Moore, Esquire, is counsel of record for appellant in this matter.

Costs due the Commonwealth
by appellant in Court of
Appeals of Virginia:

Attorney's fee $400.00 plus costs and expenses

A Copy,
Teste:

Cynthia L. McCoy, Clerk

By: Marty K.P. King

Deputy Clerk