

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D35295
C/kmb

_____AD3d_____

Argued - May 3, 2012

ANITA R. FLORIO, J.P.
RUTH C. BALKIN
CHERYL E. CHAMBERS
JEFFREY A. COHEN, JJ.

2008-06311

DECISION & ORDER

The People, etc., respondent,
v Damian Gardner, appellant.

(Ind. No. 11100/06)

Lynn W. L. Fahey, New York, N.Y. (Erica Horwitz of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Ellen C. Abbot, and Jessica L. Zellner of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Knopf, J.), rendered June 30, 2008, convicting him of criminal possession of a controlled substance in the seventh degree, upon a jury verdict, and imposing sentence. By decision and order on motion of this Court dated March 26, 2010, the People's motion to dismiss the appeal was granted and the appeal was dismissed. By opinion and order of the Court of Appeals dated October 25, 2011, the decision and order on motion of this Court dated March 26, 2010, was reversed and the matter was remitted to this Court for consideration of the merits of the appeal (*see People v Ventura*, 17 NY3d 920).

ORDERED that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient to establish beyond a reasonable doubt the defendant's guilt of the crime of criminal possession of a controlled substance in the seventh degree. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see CPL 470.15[5]; People v Danielson*, 9 NY3d 342), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor

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(see *People v Mateo*, 2 NY3d 383, 410, *cert denied* 542 US 946; *People v Bleakley*, 69 NY2d 490, 495). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (see *People v Romero*, 7 NY3d 633). Although the defendant was not in actual possession of the subject cocaine, the testimony established that he had constructive possession of the cocaine (see *People v Ortiz*, 61 AD3d 779, 780; *People v Coleman*, 5 AD3d 980, 980-981; *People v Bailey*, 295 AD2d 632, 633).

FLORIO, J.P., BALKIN, CHAMBERS and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court