¶STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KURT EDWARD YUERGENS,

Defendant-Appellant.

UNPUBLISHED
June 24, 1997

No. 190961
Recorder's Court
LC No. 94-008877-FH

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

Defendant was charged with one count of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and one count of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Following a jury trial, defendant was acquitted on the former charge but convicted on the latter. As a result, defendant was sentenced to seven to twenty years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant argues on appeal that the trial court erred when it denied his motion for directed verdict which was brought at the close of the prosecution's proofs and then renewed after defendant's case-in-chief and following a brief rebuttal by the prosecution. We disagree.

In determining whether the prosecution has introduced sufficient evidence to avoid a directed verdict, this Court must consider all of the evidence presented by the prosecution up to the time the motion is made, view the evidence in the light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

To support a conviction for possession with intent to deliver cocaine of 50 grams or more but less than 225 grams, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine was in a mixture which weighed more than 50 grams but less than 225 grams, (3) that defendant was not authorized to possess the substance

and, (4) that the defendant knowingly possessed the cocaine with the intent to deliver. *People v Acosta*, 153 Mich App 504, 511; 396 NW2d 463 (1986); MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant argues that there was insufficient evidence to support a finding that he had *possession* of the cocaine found in the trunk of a car owned by his girl friend. We disagree.

A person need not have actual physical possession of a controlled substance to be guilty of possessing it. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Possession may be either actual or constructive. *Id.* "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 521. The essential question is whether the defendant had dominion or control over the controlled substance. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). In *Konrad*, the Supreme Court, relying upon the reasoning of Judge Posner, explained:

> In the foremost discussion of what is necessary to have dominion or control over drugs, Judge Posner explained that a defendant "need not have them literally in his hands or on premises that he occupies but he must have the right (not the legal right, but the recognized authority in his criminal milieu) to possess them, as the owner of a safe deposit box has legal possession of the contents even though the bank has actual custody." [*Id.* at 271.]

Finally, possession with intent to deliver can be established through circumstantial evidence and reasonable inferences arising from that evidence. *Wolfe, supra* at 526.

In this case, there was sufficient evidence presented by the prosecution for the trier of fact to conclude that defendant had possession of the cocaine found in the trunk of the Probe. Defendant's fingerprint was on the bag containing the contraband. Although it was his girl friend's car, there was testimony that defendant was seen operating the vehicle. A trained narcotics dog indicated the presence of cocaine on the carpet in the home which defendant shared with his girl friend. Similarly, the currency found on defendant at the time of his arrest emanated the scent of narcotics. There was a box of baggies in a bedroom of defendant's apartment. In addition, drug ledgers were found on defendant as well as in his apartment. Much of this evidence is indicative of the intent to deliver, but it is also sufficient to establish a nexus between defendant and the cocaine found in the Probe. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that defendant had dominion or control, i.e., possession, of the cocaine. Thus, the trial court did not err in denying defendant's motion for directed verdict brought at the close of the prosecution's case-in-chief.

Similarly, the trial court did not err in denying defendant's renewed motion for a directed verdict which was brought at the conclusion of all the proofs. In fact, testimony from one of defendant's witnesses actually corroborated defendant's use of the Probe where the drugs were found. The trial court did not err in denying defendant's renewed motion for a directed verdict at the close of all the proofs.

Defendant argues that the only evidence that tied him to the cocaine in the Probe was a mere fingerprint on the paper bag in which the cocaine was found. Defendant then, relying upon the opinion

in *People v Harris*, 358 Mich 646; 101 NW2d 242 (1960), contends that a mere fingerprint, particularly if it cannot be shown that the fingerprint was placed on the bag at the time it was being used as a cocaine container, is insufficient evidence to support a conviction. First, contrary to defendant's representations, the fingerprint was not the only evidence creating the nexus. As illustrated above, there was additional evidence from which the jury could infer possession. Secondly, the opinion in *Harris*, is factually distinguishable. In *Harris*, the only evidence connecting the defendant to the contraband was a fingerprint and the prosecution admitted during oral argument before the Supreme Court that this was insufficient to support a conviction on possession. *Id.* at 647. Moreover, in *Harris*, there is no indication from the opinion that the defendant was even at the location where the drugs were found. Thus, defendant's reliance upon the opinion in *Harris* is misplaced. The trial court did not err in denying defendant's motions for directed verdict.

Next, defendant argues that the trial court erred when it determined that he lacked standing to challenge the search of the Probe that yielded over two hundred grams of cocaine. We disagree. This Court will not reverse a denial or a grant of a motion to suppress evidence unless the trial court's decision is clearly erroneous. *People v Armendarez*,188 Mich App 61, 66; 468 NW2d 893 (1991). Therefore, the trial court's decision will be affirmed unless, upon review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

The Fourth Amendment guarantees the right of persons to be secure against unreasonable searches and seizures. US Const, AM IV; Const 1963, art 1, § 1; *People v Lombardo*, 216 Mich 500, 504; 549 NW2d 596 (1996). However, a person must have standing to challenge the search. *People v Smith*, 420 Mich 1, 24; 360 NW2d 841 (1984). Standing to challenge the search is not automatic. *Id.* The test is whether the defendant had a reasonable expectation of privacy in the object or area of the search. *Id.* at 21. In determining whether a person has a legitimate expectation of privacy so as to confer standing to challenge the search, a two-part inquiry is employed. *Lombardo*, *supra* at 504. First, a defendant must demonstrate, under the totality of the circumstances, that there existed a legitimate personal expectation of privacy in the area or object searched. *Id.* Second, the individual's expectation must be one that society accepts as reasonable. *Id.* at 504-505. Whether the expectation exists, both subjectively and objectively, depends on all the circumstances surrounding the intrusion. *Smith*, *supra* at 27-28. The defendant bears the burden of proving standing as a result of a personal expectation of privacy. *Lombardo*, *supra* at 505.

Defendant has failed to establish a legitimate and personal expectation of privacy in his girl friend's Probe, that society accepts as reasonable. During the suppression hearing, defendant presented the testimony of his girl friend. She testified that she and defendant had been living together for approximately eight months, that the Probe was purchased in her name and that her grandmother made the car payments. She further testified that the Probe came with two sets of keys, she had one, defendant had the other. When asked if defendant had her "permission to use the car at any point in time," defendant's girl friend responded in the affirmative. Defendant's girl friend admitted telling the police that "the Probe in the parking lot was [hers] but that [defendant] was allowed to drive it." In addition to the foregoing testimony, on cross-examination, defendant's girl friend testified that defendant did not "drive [the car] a lot; whenever he felt like it," that he was not driving the Probe on the day of

his arrest, that there was another car that defendant drove and that the Probe was "mainly [her] car." The Probe was seized by the relevant law enforcement agency; however, defendant's girl friend successfully petitioned for the return of the vehicle.

Based upon the foregoing evidence, we conclude that defendant did not have a legitimate expectation of privacy because he did not use the car on a frequent or routine basis. By analogy, this Court's opinion in *People v Dalton*, 155 Mich App 591; 400 NW2d 689 (1986), is helpful. In *Dalton*, the defendant allegedly assaulted his wife then left the marital home and went to his sister's house. *Id.* at 593-594. Ultimately, the police forced their way into the sister's home and arrested the defendant. *Id*. at 595. The defendant contested the legality of his arrest, arguing that he was improperly arrested in a third party's home without a search warrant. *Id.* at 595. This Court found that the defendant lacked standing to challenge his seizure because he lacked a legitimate expectation of privacy in his sister's home. *Id.* at 596. The Court noted that "defendant had not stayed there on a regular basis any time that week, nor any time after the night of the offense on a regular basis." *Id.* at 597. In this case, defendant had not used the car on the day of the search nor did he use it very often. Indeed, with respect to the narcotics related activities defendant engaged in while under police surveillance, defendant was not operating the Probe, but rather a Mustang and a Lumina. As the prosecution points out, it is likely that defendant put the cocaine in the Probe because he did not have an obvious connection with the vehicle. Defendant's use of the Probe appeared to be sporadic at best.

If a vehicle is repeatedly used by a family member, standing may be established. See, e.g., *State v Johnson*, 598 SW2d 123 (Mo, 1980); *State v Morrill*, 197 Conn 507; 498 A2d 76 (1985); *People v Johnson*, 114 Ill 2d 170; 499 NE2d 1355 (1986). In *Johnson*, the Illinois court concluded that the defendant lacked standing because he could not prove his continuous use of, and right of access to, the family car. However, in this case, not only was defendant not related to the owner of the car, he could not establish any continuous use of the vehicle. Upon a review of the record, this Court is not left with a definite and firm conviction that a mistake was made by the trial court. Therefore, this Court will not reverse the trial court's denial of defendant's motion to suppress for lack of standing.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.