

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 197705

Muskegon Circuit Court

ROBERT WALLACE,

LC No. 96-139288

Defendant-Appellant.

Before: Neff, P.J., and Sawyer and Murphy, JJ.

NEFF, P.J., (concurring in part and dissenting in part).

I concur in the majority opinion to the extent that it affirms defendant's conviction of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). However, I respectfully dissent from the affirmance of defendant's conviction of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), because I find the facts of this case strikingly similar to those of *People v Wolfe*, 440 Mich 508, 511-512; 489 NW2d 89 (1992).

In reversing the felony-firearm conviction in *Wolfe*, our Supreme Court cited these facts:

The police officers found a shotgun on the living room floor of the apartment. Except for the presence of defendant Wolfe in the apartment, there was no evidence that he had any role in obtaining the gun or making it available during the commission of the underlying felony. . . . Likewise, there was no evidence that Wolfe attempted to use the gun, or even to reach for it, when the police entered the apartment. We conclude that Wolfe's presence in the apartment alone is insufficient proof of possession of a firearm during the commission of a felony. [*Id.* at 527.]

Because the facts of *Wolfe* are indistinguishable from those in this case, I would reverse defendant's felony-firearm conviction.

/s/ Janet T. Neff