STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN RAYMOND BIBBS,

Defendant-Appellant.

UNPUBLISHED
April 30, 1999

No. 203822
Macomb Circuit Court
LC No. 96-000771 FH

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted following a jury trial 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), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). The trial court sentenced defendant to terms of two years' imprisonment for felony-firearm, one to ten years' imprisonment for the cocaine possession, one to five years' imprisonment for being a felon in possession of a firearm, and six months in jail for possession of marijuana. Defendant appeals as of right. We affirm the convictions and sentences, but remand for correction of the presentence investigation report and the judgment of sentence.

Defendant first argues that there was insufficient evidence that he possessed the illegal drugs or the pistol that the police discovered while executing a search warrant, or that he intended to deliver the cocaine, to support his convictions. When reviewing the sufficiency of evidence in a criminal case, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proved beyond a reasonable doubt. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Possession of drugs may be actual (on the physical person) or constructive (not on the person but within the person's dominion or control), and may be exclusive (only one possessor) or joint (more than one person in actual or constructive possession). *Id.* at 515. "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). "[A] person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748, modified 441 Mich 1201 (1992). However, "constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 521.

Evidence that a defendant exercised control over premises where drugs were found can support an inference of constructive possession. *Id.* at 522. Defendant's protestations to the contrary, we hold that his jury could reasonably have concluded that he resided at the apartment where the evidence was recovered. The evidence of record provides many indications to that effect: (1) Defendant, among others, received mail there; (2) defendant gave the apartment's address as his own when he was arrested; (3) defendant was found alone there at the time of the raid; (4) according to one officer, defendant claimed ownership of the dog that lived there; (5) defendant's personal papers and photographs were found in a bedroom apparently used for storage; (6) defendant was seen in front of the apartment at least fifty times by an officer who routinely drove by. Further, defendant's attempt to identify another location as his place of residence seems incredulous, in that he was unable to provide a complete and consistent address, or even reliably identify the municipality in which it was purportedly located.

From defendant's residency at the apartment, the jury could reasonably have inferred that he slept in the only bedroom that showed signs of occupancy, and that he made normal use of the kitchen, which was where the drugs were discovered. Intent to deliver may be inferred from minimal circumstantial evidence including quantity, packaging, and the presence of facilitating equipment. *Fetterley*, *supra* at 517-518. See also *Wolfe*, 440 Mich at 524. From the quantity of the cocaine found, which was twenty to thirty times the typical sales unit, and the presence of the electronic digital scale, which could be used to divide the supplies of drugs into retail quantities, the jury could have reasonably concluded that the cocaine was intended for sale. Evidence that defendant resided at, and made normal use of, the apartment is good evidence to rebut any suggestion that defendant had no knowledge concerning criminal commercial activity taking place therein. From all of this, the jury could have reasonably concluded that defendant was not only aware that cocaine and marijuana were present in the apartment, but that they were his and that he intended to sell the cocaine. That the prosecution failed to produce evidence precluding joint ownership or participation in illicit drug activities by others has no bearing on the propriety of the jury's conclusion that defendant was responsible for both possession and intent to deliver. See *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984) (the prosecution need only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defense may produce; the prosecution need not disprove every reasonable theory of innocence).

Constructive possession of a firearm, for purposes of the felony-firearm statute, requires that the defendant be aware of, and have ready access to, a firearm during the commission of another, non-excluded felony. *People v Mitchell*, 456 Mich 693, 697-698; 575 NW2d 283 (1998); *People v Williams (After Remand)*, 198 Mich App 537, 540-541; 499 NW2d 404 (1993). The "readily

accessible" test requires greater immediacy of proximity or availability than the "dominion and control" test applicable to drugs. *People v Williams*, 212 Mich App 607, 609-610; 538 NW2d 89 (1995).

In this case, just as defendant's constructive possession of drugs could be inferred from his residency at and use of the apartment where the drugs were found, constructive possession of the firearm in question may be inferred from its discovery in an unlocked night stand in the bedroom that defendant used. The circumstances under which the gun was found suggest that in the moments just before execution of the search warrant, and while the drugs were in defendant's constructive possession, defendant was aware of, and had ready access to, that weapon. Thus, evidence of defendant's constructive possession of that weapon was sufficient for purposes of the felony-firearm conviction as well as the felon-in-possession conviction.

Defendant next argues that his conviction for being a felon in possession of a firearm should be overturned because the statute in question violates his right under Const 1963, art 1, § 6, to keep and bear arms. However, that a right is guaranteed in our state constitution does not mean that a citizen can never forfeit that right, or that the right cannot be subjected to some regulation. Our examination of defendant's arguments and the pertinent case law does not persuade us to express any disagreement with the recent holding of this Court that Const 1963, art 1, § 6 is subject to reasonable limitations under the state's police power, and that the felon-in-possession statute is a reasonable and constitutionally permissible exercise of that power. *People v Swint*, 225 Mich App 353; 572 NW2d 666 (1997).

Defendant finally argues that remand to the trial court is necessary because he objected to inaccuracies in his presentence investigation report. The trial court indicated that the subject matter of the alleged inaccuracies would have no influence on the sentence imposed, and the court directed the probation officer to amend the report. However, the report was never amended. One of the alleged inaccuracies, indicating that defendant was implicated in misconduct during an earlier incarceration, if untrue, could unfairly disadvantage defendant in the future. Under the circumstances, defendant is entitled to have the information in question either corrected or stricken. Remand to the trial court for that purpose is therefore appropriate. MCR 6.425(D)(3); *People v Paquette*, 214 Mich App 336, 346-347; 543 NW2d 342 (1995), citing *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993).

Finally, although neither party raises the issue, we note that the judgment of sentence gives no indication concerning whether and which of the four sentences are to be served consecutively as opposed to concurrently. However, review of the sentencing transcript, and of the statutes in question, indicates that the felony-firearm and felon-in-possession sentences are each to be served consecutively to all other sentences, the felony-firearm sentence to be served first; the cocaine and marijuana sentences are to be served concurrently to each other.

Affirmed with respect to defendant's convictions, but remanded for correction of the presentence report and judgment of sentence. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ William C. Whitbeck