

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UNPUBLISHED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.

HOLBROOK, JR., P.J. (concurring in part and dissenting in part).

While I agree with the majority’s resolution of defendant’s challenges to his convictions for possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d), and possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(iv); MSA 14.15(7401)(2)(a)(iv), I respectfully dissent from the majority’s conclusion that there was sufficient evidence adduced at trial to support defendant’s convictions for felony-firearm, MCL 750.227b; MSA 28.424(2), and felon in possession, MCL 750.224f; MSA 28.421(6).

In order to be convicted of felony-firearm and felon in possession, it must be proved that a defendant had possession of a firearm. MCL 750.227b; MSA 28.424(2); MCL 750.224f; MSA 28.421(6). While it is well established that possession may be actual or constructive for purposes of the felony-firearm statute, *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995), there is no case law that states that constructive possession also suffices for purposes of the felon in possession statute. I conclude that given the purpose of the statute, constructive possession is also sufficient with respect to the crime of felon in possession. See *Oregon v Wells*, 935 P2d 447, 449 (Or App, 1997).

“A defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him.” *Williams, supra*, 212 Mich App at 609. The majority concludes that defendant’s constructive possession of the firearm “may be inferred from its discovery in an unlocked night stand in the bedroom that defendant used.” *Ante* at _____. I believe that this conclusion violates the principle that an element of a crime may not be established by piling inference upon inference. See *People v Blume*, 443 Mich 476, 491-492; 505 NW2d 843 (1993); *People v Atley*, 392 Mich 298, 315; 220 NW2d 465 (1974); *People v Petro*, 342 Mich 299, 307-308; 70

NW2d 69 (1955); *People v McWilson*, 104 Mich App 550, 555; 305 NW2d 536 (1981). The chain of inferences followed by the majority includes the inference that “defendant was aware of, and had ready access to” the gun, which in turn is built upon the inference that the gun was “in the bedroom that defendant used.” Thus, the majority’s belief in the conclusion that defendant possessed the gun is impermissibly based on a belief in the truth of a series of mere presumptions.

Further, the principle that a “defendant’s access to the weapon should not be determined *solely* by reference to his arrest,” *People v Williams (After Remand)*, 198 Mich App, 537, 541; 499 NW2d 404 (1993) (emphasis added), does not mean that proximity at the time of arrest is irrelevant. In fact, consideration of a defendant’s ability to readily access a firearm at the time of his arrest has often been the central factor examined by this Court when evaluating the sufficiency of the evidence underlying that defendant’s felony-firearm conviction. See, e.g., *Williams, supra*, 212 Mich App at 610 (concluding that ready “accessibility does not exist where . . . a defendant is far away from the location of the firearm”).

In the case at hand, when the five police officers from the County of Macomb Enforcement Team (COMET) executing the search warrant entered the residence, they found defendant lying prone on the floor in a room located on the first floor of the residence. Defendant was immediately handcuffed and confined to the living room. The gun was then located at some distance inside a night stand in an upstairs bedroom by a Clinton Township Police officer who had been assigned to help the COMET team (the sixth police officer on the scene). I conclude that under these circumstances, there was insufficient evidence to support a finding that defendant was in constructive possession of the firearm. See *People v Myers*, 153 Mich App 124, 126; 395 NW2d 256 (1986).

Accordingly, while I would affirm defendant’s convictions for possession of marijuana and possession with intent to deliver less than fifty grams of cocaine, I would reverse defendant’s felony-firearm and felon in possession convictions.

/s/ Donald E. Holbrook, Jr.