STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED July 13, 1999
v	No. 213289 Wayne Circuit Court
SHAWN HUTCHINSON, Defendant-Appellee.	LC No. 94-001010

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

The Wayne County Prosecutor appeals by leave granted from the order of the trial court granting defendant's motion for a new trial. We reverse and remand.

Defendant was originally charged with possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). Following a bench trial, defendant was convicted of simple possession of 650 grams or more of cocaine, MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i). However, at the sentencing hearing, which took place more than nine months after trial due to several adjournments at defendant's request, the trial court sua sponte concluded that it had intended to convict defendant of *attempted* possession of 650 grams or more of cocaine, MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i); MCL 750.92; MSA 28.287. Accordingly, the trial court sentenced defendant to a term of forty to sixty months' imprisonment, as opposed to the mandatory sentence of life imprisonment for the completed offense.

The prosecution appealed, and this Court reversed and remanded for reinstatement of the original verdict of guilty of possession of 650 grams or more of cocaine and for resentencing. *People v Hutchinson*, 224 Mich App 603; 569 NW2d 858 (1997). Subsequently, defendant filed a motion for a new trial, which the trial court granted on the basis that a miscarriage of justice had occurred because (1) the court had intended to find defendant guilty of only attempted possession, and (2) this Court had relied on a factual inaccuracy in rendering its opinion ordering that the original verdict of simple possession be reinstated.[1]

MCR 6.431(B) provides:

> On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.[2]

The decision whether to grant or deny a motion for a new trial is entrusted to the discretion of the trial court, and that decision will not be disturbed on appeal absent an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998); *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979). This Court must examine the reasons given by the trial court for granting a new trial in order to determine if the court abused its discretion. *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). Where the reasons given by the trial court for granting the motion are inadequate or not legally recognized, the trial court abused its discretion. *Id*.

We find no miscarriage of justice resulted from the trial court's purported error in finding defendant guilty of possession, as opposed to attempted possession, of 650 grams or more of cocaine. As this Court has already noted, the trial judge "proffered no reasoned explanation which would justify a finding of guilty of only attempted possession, in the face of proofs establishing only actual possession, either on the basis of the facts originally found or any subsequent clarification." *Hutchinson, supra* at 606.

"An attempt consists of: '(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation.' " *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993), quoting 2 LaFave & Scott, Substantive Criminal Law, § 6.2, p 18. To find defendant guilty of attempted possession, the trial court would have had to find that defendant specifically intended to possess 650 grams or more of cocaine and that he had done some act in furtherance of that intent. Common sense dictates that one cannot intend to possess cocaine without knowledge of its existence. Thus, even a conviction for attempted possession would have required a finding that defendant knew there was cocaine present.

In this case, the undisputed facts at trial showed that defendant was the sole occupant and driver of the black 1989 Toyota in which the police found a bag containing 794.7 grams of pure cocaine along with clothing and a beeper belonging to defendant. There was also a bill for the beeper in defendant's name found in the glove box of the vehicle. The only factual dispute at trial was whether defendant knew that the cocaine was in the car at the time he was driving it.

The undisputed facts establish that defendant possessed the cocaine. Defendant, as the driver and sole occupant of the car, had dominion and control over the car and its contents, including the bag of cocaine found on the floor by the front passenger seat. Based on the undisputed facts at trial, we find that a verdict of guilty of a mere attempt, instead of actual possession, would be illogical. As we noted in the previous opinion in this matter, "trial judges in bench trials are both required to render logical verdicts and precluded from exercising a jury's capacity for lenity." *Hutchinson, supra* at 605-606.

We further find that no miscarriage of justice resulted from this Court's minor misstatement of fact. This Court's previous opinion in this matter erroneously stated that "a large quantity of cash" was found in defendant's possession. Contrary to defendant's assertion, and the apparent belief of the trial court, this Court did not "rely" on this factual inaccuracy in rendering its previous opinion ordering that defendant's original conviction be reinstated and that he be resentenced accordingly. Rather, this Court was merely parenthetically noting the anomaly in the court's verdict of guilty of simple possession, as opposed to possession with intent to deliver:

> Although persuaded beyond a reasonable doubt that defendant knew of the cocaine in the vehicle he was driving and was likewise knowingly exercising dominion and control over the cocaine, the court nonetheless found that defendant did not intend to deliver the more than 650 grams of cocaine found in his possession—together with a pager and a large quantity of cash—but then went on to 'find the defendant guilty of possession of 650 or more grams of a controlled substance, cocaine, contrary to statute.' [*Hutchinson, supra* at 605.]

This Court did not in any way rely on this factual inaccuracy in determining that the trial court had no authority to alter its "original reasoned verdict" of guilty of possession of cocaine. Moreover, the fact that only $13 was found in defendant's possession, as opposed to "a large quantity of cash," has absolutely no relevance with respect to his guilt or innocence of simple possession.

Defendant makes the additional argument that the trial court failed to make special findings regarding his knowledge whether there were drugs in the car. Defendant contends that this failure to comply with the court rules is an independent ground upon which a new trial may be granted, because it is a ground which would support appellate reversal of the conviction. MCR 2.517(A) provides, in relevant part:

> (1) In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.
>
> (2) Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.

In convicting defendant of possession of 650 grams or more of cocaine, the trial court specifically found that "the Defendant is a big liar." The court further found that there was insufficient proof of defendant's intent to deliver the cocaine, but that he was guilty of simple possession "contrary to the statute." Factual findings are adequate under MCR 2.517(A) if it is manifest that the court was aware of the factual issues and resolved them and it would not facilitate appellate review to require further explanation of the path the court followed in reaching the result. *People v Johnson* (*On Rehearing*), 208 Mich App 137, 141-142; 526 NW2d 617 (1994). The court's specific findings that defendant was a "liar" and that his testimony was "unbelievable" clearly demonstrate its awareness and resolution of the factual issue of whether defendant knew of the presence of cocaine in the vehicle. Therefore, we find that the trial court's findings were sufficient under MCR 2.517(A).

For these reasons, we find that the trial court abused its discretion in granting a new trial for reasons that were inadequate and not legally recognized. *Leonard*, *supra* at 580.

Finally, the prosecution requests that, on remand, defendant be resentenced before a different judge. This Court may direct that a different judge resentence defendant if it determines that this is warranted by the circumstances. *People v Coles*, 417 Mich 523, 536; 339 NW2d 440 (1983), overruled in part on other grounds in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Evans*, 156 Mich App 68, 71-72; 401 NW2d 312 (1986). In determining whether resentencing should occur before a different judge, this Court examines the following factors: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997); *Evans*, *supra* at 72.

We believe that it can reasonably be expected that the trial judge will have substantial difficulty in putting out of his mind his previously-expressed views regarding defendant's conviction and the mandatory nature of the applicable sentence. The trial judge has clearly and repeatedly indicated his reluctance to comply with the orders of this Court and to impose the legislatively mandated life sentence for possession of 650 grams or more of cocaine. Furthermore, reassignment for the purpose of resentencing would certainly not entail any waste or duplication. Therefore, we find that the circumstances warrant resentencing before a different judge upon remand.

Reversed and remanded for reinstatement of the original verdict of guilty of possession of 650 grams or more of cocaine and for resentencing before a different judge. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] In *Hutchinson*, *supra* at 605, this Court erroneously stated that "a large quantity of cash" had been found in defendant's possession at the time of his arrest. Only $13 in cash was actually found in his possession. However, as is evident from the text of this Court's opinion, the amount of cash possessed by defendant at the time of his arrest was not a factor critical to this Court's decision. *Id*.

[2] MCL 770.1; MSA 28.1098 provides that the trial court "may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs." However, MCR 6.431(B) substantially modifies the statutory standards for granting a new trial, and this Court has indicated that the court rule supersedes the statute. See *People v Bart (On Remand)*, 220 Mich App 1, 10-11; 558 NW2d 449 (1996); *People v McEwan*, 214 Mich App 690, 693 n 1; 543 NW2d 367 (1995).