

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELLIS S. EXTON,

Defendant-Appellant.

---

UNPUBLISHED  
October 15, 1999

No. 208826  
Recorder's Court  
LC No. 97-002040

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant was convicted in a bench trial of delivery of less than fifty grams of cocaine, possession with intent to deliver less than fifty grams of cocaine, and possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv).<sup>1</sup> He was sentenced to lifetime probation and appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to establish the convictions of possession of illegal narcotics with intent to deliver. We disagree. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

At trial, Officer Tyrone O'Neal testified that he went to the downstairs unit of a duplex and made an undercover purchase of six rocks of crack cocaine from defendant. At that time, other officers had the duplex under surveillance and were preparing to execute a search warrant. Once Officer O'Neal's purchase was complete, the downstairs unit of the duplex was raided. Officer Curtis Good entered the downstairs unit and observed defendant running from the dining room into the kitchen. Defendant pulled and locked a steel security door which led down a stairwell into a flooded basement. Officer Good observed defendant throw a plastic baggie into the water. Officer Good alerted Officer Myron Love of the location of the discarded baggie. Officer Love retrieved the baggie which contained 121 baggies of suspected cocaine and ten white coin envelopes of suspected heroin. The substances retrieved tested positive for the presence of 1.25 grams of cocaine and .26 grams of heroin. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find the essential

elements of possession with intent to deliver less than fifty grams of cocaine and possession with intent to deliver less than fifty grams of heroin were proved beyond a reasonable doubt. *Kelly, supra*.

Defendant does not actually challenge the commission of the elements of the crimes, but instead takes issue with the officers' identification of him as the perpetrator. Specifically, defendant testified that he was never in the downstairs portion of the duplex, his clothes and shoes were not wet although police officers testified that the perpetrator fled through a flooded basement, and the upstairs duplex, the area from which defendant was apprehended, could not be accessed from the flooded basement. The question of credibility was for the trier of fact. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). In the present case, the trial court concluded that the officers' testimony was credible and that defendant's testimony was not credible. This Court will not substitute its judgment for that of the trial court regarding matters of credibility. *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993).

Defendant next argues that the trial court abused its discretion in denying defendant's motion for a new trial based on newly discovered evidence. We disagree. This Court reviews a trial court's decision regarding a motion for a new trial for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). A motion for a new trial based on newly discovered evidence may be granted upon a showing that: (1) the evidence itself, not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) the evidence is such as to render a different result probable on retrial; and (4) the defendant could not with reasonable diligence have produced it at trial. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

In the present case, defendant presented an affidavit wherein he asserted that he tried to locate Christopher Bullock prior to trial and contacted Bullock's family, but was unable to find Bullock prior to trial. Bullock also provided an affidavit wherein he admitted to selling drugs to Officer O'Neal, and he was staying at his girlfriend's home at the time of defendant's trial, but his family was unaware of his location. Defendant was aware of this information prior to trial. Therefore, this information cannot be classified as newly discovered. *People v Lewis*, 31 Mich App 433, 437; 188 NW2d 107 (1971). Furthermore, it is questionable whether defendant could not have produced, with reasonable diligence, this evidence at trial. Bullock was an eyewitness to the criminal transactions with which defendant was convicted because he allegedly committed the crimes. Bullock's testimony would have aided in developing a full disclosure of the facts surrounding the alleged commission of the charged offenses. Accordingly, Bullock was a res gestae witness, *People v Baskin*, 145 Mich App 526, 530-531; 378 NW2d 535 (1985), and the prosecuting attorney was obligated to provide assistance in locating Bullock upon written request from defendant. MCL 767.40a(5); MSA 28.980(1); *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). However, there is no evidence that defendant sought the prosecution's assistance in locating Bullock. Accordingly, the trial court did not abuse its discretion in denying

defendant's motion for a new trial where there was no showing that the evidence was newly discovered.  
*Lester, supra.*

Affirmed.

/s/ Helene N. White

/s/ Harold Hood

/s/ Kathleen Jansen

<sup>1</sup> Defendant was also charged with, but acquitted of, possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii).