

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS RALPH BUCKALLEW,

Defendant-Appellant.

UNPUBLISHED

December 28, 1999

No. 214251

Livingston Circuit Court

LC No. 97-010241-FH

Before: Doctoroff, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of imprisonment of one to four years for the marijuana conviction and two years for the felony-firearm conviction. We affirm.

I. Facts¹

A package shipped via United Parcel Service (UPS) was seized by police and discovered to contain marijuana. The package was addressed to defendant's home. An undercover police officer, dressed as a UPS employee, delivered the package to defendant's home. Defendant, who was at the back porch of the house, told the officer that he was expecting a package. Defendant then accepted the package from the officer and took it into the house through the back door.

Police officers waited until defendant left the house and then arrested him after he had driven down the road a short distance.² Defendant was handcuffed, placed in the back seat of a police car, and returned to the house. While defendant was in the police car, officers executed a warrant to search the house. The officers found the package that had been delivered, as well as other quantities of marijuana. In addition, a loaded nine-millimeter handgun was discovered in the top drawer of a dresser that was located in the laundry room. The laundry room was immediately adjacent to the back porch area, where defendant had accepted the package from the undercover officer.

Defendant was bound over for trial, and the circuit court denied his motion to quash the felony-firearm count of the information.

II. Standard of Review

Defendant argues that the circuit court erred when it denied his motion to quash the felony-firearm count of the information. Generally, we review the circuit court's decision on a motion to quash a felony information de novo to determine whether the district court abused its discretion in binding the defendant over for trial. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). The district court must bind a defendant over for trial if, at the end of the preliminary examination, it concludes that probable cause exists to believe that a felony has been committed and that the defendant committed it. *Id.* at 655. However, this case does not involve a determination of whether probable cause existed, but rather, whether defendant's conduct fell within the felony-firearm statute, MCL 750.227b; MSA 28.424(2). The decision whether conduct falls within the scope of a criminal statute is a question of law that we review de novo. *People v Grayer*, 235 Mich App 737, 739; 599 NW2d 527 (1999).

III. Actual and Constructive Possession

MCL 750.227b; MSA 28.424(2) prohibits the possession of a firearm during the commission or attempted commission of a felony. Defendant argues that he was not in possession of the firearm because he was handcuffed and seated in the back of a police car when the police searched his home and found the firearm.

For purposes of this statute, possession of a firearm may be either actual or constructive. *People v Ben Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995). A defendant has constructive possession of a firearm when it is readily accessible to the defendant. *Id.*; *People v Samuel Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993). The firearm must be readily accessible to the defendant *at the time the underlying felony is committed*; in other words, the time of the defendant's arrest is not the determinative factor. *Samuel Williams, supra* at 541; *People v Becoats*, 181 Mich App 722, 726; 449 NW2d 687 (1989).

IV. Application

In this case, the underlying felony to support the felony-firearm conviction was possession with intent to deliver marijuana. Defendant acknowledged that he was expecting a package, and he accepted the package containing marijuana from an undercover police officer. This exchange took place at the back porch of defendant's home. During the search of the house, a loaded handgun was discovered in a room immediately adjacent to the rear porch area. Therefore, a firearm was readily accessible to defendant while he was accepting a package containing drugs from an undercover police officer. At the time that defendant possessed the marijuana with the intent to deliver it, he was in constructive possession of a firearm. Therefore, his conduct fell within the scope of the felony-firearm statute, and the circuit court did not err in denying his motion to quash.

Defendant relies on *Ben Williams, supra* at 610, where this Court held that the defendant was not in constructive possession of a firearm when the defendant was away from the location of the firearm. In that case, police officers searched the defendant's home pursuant to a warrant while the defendant was away from home, and the officers found cocaine in a closet and a firearm in a dresser next to the closet. *Id.* at 608. The panel determined that the firearm was not readily accessible to the defendant because he was not at home. *Id.* at 610. However, no evidence was presented that the defendant had access to the firearm during the commission of the underlying felony of cocaine possession. The panel did not specify whether it was focusing on the accessibility of the firearm at the time of the commission of the underlying felony or at the time of the search. Because the time of the arrest is not dispositive, *Samuel Williams, supra* at 541, we conclude that the time of the search is also not dispositive. The relevant inquiry is whether the firearm was accessible to the defendant at the time of the commission of the underlying felony.

In this case, as opposed to *Ben Williams*, the prosecutor presented evidence that while defendant committed the underlying felony, a loaded firearm was readily accessible to him in the adjacent room. The purpose behind punishing the mere possession of a firearm during a felony is partly to reduce the possibility of harm to victims, passersby, and police officers. *Ben Williams, supra* at 609, quoting *People v Elowe*, 85 Mich App 744, 748-749; 272 NW2d 596 (1978). If the criminal activity goes awry, a defendant may be tempted to use the firearm. *Id.* This purpose behind the felony-firearm statute was met in this case, where a firearm was accessible to defendant while he was accepting drugs from an undercover police officer. Accordingly, the circuit court did not err in denying defendant's motion to quash.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder

¹ Because defendant claims that the circuit court should have quashed the felony-firearm count, we will only examine testimony presented at the preliminary examination.

² The actual distance defendant had driven before being stopped and arrested is not clear from the testimony presented at the preliminary examination. Defendant claims in his brief on appeal that it was several blocks, and the prosecutor does not claim otherwise.