

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLTON DARNELL TOWNS,

Defendant-Appellant.

UNPUBLISHED

July 7, 2000

No. 216726

Ottawa Circuit Court

LC No. 98-021952-FH

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

JANSEN, P.J. (dissenting).

I respectfully dissent because I do not believe that there was sufficient evidence presented by the prosecutor linking defendant to the cocaine. Consequently, I would vacate defendant's conviction based on insufficiency of the evidence.

The evidence presented at trial shows that the incident occurred during the late evening hours of April 15, 1998, and the early morning hours of April 16, 1998, in the township of Holland. Defendant, who had been living in Detroit and Flint, was visiting in Holland with relatives. Specifically, defendant's cousin is Eric Millender, who was one of the tenants at a duplex in Holland where defendant would stay. Millender and his fiancée, Mary Dearen, both rented the duplex and lived there with their young son. Defendant stated that he was in Holland at that time because he drove another cousin, Terence Lawler, back to his home in Holland and they had arrived in Holland during the afternoon of April 15, 1998.

The prosecution's case was based largely on the testimony of a confidential informant, Kenneth (Kenny) Dearen, who is Mary Dearen's brother. Mr. Dearen testified that he became a confidential informant as a result of potential charges against him for driving with a suspended license and a charge of possession of cocaine regarding a passenger in his car. Apparently, Mr. Dearen had been stopped by police while he was driving when these charges arose. However, in exchange for acting as a confidential informant in a controlled drug buy, the charges against Mr. Dearen and his friend were dismissed. Defendant and Mr. Dearen had known each other for about 1 ½ years before this incident and there was evidence that they did not like each other.

Mr. Dearen was given \$250 in prerecorded money by Holland Police Officer Joel Serna to purchase one-eighth of an ounce of cocaine. At approximately 10:00 p.m., Mr. Dearen went to his sister's duplex to buy the cocaine from defendant. According to Mr. Dearen, Ms. Dearen, defendant, and Jennifer Marie Sandie¹ (Mr. Dearen's ex-girlfriend) were at the duplex when he arrived. Defendant and Mr. Dearen then went to the basement. Mr. Dearen testified that they talked about "a deal." Mr. Dearen told defendant that he wanted an "eight ball," which is one-eighth (in two one-sixteenth packages) of an ounce of cocaine. Defendant gave two packages of powdered cocaine to Mr. Dearen, which he believed that defendant got from a coat pocket hanging on a clothes rack behind Mr. Dearen. Mr. Dearen, in turn, gave defendant \$250 for the cocaine. Although Mr. Dearen testified that he believed that the clothes in the basement belonged to defendant, Ms. Dearen testified that the clothing in the basement belonged to her and Eric Millender.

Mr. Dearen further testified that there were two packages of cocaine on a pool table in the basement. Specifically, Mr. Dearen testified:

[Defendant] had two baggies, normal sandwich baggies, that was containing, one contained powdered coke that was already bagged up for sale, which were in sixteenths. The other one contained rock, which was bagged up and ready for sale.

Mr. Dearen testified that he was in the duplex for about fifteen minutes, left the duplex after completing the drug buy, met officer Serna after the buy, and turned over the cocaine to him.

Mary Dearen testified that she and Mr. Millender had been renting the duplex for about two to three months and had known defendant for about 1 ½ years. She knew defendant by the name of Carlos Washington. Ms. Dearen testified that she worked from 6:00 a.m. until 3:00 p.m. on the day of April 15th. Ms. Dearen testified that the doors to her home were unlocked and that defendant had been in her home before; however, she was aware that defendant would be staying at her home that day. After getting off work, Ms. Dearen met with her mother to go to yard sales. She then arrived home at about 7:30 p.m. and saw defendant with his friend, Sarah, and they "were on their way out the door." This was the only time that Ms. Dearen saw defendant that day and she later went to bed sometime between 9:30 p.m. and 10:00 p.m. Ms. Dearen corroborated that Ms. Sandie arrived at her house shortly before 9:00 p.m., but she also testified that she did not recall seeing Mr. Dearen at all that evening.

Mr. Millender did not testify at trial. Ms. Dearen testified that Mr. Millender worked from 2:45 p.m. until 12:45 a.m., but that Mr. Millender had not seen defendant because of his work schedule. Ms. Dearen also stated that after she went to bed, she was awakened at 1:30 a.m. or 2:00 a.m. by a gun to her head. This apparently occurred during the police raid of the house. Ms. Dearen stated that she did not know who owned the cocaine that was found in the basement and that she did not put it there.

¹ Ms. Sandie did not testify at trial.

Officer Serna testified that he gave the prerecorded money to Mr. Dearen to purchase an eight-ball of cocaine. Officer Serna was involved in the surveillance of the house, which continued after the controlled buy. Officer Serna observed three vehicles stop at the house for a few minutes after the controlled buy. Holland Police Officer John DeYoung, who was also involved in the surveillance, similarly testified that he saw three or four vehicles stop at the house that night. At about 11:00 p.m., one of the vehicles that had been at the house was stopped by the police and the occupant, Terence Lawler, was arrested after some cocaine was found in his vehicle.

The police ended their surveillance and obtained a search warrant of the premises, which was executed at about 1:30 a.m. According to officer Serna, there was a period of about 1 ½ hours between the end of the surveillance of the house and the subsequent execution of the search warrant. The police officers testified that they announced their presence, and when they tried to enter, they were met with resistance at the door. The police had to use a battering ram to open the door, and defendant was on the other side of the door when they finally were able to open it. Officer DeYoung grabbed defendant and took him to the basement. There were two women² in the basement when the officers executed the search warrant. Officer DeYoung searched defendant and found \$957 in cash on him. Of this amount, defendant did have the \$250 in prerecorded money included in the \$957. No weapons or drugs were found on defendant. However, defendant did give a false name (Carlos Washington) and false birth date to the police.

A police dog found two bags of cocaine under the basement stairs. According to officer DeYoung, the first bag of cocaine was placed in a heat seal because the dog punctured the bag when it was found. (This bag was the prosecution's exhibit 5). A second bag of cocaine was also found under the basement stairs. Inside of the second bag was several small baggies with the corners cut off and white residue was seen inside the smaller baggies. (This second bag of cocaine was the prosecution's exhibit 6). The police further found small baggies in the heat ducts in the basement. This first bag of cocaine (exhibit 5) was found to weigh 123.1 grams and was analyzed as being fifty-two percent cocaine. The two smaller amounts of cocaine given to officer Serna by Mr. Dearen were analyzed as being seventy-six percent cocaine.³ The parties also stipulated that no fingerprints were found on exhibit 6 and that a palm print found on the bag did not match defendant's palm print.

Defendant testified on his own behalf. He stated that he had brought Mr. Lawler to Holland on April 15th from Flint and that he spent the day mainly with his friend Sarah. Defendant testified that Mr.

² The two women in the basement were apparently defendant's friend Sarah Suzowski, the same woman that Ms. Dearen had seen defendant with earlier in the evening, and another woman only identified as Selena. Neither of these two women testified at trial despite the fact that they were the only people in the basement when the police executed the search warrant.

³ The Michigan State Police technician who analyzed the cocaine testified that the margin of error for the larger bag of cocaine was plus or minus five percent and for the two small amounts of cocaine was plus or minus seven percent.

Dearen showed up at the house at about 10:00 p.m. and that Mr. Lawler arrived shortly thereafter. Mr. Lawler and Mr. Dearen went to the basement and defendant was unaware of what happened in the basement. Mr. Dearen and Mr. Lawler did not leave at the same time; however, defendant left the house with Sarah at about 10:15 p.m. or 10:30 p.m. Defendant returned to the house between 12:00 a.m. and 12:30 a.m. Defendant stated that he was talking with Mr. Millender when the police arrived. Defendant admitted that he shut the door on the police and attempted to keep the police out; however, he denied selling any cocaine to Mr. Dearen and denied knowing that there was any cocaine in the basement. With regard to the cash, he testified that half of the cash belonged to Mr. Lawler, who had given him about \$550 before leaving the house.

The issue in this case is whether the prosecution has proven beyond a reasonable doubt that the bag of cocaine found under the basement stairs (exhibit 5) was in defendant's possession. I note that the prosecution did not charge defendant with the delivery of approximately three grams of cocaine to Mr. Dearen, and that it did not charge defendant with possession of the second bag of cocaine found under the basement stairs (exhibit 6). The first bag of cocaine found under the basement stairs was not broken down into smaller packages and weighed 123.1 grams. Based on Mr. Dearen's testimony, this bag of cocaine was *not* one of the bags that he saw on the pool table during the drug transaction he alleged to have with defendant. Mr. Dearen clearly testified that he saw two "normal sandwich baggies" on the pool table. One baggie contained powdered cocaine that was bagged up for sale (that is, it contained smaller baggies in one-sixteenth ounces) and that the second baggie was rock cocaine that was also bagged up for sale. At no time did Mr. Dearen testify that he saw a large bag of cocaine that was not broken down into smaller quantities, such as exhibit 5.

As our Supreme Court has held, a person need not have actual physical possession of a controlled substance to be guilty of possessing it. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995); *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992). Proof of constructive possession is enough to sustain a conviction of possession with intent to deliver a controlled substance. *Konrad*, *supra*, p 271. Further, possession may be joint, with more than one person actually or constructively possessing a controlled substance. *Id.*

"The essential question is whether the defendant had dominion or control over the controlled substance." *Id.* In order to establish constructive possession, a link between the defendant and the controlled substance must be shown. *Wolfe*, *supra*, p 520. A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. *Id.* Rather, some additional connection between the defendant and the controlled substance must be shown. *Id.* "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.*, p 521.

In the present case, taken in a light most favorable to the prosecution, there is no evidence linking defendant to the first bag of cocaine found under the basement stairs. The evidence establishes that defendant did sell about three grams of cocaine to Mr. Dearen and that there were two bags of cocaine on the pool table when the sale was made. However, Mr. Dearen's description of those two bags clearly does not fit the description of the bag (exhibit 5) found under the stairs. Moreover, defendant did not reside at the premises and most certainly did not have exclusive control over the

premises. In fact, there were many people in and out of the duplex that day and Ms. Dearen testified that the doors to the duplex were unlocked. There were five adults in the duplex at the time of the execution of the search warrant and significantly, there were two women (Sarah Suzowski and Selena) in the basement at the time of the search. Neither of these women testified at trial. Defendant was not found with any drugs on his person when he was searched, although he did have a significant amount of cash, including the prerecorded money given to Mr. Dearen to purchase the cocaine. Thus, while Mr. Dearen's testimony establishes that defendant was involved in the sale of cocaine, there was no evidence linking defendant with the bag of cocaine under the stairs. I again note that the cocaine given to Mr. Dearen was analyzed as being seventy-six percent cocaine, while the larger bag was analyzed as being fifty-two percent cocaine and was not broken down into smaller packages, as described by Mr. Dearen.

In addition to the numerous people identified as being in the duplex over the relevant time period, Mr. Lawler was stopped by police after being at the duplex and was found with cocaine in his vehicle. In fact, the evidence was that Mr. Lawler attempted to swallow some of the cocaine when he was stopped by the police and had to be hospitalized as a result. Yet, Mr. Lawler did not testify at trial and there was little testimony regarding his involvement, or at least exonerating him from ownership of the cocaine, especially since he actually lived in Holland and was also Mr. Millender's cousin. Further, although Mr. Dearen was a key witness, he himself admitted to being in the house for only fifteen minutes, and his testimony that defendant's clothing was in the basement was refuted by Ms. Dearen, the resident of the duplex, who stated that the clothing belonged to her and Mr. Millender. In addition to the fact that two women were found in the basement by police who did not offer any testimony at trial, the police had ended surveillance of the house for about 1 ½ hours before executing the search warrant.

Thus, although there was testimony establishing that defendant did sell cocaine and had control over other unknown quantities of cocaine, the prosecution did not charge defendant with possession with intent to deliver that specifically identified cocaine. Indeed, in attempting to tie defendant with the cocaine under the basement stairs, the prosecutor argued twice in the following manner:

Remember what Mr. Dearen had to say about the actual transaction itself? He said that Mr. Towns set two quantities of cocaine on the pool table. One that was a bag broken into small baggies, like the one he ended up buying. And another one that wasn't broken down, fitting the description of this [exhibit 5]. Set on the pool table by Mr. Towns.

* * *

[D]on't forget what Kenny Dearen said. He said there were actually two quantities on the pool table. One that was already broken down into small bags. And another one that was not, that was in more of a solid form. Like the exhibit we have here in Court.

As has been noted, Mr. Dearen did *not* testify in this manner. He testified that there were two packages of cocaine on the pool table and that both were bagged up for sale. The difference was that

one bag was in powdered form while the other was in rock form. Thus, the prosecutor's statements in this regard were totally unsupported by the evidence. Prosecutors may not make statements of fact to the jury that are unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Schutte*, ___ Mich App ___; ___ NW2d ___ (Docket no. 213259, issued May 2, 2000), slip op, p 4. Thus, the prosecutor's own attempt to link defendant to the cocaine found under the basement stairs was not supported by the evidence that the prosecutor purported to rely on.

Accordingly, I conclude that there was insufficient evidence linking defendant to the cocaine found by the police under the basement stairs. Any number of people had access to, and were in fact, in the basement of a duplex in which defendant did not reside. The packages described by Mr. Dearen did not, contrary to the prosecutor's argument, fit the description of the bag found under the basement stairs. There being no evidence establishing a sufficient connection between defendant and the specific bag of cocaine found under the basement stairs to support an inference that defendant exercised dominion or control over the cocaine, I would vacate defendant's conviction.

/s/ Kathleen Jansen