

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY LEE PERRY,

Defendant-Appellant.

UNPUBLISHED

October 3, 2000

No. 219680

Washtenaw Circuit Court

LC No. 98-009807 FH

Before: Talbot, P.J., and Hood and Gage, JJ.

PER CURIAM.

After a bench trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced defendant to 5 to 10 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant was charged with the instant crime after a police drug investigation team raided an Ypsilanti residence. The police obtained a search warrant for the residence following a controlled drug purchase there that involved two police officers and a confidential informant.

Defendant first contends that the trial court erred in refusing to either order revelation of the informant's identity or hold an in camera hearing regarding the informant's potential testimony. We review for an abuse of discretion the trial court's decision whether to require disclosure of a confidential informant's identity. *People v Poindexter*, 90 Mich App 599, 608; 282 NW2d 411 (1979).

"[W]here the government invokes the ['informant's] privilege['] in the face of a defense request for disclosure, and where the accused is able to demonstrate a possible need for the informant's testimony, the trial judge should require production of the informant and conduct a hearing in chambers" to determine whether he can provide any testimony helpful to the defense. *People v Underwood*, 447 Mich 695, 706; 526 NW2d 903 (1994), quoting *People v Stander*, 73 Mich App 617; 251 NW2d 258 (1976). Where, however, a defendant requests production of an informant "sole[ly] . . . to challenge the truth of the information supplied to the police and used to obtain the search warrant," the court need not order the informant's production. *People v Johnson*, 83 Mich App 1, 11; 268 NW2d 259 (1978). In this case, defendant's allegations with respect to the informant, specifically that "no

informant existed, and thus, no [controlled drug purchase] took place,” amount only to a challenge of the truth of the information supplied to the police and used to obtain the search warrant. *Id.* Defendant did not overcome the search warrant affidavit’s presumption of validity by substantiating his assertions concerning the falsity of the affiant officer’s claim that a drug transaction occurred. *Poindexter, supra* at 604-605. We therefore conclude that the trial court acted within its discretion in denying defendant’s request for the informant’s production. *Poindexter, supra* at 608-609, n 7, 610; *Johnson, supra*.

Defendant next argues that the trial court erred in finding that probable cause supported the search warrant absent the informant’s testimony. Probable cause to issue a search warrant exists where there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular location. *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). A reviewing court should ask whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *People v Head*, 211 Mich App 205, 208-209; 535 NW2d 563 (1995).

While defendant argues that “[t]he affidavit in support of the search warrant was almost exclusively based on allegations by the alleged confidential informant,” with respect to the controlled drug purchase the affidavit contains only the informant’s alleged statement that while inside 407 Washtenaw the informant purchased cocaine. The affidavit’s other allegations, and the officers’ testimony at the suppression hearing, established that (1) the police watched the informant approach and enter 407 Washtenaw, after providing him cash and ensuring that he did not possess any controlled substances, (2) an officer watched defendant answer the informant’s knock and watched the informant step inside the door for less than one minute, and (3) the officers observed the informant walk away from 407 Washtenaw, then found in his possession suspected cocaine and no cash. The trial court found probable cause supporting the warrant based on the officers’ observations, “[r]egardless of what the confidential informant may say or not say.” We find that the officers’ observations warranted a reasonably cautious individual’s conclusion that a substantial basis existed for inferring a fair probability that 407 Washtenaw contained cocaine and other drug paraphernalia. *Kazmierczak, supra*; *Head, supra*.

Defendant also asserts that insufficient evidence supported a finding that he possessed cocaine. In reviewing the sufficiency of the evidence in an appeal from a bench trial, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Lewis*, 178 Mich App 464, 467; 444 NW2d 194 (1989).

The possession element of the charged crime may be established by showing either actual or constructive possession. *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999). “[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband.” *Id.* at 35, quoting *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). Possession may be established by circumstantial evidence and reasonable inferences arising from that evidence. *Wolfe, supra* at 521, 526. During the October 29-30, 1997 raid of 407 Washtenaw, the police discovered in the southeast bedroom approximately 75 to 100 rocks of crack cocaine. Three witnesses, who also

resided at 407 Washtenaw at the time of the raid, testified that in October 1997 defendant and his then-girlfriend resided in the southeast bedroom, and that each witness observed defendant sell cocaine from or within 407 Washtenaw. We conclude that this evidence supported the trial court's finding beyond a reasonable doubt that a sufficient nexus existed between defendant and the crack cocaine. *Griffin, supra*.

Defendant lastly avers that the trial court improperly allowed the admission of bad acts evidence. Defendant's failure to timely object to the trial court's admission of this evidence waives our review of this issue unless the evidence's admission represents a plain error that affected the outcome of the case. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The proffered bad acts evidence was (i) relevant to establishing defendant's intent to deliver the crack cocaine, MRE 401, 402, 404(b)(1),¹ and (ii) not substantially more prejudicial than probative, in light of other evidence and inferences tending to establish defendant's intent to deliver (i.e., the large quantity of crack rocks discovered), MRE 403. Because we find no error, we will not further consider this issue.

Affirmed.

/s/ Michael J. Talbot

/s/ Harold Hood

/s/ Hilda R. Gage

¹ Contrary to defendant's argument on appeal, the record reflects that the prosecutor did provide notice of his intent to utilize testimony regarding defendant's prior bad acts. MRE 404(b)(2).