

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DARYL D. DAVIS,

Defendant-Appellant.

UNPUBLISHED

August 2, 2002

No. 232672

Wayne Circuit Court

LC No. 00-008649

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carrying a concealed weapon (CCW), MCL 750.227. The trial court sentenced defendant to a term of nine months to five years' imprisonment. Defendant appeals as of right. We reverse.

Defendant contends that the evidence presented at trial was insufficient to support his CCW conviction. In reviewing a challenge to the sufficiency of the evidence, we consider the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

The elements of CCW are that (1) the defendant carried a pistol, and (2) the pistol was concealed on or about his person. MCL 750.227(2); *People v Davenport*, 89 Mich App 678, 682; 282 NW2d 179 (1979) (opinion of Holbrook, Jr., J.). Defendant challenges both the carrying and concealment elements of the offense.

Although there was sufficient evidence that defendant constructively possessed, and thus carried, the gun,¹ *People v Adams*, 173 Mich App 60, 62-63; 433 NW2d 333 (1988), we find the

¹ We note that contrary to defendant's argument on appeal, his mere presence was not the only evidence connecting him to the gun. After the police approached defendant to investigate his involvement in a suspected drug transaction, defendant fled into the basement of a house. The police pursued him into the basement, where they found him arising from a futon. The police also found, in close proximity to defendant and at least six feet away from several other individuals in the basement, a gun on the futon.

evidence insufficient to establish concealment. Concealment is an essential element of the CCW offense. *People v Jackson*, 43 Mich App 569, 571; 204 NW2d 367 (1972). Merely carrying a pistol in one's hands without concealment does not violate the statute. *People v Kincade*, 61 Mich App 498, 502-503; 233 NW2d 54 (1975); *Jackson, supra*. “[C]oncealment occurs when the pistol is not discernible by the ordinary observation of persons casually observing the person carrying it.” *Kincade, supra* at 504.

The prosecution presented no direct evidence of concealment, and the testimony does not provide a basis from which a trier of fact reasonably could infer that defendant concealed the gun, which police officers discovered sitting near defendant on a futon. Despite the prosecution's suggestion to the contrary in its closing argument, the record simply contains no specific testimony that defendant concealed the gun underneath a cushion or elsewhere, or that defendant discarded the gun or withdrew the gun from observation so as to hide it. *Kincade, supra* at 504.

While the prosecution argues that an inference of concealment arose from the fact that none of the officers noticed defendant carrying a gun when they chased him into the house, we emphasize that none of the police witnesses testified that they did not notice defendant carrying a weapon. The officers simply offered no testimony whatsoever regarding their abilities to observe whether defendant had a weapon. Furthermore, we note the unreasonableness of inferring defendant's concealment of a gun solely from the fact that an officer observed a codefendant remove a sawed off shotgun from under his coat and cast it aside.

Because the available testimony does not support a reasonable inference that the gun discovered near defendant on the futon was “not discernible by the ordinary observation of persons casually observing” defendant, we conclude that insufficient evidence established defendant's commission of CCW. *Kincade, supra* at 504.

Reversed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder