STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 10, 2004
v	No. 244065 Wayne Circuit Court
ALTON MIMS, Defendant-Appellant.	LC No. 01-007426

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession with intent to deliver fifty grams or more, but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v), and possession with intent to deliver diazepam, MCL 333.7401(2)(c). The trial court sentenced defendant to ten to twenty years' imprisonment for the possession with intent to deliver fifty grams or more, but less than 225 grams of cocaine conviction, to be served consecutively to concurrent terms of one to four years' imprisonment for the possession of less than twenty-five grams of heroin conviction and one to four years' imprisonment for the possession with intent to deliver diazepam conviction. We affirm.

I. Facts and Procedure

During surveillance of 20287 Strasburg in Detroit, police observed defendant engaged in two suspected drug transactions outside of the house. When backup officers arrived to prevent defendant from engaging in another transaction, defendant dropped a bag of cocaine and got in a car with Parker, who had just arrived on the scene. The police arrested defendant and detained Parker for questioning.[1] Parker indicated that she lived at the Strasburg house[2] and signed a written consent form for police to search the house. In Parker's bedroom, police found two black

[1] Inside the car, police found a strainer that had cocaine residue on it and a drip bowl used to make cocaine. On defendant's person, police found keys to the Strasburg house and $267.

[2] Gary Story, Parker's cousin, also lived at the Strasburg house and was present when police searched it.

plates holding a large amount of cocaine and a small amount of heroin, 130 valium pills, and drug-mixing paraphernalia. Defendant's fingerprints were on the plate holding the cocaine.

Before trial, defendant moved to suppress the evidence found at the Strasburg house on the basis that the police had searched the house without a warrant and Parker's consent to search the house was not given voluntarily. At the evidentiary hearing regarding defendant's motion, the prosecution asserted that defendant did not have standing to challenge the search. The trial court agreed, concluding that defendant did not have a reasonable expectation of privacy in the Strasburg house and therefore did not have standing to challenge the search of the house. Accordingly, the trial court denied defendant's motion to suppress. Because the trial court denied defendant's motion to suppress, the evidence found at the Strasburg house was admitted at trial.

II. Analysis

A. Motion to Suppress

Defendant argues that the trial court erred in denying his motion to suppress, because he had a legitimate expectation of privacy in the Strasburg house and therefore had standing to challenge the search and seizure of the evidence. A trial court's factual findings regarding a motion to suppress evidence will not be reversed unless they are clearly erroneous. *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001); *People v Harrington*, 259 Mich App 703, 705-706; ___ NW2d ___ (2003). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001), quoting *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). " 'To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo.' " *Harrington, supra* at 706, quoting *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). The trial court's ultimate decision on a motion to suppress is reviewed de novo. *Frohriep, supra* at 702.

"Both the Michigan and United States Constitutions prohibit unreasonable searches and seizures. Const 1963, art 1, § 11; US Const, Am IV." *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999). In determining whether the search and seizure infringed defendant's Fourth Amendment rights, we must first ascertain whether defendant has standing to challenge the search. *Id.* at 561. This determination is made by considering the totality of the circumstances to discern whether defendant had an expectation of privacy in the object of the search and seizure and whether that expectation is one that society is prepared to recognize as reasonable. *People v Smith*, 420 Mich 1, 28; 360 NW2d 841 (1984); *People v Parker*, 230 Mich App 337, 340; 584 NW2d 336 (1998). In *United States v Haydel*, 649 F2d 1152, 1155 (CA 5, 1981), corrected 664 F2d 84 (CA 5, 1981), the Court of Appeals for the Fifth Circuit listed pertinent factors to consider when determining whether a defendant has a legitimate expectation of privacy:

> [W]hether the defendant has a possessory interest in the thing seized or the place searched, whether he has the right to exclude others from that place, whether he has exhibited a subjective expectation that it would remain free from

> governmental invasion, whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises.

The defendant has the burden of establishing standing to challenge the search. *Powell, supra* at 561.

Here, the evidence shows that defendant officially maintained his residence at his aunt's house on Klinger street; defendant's driver's license listed the Klinger address, his mail was sent to the Klinger address, and his parole officer had the Klinger address as his residence. Defendant never told his parole officer that he moved to a different address, despite the fact that he had to get his parole officer's permission to change residences. He also never changed his address with the Secretary of State or the post office. When defendant's parole officer called defendant's aunt, she confirmed that defendant lived at the Klinger house. Additionally, defendant gave one of the interviewing officers the Klinger address as his residence. On the other hand, defendant and his aunt testified that, after July 2000, defendant regularly stayed the night at the Strasburg house. They testified that defendant had taken most of his belongings, along with his bedroom set, television, and clothes, from the Klinger house to the Strasburg house. Defendant testified that he had a bedroom in the house with a door that he kept locked. Defendant claimed that he entertained women at the house and that he expected privacy when he did so. Defendant also testified that he paid Parker rent for staying at the house. Although defendant's mail was addressed to him at the Klinger house, police found some of defendant's mail at the Strasburg house. It is also undisputed that defendant appeared to have had unfettered access to the Strasburg house; he had keys to the house and police observed him enter the house on at least five different occasions without knocking or asking permission. Furthermore, the Strasburg house belonged to Parker, who was defendant's cousin and had a preexisting familial relationship with him.

The trial court concluded that defendant did not have a reasonable expectation of privacy in the Strasburg house for several reasons: (1) defendant's driver's license listed the Klinger address; (2) defendant's mail was addressed to the Klinger house; (3) defendant's aunt verified that defendant lived at the Klinger address; (4) defendant told one of the interviewing officers that he lived at the Klinger address; and (5) defendant did not tell his parole officer that he had changed residences. In ruling on defendant's motion, the trial court expressly concluded that defendant's testimony lacked credibility. The trial court believed defendant's aunt's testimony that defendant was living at the Klinger house when he was arrested, but disbelieved her testimony that he was also living at the Strasburg house at that time and had taken most of his belongings there. " 'The trial judge's resolution of a factual issue is entitled to deference.' " *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999), quoting *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). "We overstep our review function if we substitute our judgment for that of the trial court and make independent findings." *Frohriep, supra* at 702.

Given that the trial court did not believe defendant's testimony and most of defendant's aunt's testimony, the only substantial evidence supporting defendant's argument that had a reasonable expectation of privacy in the Strasburg house was as follows: (1) defendant had keys to the Strasburg house and appeared to have unfettered access, (2) pieces of defendant's mail (addressed to him at the Klinger house) were found at the Strasburg house, and (3) the Strasburg house belonged to defendant's cousin. Considering the trial court's credibility findings and other findings of fact, there is no credible evidence that defendant moved to the Strasburg house or had

ever even spent the night there. Additionally, there is no credible evidence that he had any belongings at the Strasburg house, paid rent, or had spent a substantial amount of time there. With these facts in mind, we conclude that the trial court did not err in determining that defendant did not have a reasonable expectation of privacy in the Strasburg house.

We are not persuaded by defendant's claim that the trial court improperly focused on defendant's failure to notify his parole officer, the Secretary of State, and the post office of his change of address, rather than whether defendant had a legitimate expectation of privacy in the house. Despite the trial court's focus on whether the Strasburg house was defendant's official residence, the trial court made it clear that it was aware of the correct standard and was applying this standard. For example, the trial court stated, "What the Court is concerned with is the official residence of the Defendant *de facto, not de jure*." (Emphasis added.) This shows that the court was not concerned with the legality of where defendant lived, but where he actually in fact lived. The trial court specifically articulated that its focus was on whether defendant had an expectation of privacy that society would recognize as reasonable. The trial court also made clear that it was aware that a person could have two residences and have a reasonable expectation of privacy in both of them. Furthermore, the trial court may have focused on defendant's official residence with the Secretary of State, the post office, and the Parole Board because it disbelieved defendant's and his aunt's testimony, and there was little other evidence to rely on in making its findings. Therefore, although the trial court's opinion may have been excessively verbose, when the trial court's opinion is distilled to its essence, there is no doubt that the trial court employed the correct legal standard in determining that defendant did not have a reasonable expectation of privacy in the Strasburg house.

B. Sufficiency of the Evidence

Defendant argues that, because there was insufficient evidence that he possessed the narcotics, the evidence was insufficient to convict him beyond a reasonable doubt.

> In reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime. [*People v Akins*, ___ Mich App ___; ___ NW2d ___ (2003) (Docket No. 240359, issued December 9, 2003) (citations omitted).]

Defendant was convicted of possession with intent to deliver fifty grams or more, but less than 225 grams of cocaine, possession of less than twenty-five grams of heroin, and possession with intent to deliver diazepam. To be convicted of the charge of possession with intent to deliver a controlled substance, the defendant must have knowingly possessed the controlled substance, known that what he possessed was the controlled substance, and intended to deliver that substance to someone else. *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002).

> Actual physical possession is unnecessary for a conviction of possession with intent to deliver; constructive possession will suffice. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Constructive possession exists when the

> totality of the circumstances indicates a sufficient nexus between defendant and the contraband. *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992). Possession is attributed not only to those who physically possess the drugs, but also to those who control its disposition. *Konrad, supra* at 271-272**.** In addition, possession may be either joint or exclusive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). [*Johnson, supra* at 500.]

" 'It is well established that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown.' " *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002), quoting *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 478 (1992), amended 441 Mich 1201 (1992).

Defendant compares the present case with *People v Lewis*, 178 Mich App 464; 444 NW2d 194 (1989). In *Lewis, supra* at 468, this Court concluded that the prosecution failed to present sufficient evidence that the defendant possessed the cocaine found inside the house. This Court pointed out that there was no direct evidence connecting the defendant to the cocaine found inside the house. *Id.* at 468. The defendant's fingerprints were not found on the bags of cocaine. *Id.* Furthermore, the circumstantial evidence of the defendant's possession was insufficient because it only showed that the defendant had access to the inside of the house from which he and possibly others sold cocaine. *Id.* at 469.

The present case is distinguishable from *Lewis*. In the present case, in contrast to *Lewis*, there was direct evidence connecting defendant to the narcotics; defendant's fingerprints were found on the plate holding the large chunk of cocaine. In *Lewis, supra* at 469, this Court noted that "[a]nyone could have been inside the house during the short time that transpired between the sale to Watkins and the raid and placed the cocaine on the dining room table." In the present case, on the other hand, defendant was observed making two separate suspected narcotics transactions. The police searched the house after defendant was stopped from making a third suspected transaction. The only other person who had access to the narcotics during this time was Gary Story, who was in or near the house when police searched it. These facts distinguish the present case from *Lewis*.

Viewed in a light most favorable to the prosecution, we conclude that a rational trier of fact could find that the evidence proved beyond a reasonable doubt that defendant had constructive possession of the drugs found in the Strasburg house. The evidence showed that defendant had unfettered access to the house and to Parker's bedroom, where the narcotics were found. While Parker was not home, police observed defendant engaging in two what could be inferred to be drug transactions in front of the house. Each time, defendant came out of the house with a small object and exchanged it for money. When police arrived on the scene, defendant dropped a package of cocaine. Furthermore, defendant's fingerprints were found on the plate in the house holding the cocaine. This evidence is sufficient for a juror to infer that defendant controlled the disposition of the narcotics. *Johnson, supra* at 500. It is true that the narcotics were found in Parker's bedroom and that Parker owned the house, but possession may be either joint or exclusive. *Id.*

C. Sentencing

Defendant argues that the trial court erred in denying him credit for time served. We disagree. When defendant was arrested and jailed for the offenses in the present case, he was on parole for manslaughter and felony-firearm convictions. After his arrest for the offenses in the present case, defendant remained in jail until his conviction and sentencing, but the trial court did not give him credit for time served. Instead, the trial court told defendant that he was required to complete the sentences for his paroled convictions before he could begin to serve the sentences for the present convictions.

MCL 768.7a(2) provides:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

"[T]he 'remaining portion' clause of § 7a(2) requires the offender to serve at least the combined minimums of his sentences, plus whatever portion, between the minimum and the maximum, of the earlier sentence that the Parole Board may, because the parolee violated the terms of parole, require him to serve." *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 584; 548 NW2d 900 (1996).[3] Under MCL 768.7a(2), where a defendant receives a consecutive sentence for an offense committed while on parole for a prior offense, the defendant is not entitled to credit for time served against the subsequent offense. *People v Watts*, 186 Mich App 686, 687, 691; 464 NW2d 715 (1991); *People v Brown*, 186 Mich App 350, 359; 463 NW2d 491 (1990). Instead, the credit for time served before sentencing on the subsequent offense is to be applied to the remaining portion of the sentence for the paroled offense. *Watts, supra* at 687; *Brown, supra* at 359.

Defendant argues that *Watts* and *Brown* were wrongly decided. However, because both *Watts* and *Brown* were issued after November 1, 1990, we must follow the rule of law established by those cases. MCR 7.215(J)(1). We do not believe that *Watts* and *Brown* were wrongly decided and decline an invitation to revisit the issue.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra

[3] At the time the presentence investigation report (PSIR) was written, the Parole Board had not yet seen defendant to determine what portion of defendant's sentence for the prior convictions he was required to serve because of his parole violation.