

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMER ELIAS ALBAKAL,

Defendant-Appellant.

UNPUBLISHED

June 17, 2004

No. 247349

Macomb Circuit Court

LC No. 01-001406-FH

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession of marijuana, MCL 333.7403(2)(d), and maintaining a drug house, MCL 333.7405(1)(d). He was sentenced to two years' probation.¹ Defendant appeals as of right, and we affirm.

Prior to trial, defendant moved for specific performance of dismissal of the charges, alleging that he entered into a cooperative agreement with the prosecutor's office. Defendant purportedly agreed to arrange one hundred pounds of marijuana sales in exchange for dismissal of the charges. Defendant alleged that the money was to be provided by the Warren Police Department and federal authorities. It was further asserted that there was no time frame for performance, and complete performance became impossible when defendant's cooperation with authorities was revealed to individuals with whom defendant had arranged a purchase. Defendant alleged that the individuals with whom he arranged drug transactions would not be arrested. In support of the motion, the defense relied on the testimony of a retired prosecutor and defense counsel both of whom addressed the terms of the agreement,² the delay due to the death of a Warren police detective, defendant's cooperation, and the lack of fault attributed to the defense when additional purchases did not occur.

¹ Defendant was charged with the offense of possession with intent to deliver more than five, but less than forty-five kilograms of marijuana. MCL 333.7401(2)(d)(ii). Defendant was convicted of the lesser offense.

² The defense asserted that the prosecution refused to reduce the agreement to writing and indicated that they would act in good faith.

On the contrary, the prosecution asserted that the time frame for performance was not infinite, and defendant's arrest was publicized by members of his own family, thereby compromising his informant status. Moreover, Warren Police Officer Robert McCauley testified that defendant's status with his sources was compromised by his excessive contacts with them. Additionally, defendant was expressly advised that the police department could not allow the funds utilized in the drug buys to remain on the streets. Therefore, the participants in the drug sales would be arrested following the drug transactions. Officer McCauley testified that defendant was advised of the limits of police department resources and knew that the sellers involved in the drugs sales would be arrested. Officer McCauley opined that defendant stopped contacting the department to continue to arrange drug transactions. After a two-day evidentiary hearing, the lower court concluded that defendant failed to perform his part of the agreement, and this failure could not be attributed to the prosecutor or police. It was concluded that defendant was not given an unlimited time period to perform his portion of the agreement, and the preliminary examination was delayed on seven occasions during a reasonable nine-month period to allow defendant to complete the drug purchases.

At trial, police officers testified that a confidential informant made a controlled purchase of \$300 of marijuana at defendant's residence on April 20, 2000. Additionally, police surveillance of the home on April 20, 2000, revealed that several individuals drove to the home, entered the home for a short period, and returned to their vehicles within a short period of time. The next day, a search warrant was executed at the residence. During the search of the premises, approximately eighteen pounds of marijuana was discovered. Additionally, police recovered \$19,721 in cash from the home. Officers opined, based on their training and experience that the amount of marijuana and cash coupled with the surveillance from the day before indicated that defendant was engaged in the sale of drugs not merely the personal use of marijuana. Although defendant was not home at the time of the execution of the search warrant, there was evidence of his possession and control of the premises based on the clothing, mail, and driver's license found in the home. Defendant was convicted of the lesser offense of possession of marijuana and maintaining a drug house.

Defendant first alleges that the trial court erred in denying the motion to dismiss the charges based on specific performance when defendant complied with the terms of the cooperation agreement. We disagree. We review the trial court's factual findings regarding the existence and terms of a cooperation agreement under the clearly erroneous standard. *People v Hannold*, 217 Mich App 382, 388; 551 NW2d 710 (1996). The application of strict contract principles and theories peculiar to commercial transactions may not be appropriate in this context. *People v Jackson*, 192 Mich App 10, 15; 480 NW2d 283 (1991). Rather, review is based on the existence and terms of the agreement as well as whether the ends of justice are served by enforcing the terms of the agreement. *Id.* A defendant does not have any entitlement to specific performance of a cooperation agreement where he fails to meet the conditions precedent to the bargained exchange. *People v Walton*, 176 Mich App 821, 825-826; 440 NW2d 114 (1989). The assessment of credibility, when presented by two diametrically opposed versions of events, rests with the trier of fact. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). We will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Under the circumstances of this case, we cannot conclude that the trial court's denial of the motion to dismiss based on specific performance of the cooperation agreement was clearly erroneous. *Hannold, supra*. The cooperation agreement was never reduced to writing. Therefore, the issue involved the submission of two diametrically opposed versions of events that the trial court resolved in favor of the prosecution. *Lemmon, supra*. While the defense asserted that his performance was not given a specific time frame and that his performance was defeated through no fault of his own, the prosecution asserted that the agreement did not change based on the prosecutor and police officer handling the matter at any given time.³ The trial court implicitly rejected the testimony provided by the defense and found the testimony of the prosecution witnesses to be credible. We cannot conclude that the findings were clearly erroneous under the circumstances. *Hannold, supra; Wolfe, supra*.

Defendant next alleges that the evidence was insufficient to support the convictions. We disagree. Our review of a challenge to the sufficiency of the evidence is de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When examining the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

With regard to the conviction for possession of marijuana, defendant contends that there was insufficient evidence of possession to support the conviction where he was found with "clean hands," and there was no evidence of control over the marijuana. A person need not have actual possession of a controlled substance to be convicted of a possession charge. *Wolfe, supra*. Possession may be actual or constructive, and constructive possession exists when the totality of the circumstances presents a sufficient nexus between a defendant and the contraband. *Id.* at 520-521. Constructive possession may be proven by circumstantial evidence and reasonable inferences drawn from the evidence. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient circumstantial evidence and reasonable inferences from which the jury could conclude that defendant possessed the marijuana found in the home. *Johnson, supra*. After the police received information, a confidential informant made a controlled purchase from the home where defendant resided. The next day, a large quantity of marijuana and cash were retrieved during the execution of a search warrant. Evidence of defendant's residence and use of the home was established through the mail, his clothing, and his expired driver's license. Although defendant offered his wife and another associate as the source of the marijuana, the resolution of that dispute was presented to and rejected by the jury. *Lemmon, supra*.

³ The handling of the case was allegedly hampered by the frequent change in prosecutors due to death, retirement, and change of command of the drug unit. Additionally, the police contact also varied due to a death, promotion, and change in handler.

Defendant also contends that the intent requirement to support the maintaining a drug house conviction was not supported with sufficient evidence. Intent may be inferred from all of the facts and circumstances. *People v Hardrick*, 258 Mich App 238, 246; 671 NW2d 548 (2003). Where there is credible evidence presented that both supports and negates the intent requirement, a factual question exists that is left for resolution by the jury. *People v Neal*, 201 Mich App 650, 655; 506 NW2d 618 (1993). Because of the difficulty of proving a defendant's state of mind, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Viewing the evidence in the light most favorable to the prosecution, *Johnson, supra*, we cannot conclude that the trier of fact's factual determination regarding the intent requirement was clearly erroneous.

Affirmed.

/s/ Richard Allen Griffin

/s/ Mark J. Cavanagh

/s/ Karen M. Fort Hood