

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOE ROMEO,

Defendant-Appellant.

UNPUBLISHED
February 13, 2007

No. 265384
Wayne Circuit Court
LC No. 05-002401-01

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). Defendant was sentenced to two years' probation. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in denying his motion to suppress, given the unlawful protective sweep of his home. We disagree.

A trial court's factual findings that are made in conjunction with a motion to suppress evidence are reviewed for clear error. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). But to the extent that the trial court's decision on the motion to suppress is based on issues of law, appellate review is de novo. *Id.*

Testimony at the evidentiary hearing revealed that Officers Zucchetto and Price went to defendant's home to arrest him on a warrant for possession with intent to deliver marijuana. Officer Zucchetto knocked on defendant's front door, but received no answer. He went to the side door and saw an individual peek his or her head into the kitchen and then disappear. A few minutes later, defendant came to the door and the officers placed him under arrest in the kitchen. Unbeknownst to the officers, the arrest warrant for defendant was issued in error. The warrant should have been issued instead for defendant's brother. The error was realized shortly after defendant's arrest, and the court subsequently dismissed the warrant.

Officer Zucchetto stayed with defendant in the kitchen while Officer Price looked around in other parts of defendant's house. Officer Price testified that he searched the home (1) in the event there was another person or persons in the home who would pose a danger to himself or Officer Zucchetto and (2) to determine whether there were any children, pets, running appliances, or burning candles left in the house that might pose a problem when left unattended

while defendant was in custody. While looking into one of the bedrooms, Officer Price observed marijuana in plain view. A search warrant for defendant's home was subsequently secured, and other officers arrived on the scene to execute the search warrant. The search revealed cocaine, a substantial amount of marijuana, and various drug paraphernalia. In a statement to police, defendant admitted that he knew there was marijuana in the house, but that it was merely a keepsake from the 1980s. With regard to the cocaine, defendant stated that it was from the 1980s and he does not smoke it. One of the officers testified that the drugs were packaged in such a way as to be consistent with a sale or with recreational use. The officer also testified that he was unable to determine how long the drugs had been on the premises. Defendant subsequently filed a motion to suppress the evidence, arguing that the protective sweep was unlawful because it failed to meet the standard set out in *Maryland v Buie*, 494 US 325, 334-336; 110 S Ct 1093; 108 L Ed 2d 276 (1990). The trial court denied his motion, concluding that the protective sweep was lawful and that the evidence found as a result of it need not be suppressed given the officer's reasonable belief that there might be others in defendant's house who could pose a danger to the officers.

Both the United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Bolduc*, 263 Mich App 430, 437; 688 NW2d 316 (2004). The search of a home is generally unreasonable absent a warrant issued on the basis of probable cause. *Buie, supra* at 331. However, "[t]he Fourth Amendment permits a properly limited protective sweep in connection with an in-home arrest if the police reasonably believe that the area in question harbors an individual who poses a danger to them or to others." *People v Beuschlein*, 245 Mich App 744, 757; 630 NW2d 921 (2001), citing *Buie, supra* at 337. The United States Supreme Court announced the following principles with regard to protective sweeps incident to the arrest of someone in a dwelling:

We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. . . .

We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises. [*Buie, supra* at 334-335.]

Furthermore, pursuant to the plain view doctrine, once police officers are lawfully in a position to view an item pursuant to a protective sweep, they may seize items if their incriminating character is immediately apparent. *Beuschlein, supra* at 758, citing *People v Champion*, 452 Mich 92, 101-102; 549 NW2d 849 (1996).

The case of *People v Shaw*, 188 Mich App 520; 470 NW2d 90 (1991), is instructive on the matter of protective sweeps. In *Shaw*, five officers went to the defendant's apartment to

execute an arrest warrant for the defendant on a charge of delivery of cocaine. Another person was involved in that drug transaction, but the police did not know where that other person was located. The officers approached the defendant's apartment with their weapons drawn and knocked. The defendant then answered the door and identified herself. The officers advised the defendant of their purpose, and she stepped back into her apartment. Upon request, the defendant allowed the officers to enter, and they conducted a protective sweep of the defendant's apartment. At that time, the officers did not know if anyone else was in the defendant's apartment. During the protective sweep of the apartment, the police observed an electronic scale with what they believed to be cocaine residue on it. After being asked for consent to search the apartment and told that police would otherwise procure a search warrant, the defendant gave the officers consent to search her apartment, and police discovered twelve bags of cocaine, which formed the basis of the charges for possession with intent to deliver cocaine. The trial court denied the defendant's motion to suppress, holding that it was reasonable for the officers to conduct a protective sweep given the crime for which the defendant was being arrested, as well as the dangerous nature of the narcotics business. *Shaw, supra* at 521-523. On review, this Court applied the *Buie* standard and affirmed. *Shaw, supra* at 524.

Likewise, in the instant case, the protective sweep was valid considering the circumstances. First, the officers went to defendant's home to execute an arrest warrant for defendant on a charge of possession with intent to deliver marijuana. As the trial court had noted in *Shaw*, trafficking narcotics is a dangerous crime. Officer Price testified that given his extensive experience conducting narcotic trafficking investigations, he has come to reasonably anticipate armed individuals on the scene. Although defendant indicated to the officers that his niece lived with him, but that there was no one in the house with him at the time, the officers could not be certain that this was the case. Officer Price testified that he wanted to conduct a brief walk through of the home in order to make certain that there was no one else there who might pose a danger. Second, and importantly, considering Officer Zucchetto's observance of someone peeking his or her head into the kitchen and then disappearing, along with the delay in defendant answering the door, the officers had reason to become suspicious and to do a protective sweep. The reasonable belief that there might be another individual on the premises justified at least a walk through the house to confirm that the officers were not in danger. Third, Officer Price testified that another reason he searched the house was to determine whether there were any children, pets, running appliances, or burning candles left in the house, which might pose a problem when left unattended while defendant was in custody. *Buie* only authorizes a protective sweep to uncover dangerous individuals on the premises. Given the other justifications here that are addressed and deemed proper in *Buie*, we need not resolve the propriety of a protective sweep solely to check for the presence of children, pets, burning candles, and the like.

In addition to arguing that the officers were not justified in believing that defendant's home harbored a dangerous individual, defendant contends that the protective sweep could not be conducted because it came after the arrest was made and after the time the officers could have safely departed the premises with defendant in tow. This Court has upheld a protective sweep that occurred after the defendant was handcuffed. *Beuschlein, supra* at 747. Moreover, the *Buie* Court stated, "We are quite sure . . . that the arresting officers are permitted . . . to take reasonable steps to ensure their safety *after, and while making*, the arrest. *Buie, supra* at 334 (emphasis added). Therefore, the fact that the protective sweep in the instant case was conducted

immediately after defendant was placed under arrest does not invalidate the sweep. The sweep was conducted within a reasonable departure time and protected the officers from possibly being exposed to someone shooting at them from the home as they returned to their vehicles. Because Officer Price was conducting a valid protective sweep of defendant's home, the observation of the drugs, which were in plain view in a bedroom, was valid under the plain view doctrine. *Beuschlein, supra* at 758. Thus, under the circumstances, the trial court did not err in denying defendant's motion to suppress.

Defendant's second argument on appeal is that there was insufficient evidence to support his conviction of possession with intent to deliver marijuana. We disagree.

When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court reviews the evidence in the light most favorable to the prosecutor and determines 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, 723; 597 NW2d 73 (1999).

To establish the offense of possession with intent to deliver less than five kilograms of marijuana, a prosecutor must prove beyond a reasonable doubt that: (1) the defendant knowingly possessed the controlled substance, (2) the defendant intended to deliver the controlled substance to someone else, (3) the substance possessed was marijuana and the defendant knew that it was, and (4) the marijuana was in a mixture that weighed less than five kilograms. *People v Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005). Actual delivery is not required to prove intent to deliver a controlled substance. *People v Gonzalez*, 256 Mich App 212, 226; 663 NW2d 499 (2003), disapproved in part on other grounds 469 Mich 967 (2003). An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Id.* Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence. *Id.*

In the instant case, defendant admitted to possessing the marijuana, therefore, the critical issue is whether he had the intent to deliver. As this Court indicated in *Williams*, an intent to deliver may be inferred from the amount and packaging of the controlled substance. *Williams, supra* at 422-423. The amount of drugs uncovered in defendant's home is significant. Officers testified at trial that the 28 grams worth of marijuana overran one of the bedrooms. Marijuana was found in a cigar box, glass jars, and various boxes strewn about the room. Some of the marijuana was wrapped in plastic and aluminum. Some was in glass burette-type objects and stuffed into jars. The amount, as well as the packaging, suggests an intent to deliver. Further, there was also various drug paraphernalia in the bedroom, including a scale, several marijuana pipes, and thousands of screens. According to defendant, he possessed the marijuana, but denied having the intent to deliver it. He indicated that he kept it solely as a keepsake from his past. The facts, however, paint a different picture. Factors such as the amount of marijuana found, its placement throughout the bedroom, its packaging, and the presence of a scale, several pipes, and thousands of screens point toward an inference of commercial intent. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Given the facts of this case that were presented to the trier of fact,

i.e., the trial judge, there was sufficient evidence for the court to find defendant guilty of possession with intent to deliver marijuana.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter