

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY LEE MOORE,

Defendant-Appellant.

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UNPUBLISHED

November 27, 2007

No. 271928

Wayne Circuit Court

LC No. 06-002943-01

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of third-degree fleeing and eluding a police officer, MCL 257.602a(3), and possession of a firearm by a felon (felon-in-possession), MCL 750.224f. Pursuant to MCL 769.10, defendant was sentenced as a second habitual offender to concurrent prison terms of 28 months to 7 ½ years. He appeals as of right. We affirm in part, reverse in part, and remand for resentencing.

As defendant was driving, a police officer attempted to stop his vehicle. Defendant's acquaintance, Jamaal Taylor, was riding in the passenger seat. The officer activated his overhead lights and siren, but defendant continued to drive through a residential neighborhood and failed to obey at least one stop sign. During the pursuit, the officer observed a dark object thrown from the passenger window of defendant's vehicle. Defendant thereafter stopped his vehicle. The police later found a loaded semiautomatic handgun in the area where the object had been thrown from the vehicle. No useable fingerprints were found on gun.

Taylor pleaded guilty to carrying a concealed weapon. At trial, Taylor testified that the gun belonged to him and that defendant was not aware of the gun. Taylor claimed that he threw the gun out the window during the police chase in such a way that defendant could not have seen it.

Defendant argues that there was insufficient evidence to support his conviction of felon-in-possession because there was no proof that he possessed the handgun in question. We agree.

An appellate court's review of the sufficiency of the evidence does not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v*

*Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id.* at 515.

Pursuant to MCL 750.224f(2), a person who has been convicted of a specified felony may not possess a firearm until that individual's rights to possess a firearm are restored under MCL 28.424, among other requirements. *People v Perkins*, 473 Mich 626, 629; 703 NW2d 448 (2005). Defendant does not dispute that he was ineligible to possess a firearm. Therefore, the sole matter at issue here is the element of possession.

Possession may be either actual or constructive. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). A defendant may have constructive possession of a firearm if the location of the weapon is known to the defendant and reasonably accessible to him. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

It is true that possession may be proven by circumstantial evidence and reasonable inferences drawn from the evidence. *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005). However, a defendant's mere presence in the same area where the firearm is found is insufficient to prove constructive possession. See *id.*

As defendant points out, the evidence showed that the gun was thrown from the passenger side of the car. Further, although both men were in the front seat of the car, there was simply no other evidence that defendant knew of the gun, that he was aware of its existence, or that the gun was readily accessible to him at any time. Viewed in a light most favorable to the prosecution, the evidence was insufficient to warrant a finding beyond a reasonable doubt that defendant had actual or constructive possession of the firearm. Defendant's felon-in-possession conviction must be reversed.

In a brief filed in propria persona, defendant also argues that he is entitled to resentencing because of errors in the presentence investigation report (PSIR) and because the trial court erroneously believed that defendant was subject to consecutive sentencing. We agree.

Consecutive sentences may only be imposed if specifically authorized by law. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003). The prosecution concedes that consecutive sentencing was not authorized for either of defendant's convictions. Nevertheless, the PSIR erroneously stated that defendant was subject to consecutive sentencing. The PSIR also erroneously indicated that defendant was convicted of felony-firearm rather than felon-in-possession.

The trial court mistakenly believed that defendant was subject to consecutive sentencing. At sentencing, the court repeatedly informed defendant that it had the discretion to impose consecutive sentences, but explained that it would not do so because of many positive factors within his background. While the court imposed concurrent sentences, it sentenced defendant at the upper limit of the sentencing guidelines range.

It is undisputed that consecutive sentencing was not authorized in this case. However, the prosecutor argues that defendant was not prejudiced in any way because the trial court did not actually impose consecutive sentences.

Although the trial court did not impose consecutive sentences, it is clear that the trial court relied on inaccurate information at the time of sentencing. It is well settled that sentences must be based on accurate information. MCL 769.34(10); *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006). Indeed, “a sentence is invalid if it is based on inaccurate information.” *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Further, a defendant is generally entitled to resentencing where the sentencing court operates under a mistaken belief of the law. *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002); see also *People v Hill*, 221 Mich App 391, 394-395; 561 NW2d 862 (1997).

We recognize that resentencing is not required if the trial court would have imposed the same sentence notwithstanding the mistaken belief or error of law. *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005). Here, the sentences for defendant’s fleeing-and-eluding and felon-in-possession convictions were identical—28 months to 7 ½ years in prison. However, we cannot determine whether, in the absence of the inaccurate information relied on at sentencing, the trial court would have imposed a sentence of 28 months to 7 ½ years for defendant’s fleeing-and-eluding conviction alone. We therefore conclude that defendant is entitled to resentencing on his fleeing-and-eluding conviction.

We affirm defendant’s conviction of fleeing and eluding a police officer, but reverse defendant’s felon-in-possession conviction. We remand for resentencing on the fleeing-and-eluding conviction. In light of our resolution of the issues, we need not address the remaining arguments raised by defendant on appeal.

Affirmed in part, reversed in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ Kathleen Jansen  
/s/ Jane M. Beckering