

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID POWELL,

Defendant-Appellant.

UNPUBLISHED

March 13, 2008

No. 276084

Wayne Circuit Court

LC No. 06-009409-01

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to three years of probation. We affirm.

This case arises out of the execution of a drug-related search warrant. Defendant was found on a bed inside the house that was being searched. He appeared to be possibly asleep. The police found a gun between the mattresses of the bed, within reach of defendant. The butt of the gun was sticking out of the mattresses so as to be in plain view.

Defendant first argues that knowledge is a required element of the crime of felon in possession. Questions of statutory interpretation are reviewed de novo. *People v Stone Transport, Inc*, 241 Mich App 49, 50; 613 NW2d 737 (2000).

In order to prove the offense, the prosecutor had to show that (1) defendant possessed a firearm, (2) defendant was previously convicted of a felony, and (3) defendant's right to possess a firearm has not been restored. MCL 750.224f; CJI2d 11.38. Possession may be actual or constructive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Id.* at 470-471. Thus, knowledge of the gun is necessary in cases involving constructive possession. Any proposition the prosecutor must prove beyond a reasonable doubt in order to garner a conviction may be fairly termed an "element" of the crime. *People v Lively*, 470 Mich 248, 257 n 11; 680 NW2d 878 (2004); see also *People v McCuller*, 479 Mich 672, 709-711; 739 NW2d 563 (2007) (discussing the distinction between elements and sentencing factors).

Our conclusion is consistent with the ordinary interpretation of criminal statutes. Criminal intent – knowing or intentional conduct – is ordinarily an element of a crime; strict

liability crimes are disfavored. *People v Tombs*, 472 Mich 446, 451 (opinion by Kelly, J.), 465 (opinion by Taylor, C.J.); 697 NW2d 494 (2005). Even if a statute is silent regarding the question of intent, this Court will generally imply an element of criminal intent. *Id.* Thus, we find that knowledge was an element of the crime in the instant case.

Defendant next argues that the prosecutor failed to present sufficient evidence to prove that defendant had knowledge of the gun under his mattress.¹ We disagree. We review claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Tombs, supra* at 459 (opinion by Kelly, J), 465 (opinion by Taylor, C.J.).

The uncontroverted evidence was that the gun was within reach of defendant, in plain view, under the mattress on which he was apparently sleeping. Defendant argues that there was no evidence that he lived in the room or house and that there were no fingerprints on the gun. However, it is for the trier of fact to determine the weight of the inferences to be drawn from the evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Further, the evidence must be viewed in the light most favorable to the prosecutor. *Tombs, supra* at 459 (opinion by Kelly, J), 465 (opinion by Taylor, C.J.) A rational jury could have found that defendant was aware of a visible gun found within his reach, and, therefore, had constructive possession of the gun.

Defendant also argues that the trial court's instructions to the jury failed to explain that knowledge is an element of the crime of felon in possession. Defendant has waived this issue.

Before the proposed jury instructions were read to the jury, the court inquired whether the attorneys had any "anything else" to add. Defense counsel replied by stating "[m]ere presence" and also stated: "And all of the standard instructions for there [sic], your Honor, and the standard instruction as it relates to felony firearm." After the court read the jury instructions, it asked whether the attorneys had anything they wanted to bring to the court's attention about them. Defense counsel answered, "[n]ot on behalf of Mr. Powell, your Honor." Then, after the court gave a supplemental instruction regarding knowledge, the court asked if the attorneys had anything they wanted "to add or say about this." Defense counsel answered, "[n]o, your Honor."

Waiver is "the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (internal citations and quotation marks omitted). One who waives one's rights at trial may not thereafter seek appellate review predicated on the deprivation of those rights. *Id.* The above exchanges make clear to us that defendant waived review of this issue and thereby extinguished any error, as discussed in *Carter, supra* at 215-220.

¹ Defendant stipulated that he was previously convicted of a felony and not eligible to possess a firearm.

Affirmed.

/s/ Patrick M. Meter

/s/ David H. Sawyer

/s/ Kurtis T. Wilder