

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON JOSEPH WASHINGTON,

Defendant-Appellant.

UNPUBLISHED

January 13, 2009

No. 279873

Wayne Circuit Court

LC No. 07-007094-01

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of felon in possession of a firearm, MCL 750.224f, possession with intent to distribute a controlled substance (cocaine), MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent sentences of two to five years' imprisonment for the felon in possession of a firearm conviction and of 2 to 20 years' imprisonment for the possession with intent to deliver conviction. These sentences are to run consecutively to a sentence of two years' imprisonment for the felony-firearm conviction. Defendant was also ordered to pay attorney fees as part of his sentence. Defendant appeals as of right. We affirm the convictions, but remand for reconsideration of defendant's capacity to pay attorney fees.

The police set up a surveillance team, which observed defendant routinely letting people into a particular home for brief periods of time. A "source" was sent into a home by the police to make a controlled purchase of drugs. A police officer, Jerold Blanding, noticed defendant let the source into the home to purchase the drugs. When the source returned to Blanding's vehicle, he had made the purchase and informed Blanding that defendant sold him several Ziploc bags of cocaine. A search warrant was thereafter executed. During the execution of a search warrant, defendant fled from the couch area of the living room to a bedroom on the first floor of a small home. Blanding noticed that there was an automatic .40-caliber Taurus handgun on the floor next to the couch. A bag of drugs was also discovered at the base of the basement steps. Blanding noted that they heard two men "running down the stairs" into the basement when the police knocked and announced their presence. These two men were subsequently discovered hiding in the basement with the bag of drugs.

Defendant argues that the evidence was insufficient to establish that defendant was in possession of a firearm as required under the felony-firearm or felon in possession statutes. The standard of review for a sufficiency of the evidence claim is de novo, and the reviewing court

must examine “the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This is a highly deferential standard of review; it requires the reviewing court to respect the trier of fact’s determinations regarding proper inferences that may be drawn from the evidence and to determine the weight to give those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

MCL 750.227b provides in relevant part:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years.

A person has possession of a firearm for purposes of the felony-firearm statute when it is “accessible and available” at the time a felony is committed; “actual possession of the firearm at the time of arrest” is not required. *People v Williams*, 198 Mich App 537, 541; 499 NW2d 404 (1993). It is possession, not use, of a firearm during the commission of a felony that satisfies the requirements of the felony-firearm statute. *People v Beard*, 171 Mich App 538, 546; 431 NW2d 232 (1988). Possession under the statute has been held to include “both actual and constructive possession.” *People v Mumford*, 60 Mich App 279, 282-283; 230 NW2d 395 (1975). Constructive possession exists if there is proximity to the article coupled with an indicia of control; actual physical possession is unnecessary. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Our Supreme Court has also held that it is constitutionally permissible for the underlying felony of a felony-firearm conviction to be felon in possession of a firearm because “felon in possession of a firearm” is not one of the four felonies expressly enumerated as exceptions to the statute. MCL 750.227b(1); *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). Possession of a firearm under Michigan law can be proven by circumstantial evidence. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). However, a defendant’s mere presence near firearms, without more, is insufficient to prove that he or she was in possession of the firearm. *People v Wolfe*, 440 Mich 508, 527; 489 NW2d 748, amended 441 Mich 1201 (1992).

Further, MCL 750.224f provides in relevant part:

(1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist: (a) the person has paid all fines imposed for the violation. (b) the person has served all terms of imprisonment for the violation. (c) the person has successfully completed all conditions of probation or parole imposed for the violation.

Possession of a firearm under this statute, as under the felony-firearm statute, can be actual or constructive and can be proven by circumstantial evidence. *Hill, supra* at 470. “[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.

When viewed in a light most favorable to the prosecution, there was sufficient evidence to sustain the convictions for felony-firearm and felon in possession of a firearm. Circumstantial evidence established beyond a reasonable doubt that defendant had reasonable access to the weapon and that its location was known to the defendant. Blanding testified that he saw defendant run from the couch area where the handgun was located. Defendant was the only person in the proximity of the gun when the police entered the home when the search warrant was executed. Before that time, officers observed defendant allowing people into the residence for brief periods of time, consistent with the behavior of a narcotics dealer. Blanding's testimony established that his source confirmed that defendant was selling drugs on the premises. It was a reasonable inference for the trier of fact to conclude that defendant constructively possessed the weapon because the weapon was in proximity of defendant, who appeared in control of the premises, and possessed the weapon to assist in these drug sales. Therefore, it was reasonable for the trier of fact to conclude constructive possession existed to support the convictions for felony-firearm and felon in possession of a firearm.

Defendant next argues that the trial court abused its discretion when it ordered him to pay attorney fees without a consideration of his ability to pay. We agree. Sentencing decisions are reviewed for abuse of discretion. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). “[B]y definition, a court abuses its discretion when it makes an error of law.” *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006). A defendant may be required to reimburse the county for the cost of a court-appointed attorney, but the court must order a fee that bears a relationship to the defendant's foreseeable ability to pay. *People v Trapp*, 280 Mich App 598; ___ NW2d ___ (2008); *People v Dunbar*, 264 Mich App 240, 251, 254-255; 690 NW2d 476 (2004). A trial court's pronouncement of the costs without consideration of the defendant's present and future ability to pay is insufficient and warrants a remand to the trial court. *Dunbar*, *supra* at 255. The sentencing court need not conduct a formal evidentiary hearing. *People v DeJesus*, 477 Mich 996, 997; 725 NW2d 669 (2007); *Trapp*, *supra*. Rather, an updated report from the probation department may suffice. *Trapp*, *supra*; *Dunbar*, *supra*.¹

Defendant's convictions are affirmed, but the case is remanded for reconsideration of order to pay attorney fees. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Kurtis T. Wilder

/s/ Stephen L. Borrello

¹ In a recent filing, the prosecutor asserts that the trial court complied with this requirement by asking defendant if he was employed at sentencing. However, review of the transcript in context reveals that defendant had a prior offense, and the trial court inquired regarding defendant's education level and employment status because he was only 21 years old and would go “away to prison for a long time” for selling drugs. The discussion did not occur to determine if defendant had the ability to pay.