STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 9, 2010
v	No. 288381 Wayne Circuit Court
SHONTE LAMARTRE HARBIN, Defendant-Appellant.	LC No. 08-003490-FH

Before: Hoekstra, P.J., and Stephens and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his bench convictions for possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). The trial court sentenced defendant as an habitual offender, MCL 769.10, to concurrent terms of 9 months to 20 years in prison for possession with intent to deliver cocaine and to nine months to five years in prison for each of his remaining convictions except his felony-firearm conviction. The trial court sentenced defendant to serve five years in prison for his felony-firearm conviction, which was to be served prior to the other sentences. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first argues that the trial court erred when it denied defendant's motion to suppress evidence seized at the time of his arrest. We review a trial court's factual findings in connection with a motion to suppress for clear error and review de novo the ultimate legal conclusion. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). The government performs a search within the meaning of the Fourth Amendment when it intrudes on an individual's reasonable or justifiable expectation of privacy. *People v Nash*, 418 Mich 196, 204-205; 341 NW2d 439 (1983). Our Supreme Court has explained that whether a person has a legitimate expectation of privacy under the Fourth Amendment depends on the totality of the circumstances:

> "An expectation of privacy is legitimate if the individual has an actual, subjective expectation of privacy and that actual expectation is one that society recognizes as reasonable. Whether an expectation of privacy exists in both the subjective and the objective sense is determined by scrutinizing the totality of circumstances

> surrounding the alleged intrusion." [*People v Smith*, 420 Mich 1, 27; 360 NW2d 841 (1984) (citations omitted), quoting *Nash*, 418 Mich at 205.]

An owner has no expectation of privacy in abandoned property, and the search and seizure of abandoned property is "presumptively reasonable." *People v Rasmussen*, 191 Mich App 721, 725; 478 NW2d 752 (1991). Moreover, "[p]olice officers do not need a warrant before entering structures that, by all objective manifestations, appear abandoned." *People v Taylor*, 253 Mich App 399, 409; 655 NW2d 291 (2002). Courts examine the totality of the circumstances when evaluating whether police officers must secure a warrant before entering what appears to be an abandoned or vacant structure. *Id*. at 407. The factors to be considered include:

> (1) the outward appearance, (2) the overall condition, (3) the state of the vegetation on the premises, (4) barriers erected and securely fastened in all openings, (5) indications that the home is not being independently serviced with gas or electricity, (6) the lack of appliances, furniture, or other furnishings typically found in a dwelling house, (7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows, (8) the history surrounding the premises and prior use, and (9) complaints of illicit activity occurring in the structure. [*Id*].

Here, the trial court did not clearly err when it found that police officers reasonably determined that the house was abandoned. The house did not have boarded up windows or extensive exterior damage, but officers Steven Kopp and Barron Townsend testified that two days before the arrest they went to the house and found that the front door was wide open. The house appeared to be vacant, and there was nobody inside. Moreover, the front door did not have a handle or a locking mechanism. The police officers did not enter the upper unit because it was secured, but in the lower unit, there was garbage and feces scattered throughout the house, and the officers noticed that there was no food or clothing inside. Further, there were sparse furnishings, the basement was flooded with several feet of sewage, and the electricity was illegally hooked up to the house. The officers did not believe that a person could safely live in the house.

When the officers returned two days later, the house appeared to be in the same condition, although this time there was someone working on the front door and there were people inside. As the officers approached, the man working on the door walked right into the house leaving the door wide open. The overall condition of the house coupled with the relatively short period of time between the officers' first and second visits weigh heavily in favor of the reasonableness of the inference that the house was still abandoned. Defendant failed to establish that the trial court's findings were clearly erroneous. *Attebury*, 463 Mich at 668. The officers did not need a search warrant before entering the house because, by all objective manifestations, the house was abandoned. *Taylor*, 253 Mich at 409. Although defendant may have had the right to occupy the house, the officers did not violate any legitimate expectation of privacy protected under the Fourth Amendment when they entered the house without a warrant. Accordingly, the trial court did not err when it denied defendant's motion to suppress the evidence seized from the house.

Defendant next argues that the prosecutor presented insufficient evidence to support his conviction for possession with intent to deliver less than 50 grams of cocaine. We review de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). This Court views the evidence in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* "To convict a defendant of possession with intent to deliver, the prosecution must prove (1) that the recovered substance is a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The intent to deliver may be inferred from "the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant argues only that the evidence of knowing possession with intent to deliver was insufficient. At trial, the prosecution admitted the preliminary examination testimony by officer Anthony O'Rourke's under MRE 804. Officer O'Rourke testified that he recovered what appeared to be crack cocaine and marijuana from defendant's pocket. The parties stipulated to police tests that determined that two of the seven bags recovered contained 16 grams of cocaine.[1] In addition, there was evidence that defendant intended to deliver the cocaine. Officer O'Rourke testified that the narcotics were packaged for individual sale. Moreover, inside the dining room, the police found drug scales and paraphernalia used to package narcotics on a table. And, defendant admitted that he possessed the marijuana found in his pocket, which was also packaged for individual sale, and that he was intending to sell it on the street. From this evidence, the trial court could properly infer that defendant also intended to deliver the cocaine that was individually packaged for sale. See *Wolfe*, 440 Mich at 524-526.

Defendant finally argues that the trial court erred in permitting the prosecutor to admit O'Rourke's preliminary examination testimony without a showing that the prosecutor exercised due diligence to ensure his presence. We review a trial court's determination whether to admit the preliminary examination testimony for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The testimony of a witness from a prior proceeding is admissible in a later proceeding if the witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination at the earlier time. MRE 804(b)(1). A witness is unavailable when he is absent from the hearing and the proponent of his statement has used due diligence to procure his attendance. MRE 804(a)(5). The party proffering the former testimony must demonstrate that he made a reasonable, good-faith effort to secure the declarant's presence for trial; however, the party need not have done everything possible to locate the witness. *Bean*, 457 Mich at 684.

[1] The record does not state whether the amount recovered represents each individual bag or the total amount.

Under the circumstances of this case, the trial court did not abuse its discretion in admitting the testimony. The prosecutor established that officer O'Rourke was on active military service and had been deployed to Afghanistan; this evidence was sufficient to establish O'Rourke's unavailability. See *People v Boyles*, 11 Mich App 417, 421-423; 161 NW2d 448 (1968). Here, the record established that the prosecutor was aware of O'Rourke's location in Afghanistan and his military status. He had successfully procured O'Rourke's testimony for the previous trial date, but defendant did not appear on that date. Before the next scheduled trial date, O'Rourke was called to active duty and deployed to Afghanistan. At trial, the prosecutor produced official documentation detailing O'Rourke's situation. Due diligence is an attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). Although the prosecutor did not attempt to secure O'Rourke's presence from Afghanistan, he was not required to exhaust all avenues to secure the witness's presence. The prosecutor understood that he would be unable to procure O'Rourke's attendance because of his military status. Indeed, nothing in the record supports that O'Rourke could have been returned for trial. Thus, the prosecutor exercised the required due diligence under MRE 804(a)(5). Additionally, given that it is undisputed on appeal that defendant had an opportunity and similar motive to cross-examine O'Rourke at the preliminary examination, the trial court did not abuse its discretion when it granted the prosecution's motion to admit O'Rourke's prior testimony into evidence. MRE 804(a)(5); MRE 804(b)(1).

There were no errors warranting relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly