STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2010
v	No. 286768 Wayne Circuit Court
JAMES TAYLOR, Defendant-Appellant.	LC No. 07-014233-FH

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, the prosecutor failed to present sufficient evidence that defendant constructively possessed the marijuana and firearms, as charged.

Based on information gathered during a controlled narcotics purchase, the police obtained a search warrant for the upper flat of a two-family dwelling at 5259 Chatsworth Street in Detroit. The search warrant identified Sayyid Watkins as a resident of the upper flat. The first officer who entered the upstairs flat found defendant walking from a rear bedroom and detained him. That officer searched the area and "didn't make any confiscations." A second officer discovered in a front closet a shoebox containing marijuana and two handguns. Further investigation at the scene revealed that Watkins resided in the lower flat.

At trial, the prosecutor questioned Detroit Police Lieutenant Darryl Brown regarding "proof of residence" of the upstairs flat:

> *Prosecutor:* Were you able to get proof of residence from the upstairs location?
>
> *Brown*: Yes, sir; we were.
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> * * *
>
> *Prosecutor:* I want to show you what's marked as People Exhibit-3—proposed Exhibit-3. And if you could look at it and tell me what it is.

Brown: Yes, sir. It's Total Health cards in the name of James R. Taylor at 5259 Chadsworth [sic]; Detroit, Michigan 48224. It is someone's HMO medical cards.

Prosecutor: All right. And it has the defendant's name on it, and it has the address of Chadsworth [sic] Street?

Brown: That's correct.

Prosecutor: Now, looking at the cards there, the card actually has a birthday; is that correct? On the cards; the actual medical cards.

Brown: That's correct.

Prosecutor: And what's the birthday on there?

Brown: That would be 11/4 of 2000.

Prosecutor: Okay. Which would make the person about eight, seven years old? About seven years old.

Brown: Seven years old; that's correct.

Prosecutor: And where did you find that at?

Brown: This was recovered from the premises upstairs living room.

On cross-examination, Lieutenant Brown admitted that because defendant's date of birth is September 30, 1974, the health card did not belong to him.

The prosecutor introduced no additional evidence that connected defendant to 5259 Chatsworth. For example, no evidence tended to support that defendant resided in the upper flat or had ever touched the drugs and guns found in the closet. And no evidence established defendant's address or that the police found defendant's clothes or other personal items in the upstairs flat.

The majority opines that "it is reasonable to infer that the medical cards found in an envelope addressed to James Art Taylor at the 5259 Chatsworth address were for defendant's minor son." *Ante* at 3. I agree that this is a reasonable inference. However, I respectfully disagree with the majority's conclusion that the inference supporting that the cards belonged to defendant's son equates to sufficient evidence that defendant lived in the upstairs flat or possessed any knowledge about the contents of its closets. In my view, the circumstantial evidence supporting defendant's constructive possession of the contraband in the shoebox qualifies as entirely speculative and conjectural, and thus insufficient to support defendant's convictions.

When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in the 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This standard, articulated in *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979), reflects "an attempt to give 'concrete substance'" to a criminal defendant's due process rights. *Wolfe*, 440 Mich at 514. The beyond a reasonable doubt standard requires that the fact finder "reach a subjective state of near certitude of the guilt of the accused . . . ." *Jackson*, 443 US at 315.

Defendant's convictions for possession with intent to deliver marijuana and possession of a firearm during the commission of a felony required proof beyond a reasonable doubt that he knowingly possessed the contraband, either actually or constructively. *Wolfe*, 440 Mich at 517; *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). Because no evidence showed that defendant actually possessed the marijuana or guns found in the closet, the prosecutor bore the burden to establish that defendant constructively possessed them. A person constructively possesses an item "if he 'knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons . . . .'" *Hill*, 433 Mich at 470, quoting *United States v Burch*, 313 F2d 628, 629 (CA 6, 1963). "Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of possession." *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). However, a defendant's mere presence near contraband does not prove knowing possession or an ability to control it. In *Wolfe*, 440 Mich at 520, the Supreme Court reiterated the "well established" principle "that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." To support a conviction premised on constructive possession, the prosecution must demonstrate "some additional connection between the defendant and the contraband . . . . *Id*.

In *People v Hardiman*, 466 Mich 417, 422-423; 646 NW2d 158 (2002), the "additional connection[s]" between the female defendant and narcotics discovered in an apartment included the presence of narcotics in the pocket of a dress hanging in a bedroom closet, other clothes in the bedroom belonging to a woman, and letters addressed to the defendant discovered in the bedroom's nightstand and the apartment's mailbox. In *McGhee*, 268 Mich App at 623, this Court identified several evidentiary links between defendant and the property where narcotics were found, including a utility bill, vehicle and other insurance documents bearing the defendant's name and the raid address, and the defendant's driver's license and a property deed both reflecting the raid address. This evidence sufficed to "indicate defendant's ownership and control of the location at which drugs were found at the time when they were found." *Id*.

In contrast, the prosecutor here introduced only mere presence evidence linking defendant and the marijuana and firearms in the closet. The contraband was not in plain view. The medical insurance card did not belong to defendant. The prosecutor presented no evidence of utility bills, lease agreements, or even a driver's license connecting defendant to the premises. In my view, no plausible inference permits a fact finder to conclude that the presence of an insurance card, presumably belonging to defendant's son, established beyond a reasonable doubt defendant's dominion and control over the upper flat. "While the trier of fact may draw reasonable inferences from facts of record, it may not indulge in inferences wholly unsupported by any evidence, based only upon assumption." *People v Petrella*, 424 Mich 221, 275; 380 NW2d 11 (1985). Stated differently, when the evidence does not rise above the threshold of speculation and conjecture, the prosecutor has not established guilt beyond a reasonable doubt.

The evidence introduced here does not even come close to giving rise to a reasonable inference that defendant knew that a shoebox in the front closet contained marijuana and weapons. To convict defendant, the trial court had to assume that the insurance card belonged to defendant's son, and that the insurance card's presence in the flat meant that defendant had the right to control the entire premises. The first inference qualifies as reasonable, but the second does not.

Because no evidence reasonably tends to prove that defendant lived in the flat, frequently visited, or had reason to know of the marijuana and firearms in the closet, I would reverse.

/s/ Elizabeth L. Gleicher