STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee/Cross-Appellant,

v

KENNEDY LYNDON WADE,

Defendant/Appellant/Cross-Appellee.

UNPUBLISHED
February 27, 1998

No. 190318
Recorder's Court
LC No. 94-009283-FH

Before: Neff, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession of 225 or more but less than 650 grams of cocaine, MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii). Defendant was sentenced to ten to thirty years in prison for his conviction. We affirm in part, reverse in part and remand.

Defendant raises five issues on appeal. First, defendant argues that the prosecution presented insufficient evidence to establish that he knowingly possessed the cocaine found in his house during a June 24, 1994, police raid. We disagree.

Four elements are necessary to support a finding that a defendant possessed 225 or more but less than 650 grams of a mixture containing cocaine: (1) the substance must be shown to be cocaine; (2) the mixture containing the cocaine must weigh at least 225 grams, but less than 650 grams; (3) it must be shown that the defendant was not authorized to possess the substance; and (4) it must be shown that the defendant knowingly possessed the cocaine. *People v Schultz*, 172 Mich App 674, 680-681; 432 NW2d 742 (1988). Possession may be either actual or constructive. Constructive possession is established where the accused had the right to exercise control of the cocaine and knew that it was present. *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995). A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Some additional connection between the defendant and the contraband must be shown. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992).

We hold that the prosecution presented sufficient evidence for the jury to find beyond a reasonable doubt that defendant had knowing, constructive possession of the cocaine found in his

den closet during the police raid of June 24, 1994. *Wolfe, supra* at 520; *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). Defendant controlled the premises where the cocaine was found; he owned the house, had lived there in the past and allowed his wife and children to live there at the time of the raid. Defendant was seen leaving the house at 4:00 p.m., the time the raid began. The den closet was opened with a skeleton key that the raid squad leader found in defendant's possession. Also, defendant told the raid squad leader when the squad entered the house that there were drugs in the house, and later admitted to the police officers that the cocaine, marijuana and money the officers found were his. Moreover, the testimony of defendant's friend, who testified that the drugs belonged to him, was too incredible for the jury to believe. *People v Sharbnow*, 174 Mich App 94, 105; 435 NW2d 772 (1989). The witness was a cocaine addict and a paranoid schizophrenic who could not even communicate unless he took his medication. Further, the raid squad leader, in taking the witness' statement to police, caught the witness in a lie by asking him about a nonexistent master lock on the closet door and receiving an affirmative reply. We conclude that there was sufficient evidence produced at trial to sustain defendant's conviction.

Next, defendant argues that the trial court committed error requiring reversal in denying his pretrial motion to suppress the drugs and money taken from the den closet on June 24, 1994, because the affidavit supporting the search warrant used to search defendant's house was based on untruthful, insufficiently investigated statements. We disagree.

We hold that the affidavit provided sufficient probable cause to support the search warrant because it was based on the assertions of a credible, reliable informant. *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995); *People v Lucas*, 188 Mich App 554, 569-570; 470 NW2d 460 (1991). The raid squad leader, who was also the affiant, testified that he had known the informant for about a year before the June 24, 1994, raid, and that the informant had provided information leading to at least three arrests and three convictions. Further, the information provided by the informant was sufficiently detailed to allow the officer to believe that the informant spoke from personal knowledge. *Lucas, supra* at 570. The informant told the officer that he had been with defendant while defendant delivered ounces of cocaine around Detroit's east side, driving either a white Plymouth or a white Jeep Grand Cherokee. The informant further told the officer that he had seen cocaine, large amounts of cash, and handguns at defendant's home. Finally, the raid squad leader corroborated the informant's tip with independent investigation. *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991). The officer drove past defendant's house and saw the Plymouth and the Jeep Grand Cherokee in defendant's driveway. The officer also surveilled defendant on June 23, 1994, and saw defendant make an apparent drug pickup at an east side Detroit home. We thus conclude that the trial court did not commit error requiring reversal in denying defendant's motion to suppress the drugs and money because the informant's information was sufficiently reliable to allow a reasonable person to find that the information provided a substantial basis of probable cause to support the affidavit and the search warrant. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996); *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995).

Defendant's third issue is that the trial court committed error requiring reversal by denying defendant's motion to suppress his statement to police, which defendant argues was not knowingly and voluntarily made. We disagree.

Our review of the circumstances surrounding the taking of defendant's statement leads us to conclude that the statement was indeed knowingly and voluntarily made. *People v Marshall,* 204 Mich App 584, 587; 517 NW2d 554 (1994). Defendant was neither detained nor questioned for a long period of time. The interrogating officer estimated that twenty minutes elapsed between the raid squad's arrival at defendant's house and the beginning of the questioning, and that the questioning lasted about fifteen minutes. Defendant was not harmed physically, although he was handcuffed, and appeared to be comfortable and cooperative while making his statement. He was released immediately after making the statement. Most importantly, defendant was fully advised of his rights before he made the statement. The raid squad leader quickly advised defendant of his rights when the squad arrived at defendant's house, and the interrogating officer went over the rights again with defendant, making sure that defendant read and understood the rights. Moreover, the officers' discussion of possible leniency for defendant in exchange for his assistance in capturing other drug dealers took place after defendant gave his statement, and so could not have overborne defendant's will. *People v Carigon,* 128 Mich App 802, 821; 341 NW2d 803 (1983) (MacKenzie, J., dissenting). We conclude that the trial court did not clearly err in finding that defendant's statement was freely and voluntarily made and in denying defendant's motion to suppress it. *People v Haywood,* 209 Mich App 217, 225-226; 530 NW2d 497 (1995); *Marshall, supra* at 587.

Defendant's fourth issue on appeal is that the trial court committed error requiring reversal in denying defendant's motion to suppress the drugs and money taken from the den closet on June 24, 1994, because the raid squad violated the "knock and announce" statute, MCL 780.656; MSA 28.1259(6), by battering down defendant's front door instead of asking defendant, who was standing by as the raid occurred, to open the door. We disagree.

We conclude that the raid squad lawfully entered defendant's home. MCL 780.656; MSA 28.1259(6) authorizes a police officer executing a search warrant to break the doors or windows of a house if, after notice of his authority and purpose, he is refused admittance. *People v Humphrey,* 150 Mich App 806, 813-814; 389 NW2d 494 (1986). The officer's entry is lawful if the officer substantially complies with the requirements of the statute. *People v Zuccarini,* 172 Mich App 11, 17; 431 NW2d 446 (1988). The officers' actions during the raid on June 24, 1994, were in substantial compliance with MCL 780.656; MSA 28.1259(6). The officers loudly knocked on defendant's front door and yelled "Police officer, search warrant," then waited for about twenty seconds for a response before battering down the door. *Humphrey, supra* at 814. Further, although no one was in the house when the officers entered, this fact was not known to the officers when they executed the warrant. Defendant's wife was known to be living at the house at the time of the raid and, had she been home, might have been able to destroy the drugs in the closet before the officers had a chance to seize them. *People v Asher,* 203 Mich App 621, 623-624; 513 NW2d 144 (1994).

We also conclude that defendant's argument has taken the United States Supreme Court opinion of *Wilson v Arkansas,* 514 US 927; 115 S Ct 1914; 131 L Ed 2d 976 (1995), further than

the Court intended. Our reading of the Court's opinion leads us to believe that the Court emphasized only that a raiding police officer announce his presence and act reasonably before breaking a door or window, not that he ask for and be refused entry first, as defendant has argued. *Wilson, supra* at ___; *United States v Bates,* 84 F3d 790, 795 (CA 6, 1996). We thus hold that the trial court did not commit clear error in denying defendant's motion to suppress the money and drugs based on a violation of MCL 780.656; MSA 28.1259(6). *Peebles, supra* at 664.

Defendant's final issue on appeal is that the trial court deprived him of a fair trial by allowing the prosecutor to introduce evidence of defendant's prior conviction for attempted possession of cocaine. Defendant argues that the evidence of his prior conviction is inadmissible character evidence pursuant to MRE 404(b)(1). We disagree.

We hold that the trial court's admission of the evidence of defendant's prior conviction meets the standard established by the Michigan Supreme Court in *People v VanderVliet,* 444 Mich 52, 74; 508 NW2d 114 (1993). The evidence was admitted for a proper purpose, to show that defendant was familiar with the appearance of cocaine despite his testimony to the contrary, and was relevant to and probative of that purpose. The evidence was not unfairly prejudicial, since the prosecution presented sufficient evidence that defendant possessed the drugs to sustain defendant's conviction without the evidence of defendant's prior conviction. The trial court also gave the jury a proper instruction limiting the jury's use of the evidence. We conclude that the trial court did not abuse its discretion in allowing the prosecutor to introduce evidence that defendant had a prior conviction for attempted possession of cocaine. *VanderVliet, supra* at 74; *People v McElhaney,* 215 Mich App 269, 280; 545 NW2d 18 (1996).

The prosecution raises only one issue on cross appeal. The prosecution argues that the trial court abused its discretion in sharply departing from the twenty-year mandatory minimum sentence required for defendant's conviction by MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii), in the absence of substantial and compelling reasons to do so. We agree.

We hold that the trial court had no substantial and compelling reasons to depart from the mandatory minimum sentence by ten years. *People v Perry,* 216 Mich App 277, 281; 549 NW2d 42 (1996). Defendant had a prior conviction for attempted possession of cocaine, for which he was still on probation at the time of the instant offense. Defendant had held his job since 1985, but only earned $100 a week from his job. Yet defendant lived in a spacious home and owned two cars, one of which had a monthly payment of $591. Defendant did not support his child from his previous marriage and gave only minimal support to his children of his present marriage. The raid squad found 237 grams of cocaine, a large amount of marijuana and $2,600 in cash in defendant's den closet. Finally, defendant gave vague and useless information to the police officers he had promised to help and failed to make cocaine purchases as they requested. We conclude that the trial court abused its discretion in finding that defendant's employment record and support of his children provided substantial and compelling reasons to depart from the mandatory minimum sentence of twenty years for defendant's conviction offense. *People v Fields,* 448 Mich 58, 78; 528 NW2d 176 (1995).

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ William B. Murphy