STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD JOHN ABDELLA,

Defendant-Appellant.

UNPUBLISHED
February 12, 1999

No. 197935
Oakland Circuit Court
LC No. 95-140824 FH

Before: Sawyer, P.J., and Bandstra and R.B. Burns*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to consecutive prison terms of two years for felony-firearm and one to four years for possession of cocaine. Defendant was sentenced to the time served of eighty-seven days in jail for possession of marijuana. He now appeals as of right. We affirm.

Defendant first argues that the affidavit in support of the search warrant contained false statements and omitted material information. Defendant challenged the validity of the affidavit in the district court. At an evidentiary hearing in conjunction with the preliminary examination, the court accepted a stipulation to excision of one paragraph from the affidavit. The court then ruled that defendant had not established that any other information needed to be excised, the redacted affidavit still supported probable cause for issuance of the warrant, and, therefore, the evidence did not need to be suppressed.

We review the lower court's findings of fact for clear error only, but we review the ultimate decision regarding a motion to suppress de novo. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997). If a defendant shows by a preponderance of the evidence that the affidavit in support of a search warrant contained false statements or material omissions, which were made

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

knowingly, intentionally, or with a reckless disregard for the truth, the evidence obtained from the resulting search must be suppressed if the false information or omissions were necessary to the finding of probable cause. *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Chandler*, 211 Mich App 604, 612-613; 536 NW2d 799 (1995); *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992). If the affidavit would still support a finding of probable cause for the issuance of the warrant after false information has been redacted and in light of any material omissions, the evidence need not be suppressed. *People v Melotik*, 221 Mich App 190, 200-202; 561 NW2d 453 (1997); *Chandler, supra* at 613; *People v Kolniak*, 175 Mich App 16, 21-23; 437 NW2d 280 (1989).

We first note that although defendant argues that the redacted affidavit was "completely inadequate and misleading," his brief on appeal fails to specify what statements were false or what material information was omitted. Because defendant has failed to argue the merits of this issue, we deem it abandoned. *People v McClain*, 218 Mich App 613, 615; 554 NW2d 608 (1996); *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992). Nonetheless, we have reviewed the affidavit, warrant, evidentiary hearing transcript, as well as the motion and supporting brief filed by defendant in the district court. We find that defendant's assertion that certain items did not exist does not necessarily follow from the fact that those items were not seized during the subsequent search. The hearing testimony supported the information in the affidavit. Also, we are not convinced that the magistrate's basis for probable cause would have been eroded by the inclusion of the details that defendant claims were omitted. Therefore, the district court's decision to examine the four corners of the rest of the redacted affidavit for probable cause was not clearly erroneous.

The redacted affidavit still included information that: (1) there had been a gunfight at defendant's residence; (2) during the course of a protective sweep of the house, a police officer made observations of objects in plain sight; (3) there were cut straws associated with the snorting of cocaine, baggies and foil associated with the packaging of controlled substances, and some white powder that looked like cocaine, all in a bucket of water; (4) there were strainers and an item used to facilitate the weighing of substances in the same area; and (5) there was a handgun, a long gun, numerous bullet holes, spent casings, and live shells in the house. From this, a person of reasonable caution could have concluded that contraband and evidence of criminal conduct would be found in defendant's house. Therefore, the district court did not err in refusing to suppress the evidence and quash the warrant. *Darwich, supra* at 636-637.

Defendant next argues that the trial court erred in denying his motions for directed verdict on the possession of cocaine charge. We disagree. When ruling on a motion for a directed verdict, the court must consider the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime had been proven beyond a reasonable doubt. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

To obtain a conviction for possession of less than twenty-five grams of cocaine, the prosecutor needed to prove (1) that defendant knowingly or intentionally possessed a substance that was (2) in an amount less than twenty-five grams of any mixture containing cocaine. MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v); *People v Pegenau*, 447 Mich 278, 303 (Mallett, J.); 523 NW2d 325 (1994).

An expert testified that one of the substances recovered from defendant's house was .28 grams of cocaine, and defendant does not dispute that fact on appeal. The sole issue raised here is whether there was sufficient evidence that defendant possessed the cocaine.

Possession of cocaine may be actual (where it is found on the person) or constructive (when it is within a person's dominion or control); it may be exclusive (i.e., only possessed by one person) or joint (where more than one person is in actual or constructive possession). *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). While mere association with, or presence at, a house where drugs are found is insufficient to establish constructive possession, it is established "when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Wolfe, supra* at 520-521. "The essential question is whether the defendant had dominion or control over the controlled substance." *Fetterley, supra.* Circumstantial evidence and reasonable inferences therefrom are sufficient to establish possession. *Id.*

In the present case, defendant was a joint owner of the house in which cocaine was found and his dominion and control over the premises were definitively established by his armed repulsion of intruders on the night in question. One of the witnesses told police that the cocaine was in the house before he arrived. In proximity to the cocaine were materials commonly used for packaging cocaine, a substance commonly used to dilute cocaine, equipment typically used for mixing cocaine, and cut straws that are often used for snorting cocaine. Thus, cocaine was not only present in defendant's house, it was apparently being processed there. From all of this, a rational jury could have found beyond a reasonable doubt that defendant constructively possessed the cocaine found in his home.

Defendant's final argument is that his felony-firearm conviction must be vacated because the statute proscribing the possession of a firearm during the commission of a felony unconstitutionally infringes upon his right to keep and bear arms under both the federal and Michigan Constitutions and because of vagueness. However, defendant cites no authority in support of these constitutional arguments and we consider them waived. *People v Hanna*, 223 Mich App 466, 470; 567 NW2d 12 (1997); *People v Dilling*, 222 Mich App 44, 51; 564 NW2d 56 (1997). We further note that the Second Amendment to the United States Constitution is not applicable to the states. *People v Swint*, 225 Mich App 353, 359-360; 572 NW2d 666 (1997). As to the Michigan Constitution, its right to bear arms provision embodies a rule of reason rather than an absolute. It does not protect the right to keep and bear arms in and of itself, but rather for the purpose of defending self or state. The right is subject to reasonable regulation by the Legislature under the police power. *Id.* at 362-363, 375. See, also, *People v Zerillo*, 219 Mich 635, 638; 189 NW 927 (1922). The felony-firearm statute punishes "possession" not "use" of a firearm while committing a felony. MCL 750.227b(1); MSA 28.424(2)(1); *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995). The purpose is to reduce the risk of harm to others because a felon may be tempted to use his firearm if the criminal enterprise goes awry. *Williams, supra*. "[T]he legitimate legislative purpose of keeping guns out of the hands of those most likely to use them against the public" such as "felons, who have exhibited their disregard for ordered society," is a reasonable restriction on the right to bear arms imposed by the state

exercising its police powers. *Swint, supra* at 374-375. Accordingly, even if this issue was preserved, the felony-firearm statute is not unconstitutional as applied against defendant.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Robert B. Burns