# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 28, 1999 |
| v | No. 210251<br>Cass Circuit Court |
| DAVID CARLYLE SHEPARD, JR.,<br><br>Defendant-Appellant. | LC No. 96008938 FH |

Before: Bandstra, P.J., and Markman and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for one count of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv) and one count of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced as a three-time habitual offender, MCL 769.11; MSA 28.1083 to five to forty years' imprisonment for each count. The sentences are to be served concurrently. We affirm.

Defendant contends that insufficient evidence was admitted at trial to support his convictions. We disagree. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded that all of the elements of each offense were proven beyond a reasonable doubt. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993).

Addressing the conviction on the count of delivery of less than 50 grams of cocaine, delivery is defined in MCL 333.7105(1); MSA 14.15(7105)(1) as the actual, constructive, or attempted transfer from one person to another of a controlled substance. We have held that the act of transferring a controlled substance is sufficient to sustain a finding of an actual delivery. *People v Maleski*, 220 Mich App 518, 522; 560 NW2d 71 (1996). We have also held that evidence consisting of an officer's testimony that a defendant handed him the drug in question was sufficient to sustain the finding that the delivery occurred. *People v Edwards*, 107 Mich App 767, 770; 309 NW2d 607 (1981).

Here, the evidence was overwhelming that delivery occurred. The undercover officer testified that he exchanged forty dollars in marked bills with defendant for two rocks of crack cocaine. The

cocaine was properly accounted for and placed into evidence against defendant at trial. Even though the marked bills were not found until the next day in the police car that transported defendant to the police station, it would be reasonable for a jury to conclude that defendant hid the money in the seat while in transit. Finally, the Michigan State Police Lab drug analyst testified that the rocks that defendant sold to the undercover officer tested positive for cocaine.

Addressing the conviction on the second count, in order to support a conviction for possession with intent to deliver less than fifty grams of cocaine, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-17; 489 NW2d 748 (1992), amended 441 Mich 120 (1992).

A drug analyst here testified that both the rocks sold to the undercover officer and the rocks found on defendant tested positive for cocaine and that the total weight of the rocks was less than 50 grams; therefore, elements one and two have been met. Defendant clearly was not authorized to possess the cocaine under MCL 333.7401; MSA 14.15(7401). Addressing the fourth element, possession may be either actual or constructive. *Id.*, 520. In the instant case, the undercover officer testified that when he left defendant's car, he saw defendant place the baggy containing the individually wrapped bags of crack cocaine into his waistband or pants pocket before returning to the restaurant where he was employed. Minutes later when defendant was arrested and searched, the baggy containing the individually wrapped bags of crack cocaine was found in defendant's waistband. Finally, not only did the leader of the drug task force testify that, in his experience, individually wrapped bags of crack cocaine are meant for sale and not personal use, but defendant actually sold crack cocaine to the undercover officer.

When the above evidence and the reasonable inferences arising therefrom are looked at in the light most favorable to the prosecution, a rational trier of fact could have been convinced beyond a reasonable doubt that defendant was guilty of delivering less than 50 grams of cocaine to an undercover officer and guilty of possession with the intent to deliver less than 50 grams of cocaine.

Affirmed.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman
/s/ Patrick M. Meter