STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK J. OKLAD,

Defendant-Appellant.

UNPUBLISHED
March 3, 2000

No. 206589
Oakland Circuit Court
LC No. 95-141940 FH

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). Defendant was sentenced to the county jail for consecutive terms of 183 days for the possession with intent to deliver less than fifty grams of cocaine conviction, and thirty days for the possession with intent to deliver marijuana conviction. We affirm defendant's convictions and sentences, and remand for further proceedings regarding defendant's request for the return of items seized.

Defendant first argues that there was insufficient evidence to establish that he was in constructive possession of the cocaine and marijuana seized during the execution of a search warrant. We disagree. When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a 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, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Kozyra*, 219 Mich App 422, 428; 556 NW2d 512 (1996).

A person need not have physical possession of a controlled substance to be found guilty of possessing it. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). Possession may be either actual or constructive, and may be joint as well as exclusive. *Fetterley, supra*, 229 Mich App 515. The essential question is whether the defendant had dominion or control over the controlled substance. *Fetterley, supra*, 229 Mich App 515. A person's presence at the place where the drugs

were found is not sufficient, by itself, to prove constructive possession; rather, some additional link between the defendant and the contraband must be shown. *Fetterley, supra*, 229 Mich App 515.

At trial, there was testimony that officers went to 1225 Humphrey on July 31, 1995, to execute arrest warrants for defendant and his wife. Officers were told that defendant's wife was present but defendant was not. In searching the premises for defendant, officers observed narcotics and narcotics paraphernalia in one of the small bedrooms, a scale with a white powdery substance on it, a bottle of Inositol, an agent commonly used to cut cocaine, on top of a desk in the same room as the scale, ten to fifteen rifles in an upstairs room, and marijuana plants sitting under grow lights and a small collection of marijuana seeds and stems sitting next to the plants downstairs.

The officers obtained a search warrant and returned. In executing the warrant, officers retrieved three freezer bags full of marijuana from the front closet, along with paper packaging materials; three plants and a sandwich bag full of marijuana from downstairs; some marijuana from a Red Wings jacket and some scattered marijuana from underneath the coffee table in the living room; another large bag of marijuana from the bedroom where the officers first saw the scale and the Inositol; a cocaine grinder from a night stand in one of the bedrooms; a small amount of cocaine, marijuana and cash from the kitchen; and seeds, marijuana debris, small manila envelopes commonly used for packaging, plastic bags with white powder residue, and three bottles of Inositol from a desk in an upstairs room.

The parties stipulated that the plants were marijuana plants, that marijuana was found in a bag, and that cocaine was found in a small bag. The parties also stipulated that when defendant was booked at the Birmingham Police Department, he gave 1225 Humphrey as his address.

The narcotics and the narcotic paraphernalia observed and seized by the officers were readily visible throughout the entire house. Possession may be established by evidence that defendant exercised control or had the right to exercise control of the substance and knew that it was present. *People v Richardson*, 139 Mich App 622, 625; 362 NW2d 853 (1985). Accordingly, viewed in a light most favorable to the prosecution, there was sufficient evidence for the trial court to conclude that because defendant lived at the house and controlled substances were visibly located throughout the house, defendant constructively possessed the cocaine and marijuana found at the house. *Fetterley, supra*, 229 Mich App 515.

Defendant also argues that the prosecution failed to present sufficient evidence to establish that defendant possessed cocaine with the intent to deliver. We disagree. The offense of possession with the intent to deliver less than fifty grams of cocaine requires 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 the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the cocaine with the intent to deliver. *Wolfe, supra*, 441 Mich 516-517; *People v Lewis*, 178 Mich App 464, 468; 444 NW2d 194 (1989). Defendant only challenges whether there was sufficient proof of the fourth element.

A defendant's intent can be inferred from all the facts and circumstances. *Fetterley, supra*, 229 Mich App 518-519. Actual delivery is not required to prove intent to deliver. *Fetterley, supra*,

229 Mich App 517. Intent to deliver can be inferred from the quantity of the controlled substance in the defendant's possession and from the way in which the controlled substance is packaged. *Fetterley, supra*, 229 Mich App 518.

In the instant case, police found a total of 4.7 grams of cocaine, a scale with a white powdery substance on it, a cocaine grinder, plastic bags with white powder residue, and a large quantity of Inositol, the cutting agent. Thus, not only did the officers observe and seize cocaine, but they also found materials consistent with the packaging and distribution of cocaine, such as Inositol, an agent used to cut cocaine, and a scale and a grinder, both used to prepare cocaine for use and distribution. Defendant's intent to deliver could reasonably have been inferred from the quantity of the cocaine in defendant's possession and from the way in which the cocaine was going to be packaged. *Fetterley, supra*, 229 Mich App 518. Viewing this evidence in a light most favorable to the prosecution, there was sufficient evidence from which the trial court could conclude that the cocaine was not solely for defendant's personal use, but that he intended to deliver it to others. *Fetterley, supra*, 229 Mich App 518.

Defendant next argues that the trial court deprived him of his property without due process when it denied his motion for the return of his guns after trial. We agree. This Court reviews constitutional questions de novo. *People v Echavarria*, 233 Mich App 356, 258; 592 NW2d 737 (1999).

A defendant is entitled to the return of his property unless there is a lawful reason to deny him its return. *Banks v Detroit Police Dep't*, 183 Mich App 175, 178; 454 NW2d 198 (1990). The prosecution has the burden of proof to establish a lawful reason for denying the return of the property to the defendant from whom it was seized. *Id.*

The prosecution argues that the trial court properly denied the return of defendant's rifles pursuant to MCL 750.239; MSA 28.436, and MCL 750.224f; MSA 28.421(6). MCL 750.239; MSA 28.436 provides:

> All pistols, weapons or devices carried, possessed or used contrary to this chapter are hereby declared forfeited to the state, and shall be turned over to the commissioner of the Michigan state police or his designated representative, for such disposition as the commissioner may prescribe.

MCL 750.224f; MSA 28.421(6) provides that:

> Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all the following circumstances exist:

However, this Court rejected a similar argument in *Banks, supra*, in which the Detroit Police Department refused to return several firearms which the police department seized from the plaintiff pursuant to a search warrant. *Banks, supra*, 183 Mich App 177. The Detroit Police Department argued that it was entitled to retain the plaintiff's confiscated firearms pursuant to 18 USC 922(g),

"which declares it unlawful for a person convicted of a crime which is punishable by imprisonment for more than one year to transport a firearm, or receive a firearm which has been transported, in interstate commerce." *Banks, supra,* 183 Mich App 179-180. However, this Court ruled that even though the Detroit Police Department could not turn the firearms over to the plaintiff, it could not retain the firearms without instituting forfeiture proceedings or establishing a violation of the statute. *Banks, supra* at 180. This Court directed that the plaintiff could designate an individual to receive the guns. *Id.*

In *People v Switras*, 217 Mich App 142, 144; 550 NW2d 842 (1996), this Court ruled that MCL 750.239; MSA 28.436 "is unambiguous on its face and provides for a forfeiture of firearms if they are carried, possessed, or used contrary to chapter 37 of the Penal Code." Accordingly, this Court held that the trial court erred in imposing forfeiture under MCL 750.239; MSA 28.436 when the defendant was convicted of an offense that was not within chapter 37, involving firearms, of the Penal Code. *Switras, supra,* 217 Mich App 146-147.

In the instant case, defendant was not convicted of a firearms offense within chapter 37 of the Penal Code, and therefore, MCL 750.239; MSA 28.436 is inapplicable. *Switras, supra*, 217 Mich App 146-147. Further, the prosecution did not establish a violation of MCL 750.224f; MSA 28.421(6), nor did it pursue forfeiture proceedings. *Banks, supra*, 183 Mich App 180.

Defendant's convictions and sentences are affirmed. However, the trial court's order denying defendant's motion for return of seized property is reversed, and the case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Harold Hood
/s/ Kathleen Jansen