STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 2, 2000
v	No. 209384 Oakland Circuit Court
ERIC L. VIDEAU, Defendant-Appellant.	LC No. 97-150698-FH

Before: Cavanagh, P.J., and White and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of conspiracy to deliver fifty grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii); MCL 750.157a; MSA 28.354(1); one count of delivery of fifty grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and one count of possession with intent to deliver fifty grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to mandatory consecutive terms of ten to thirty years' imprisonment for each of the three counts. Defendant appeals as of right, and we affirm.

I

Defendant first argues that the trial court erred in denying his motion to suppress the evidence of the money, including $1,900 in prerecorded bills, found on his person during a raid of codefendant Rafael Finley's apartment. This Court reviews de novo the trial court's ultimate decision regarding a motion to suppress evidence; however, the trial court's findings of fact in deciding the motion are reviewed for clear error. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998). A finding of fact is clearly erroneous when, after a review of the entire record, this Court is left with a definite and firm conviction that the trial court made a mistake. *Id*.

The exception to the warrant requirement regarding a search incident to a lawful arrest allows an arresting officer to search the person arrested and seize any evidence to prevent its concealment or destruction. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 529-530; 560 NW2d 651

(1996). The exception applies whenever there is probable cause to arrest, *id*., which occurs when the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed, *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

Deputy Miles testified that when he entered Finley's apartment, he saw defendant standing next to a table; on top of the table was a large amount of cocaine, electronic scales, packaging material, a pager, and a car phone. Miles stated that Finley and defendant appeared to be packaging the cocaine for sale. The previous day, the police had observed defendant meeting with Finley right after the latter arranged a cocaine purchase with an undercover officer but told the officer that he first had to meet with his supplier. Considering these facts, we are not left with a definite and firm conviction that the trial court erred in finding that the officers had probable cause to arrest defendant and conduct a search incident to the arrest.

II

Defendant next maintains that the evidence presented at trial was not sufficient to support his convictions. When ascertaining whether sufficient evidence was presented at trial to support a conviction, a court must view 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 were proven beyond a reasonable doubt. Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

A

Defendant contends there was insufficient evidence to support the conviction of conspiracy to deliver fifty grams or more but less than 225 grams of cocaine.[1] We disagree.

In order to convict a defendant of conspiracy to deliver a controlled substance, the prosecution must prove that (1) the defendant possessed the intent to deliver the statutory amount as charged; (2) his coconspirators possessed the intent to deliver the statutory amount as charged, and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory amount as charged to a third person. *People v Mass*, 238 Mich App 333, 336; 605 NW2d 322 (1999). Direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997).

Defendant asserts that the evidence was sufficient to establish only the existence of a buyer-seller relationship between Finley and himself. However, the prosecution presented evidence that a reasonable factfinder could conclude indicated the existence of something more than a buyer-seller relationship. There were numerous telephone and pager contacts between Finley and defendant. On December 9, 1996, defendant met with Finley prior to the latter's delivery of three ounces of cocaine to

the undercover officer. On December 10, 1996, shortly before Finley was to deliver a large quantity of cocaine to the undercover officer, defendant was observed following Finley from a parking lot to Finley's apartment, entering Finley's apartment, exiting after a short time, returning to his car and opening the trunk, apparently to retrieve something, and then reentering Finley's apartment. When the police entered Finley's apartment, defendant was standing near the cocaine and was apparently participating in its packaging. Given the amount of cocaine involved, a factfinder could reasonably infer that defendant and Finley intended to sell the cocaine. See *People v Catanzarite*, 211 Mich App 573, 578; 536 NW2d 570 (1995). Finally, defendant had in his pocket prerecorded bills that had been used in two separate drug purchases that the undercover officer had previously made from Finley. Viewing these facts in a light most favorable to the prosecution, there was sufficient evidence to support the conviction of conspiracy to deliver the cocaine.

B

Next, defendant argues that insufficient evidence was presented to support his conviction of delivery of fifty or more but less than 225 grams of cocaine. "Delivery" is defined as "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1); MSA 14.15(7105)(1).

The prosecution presented evidence that on December 9, 1996, the undercover officer told Finley that he wanted to buy three ounces of cocaine. Finley stated that he did not have the cocaine at that time, but that he would get it. Finley paged defendant immediately after this conversation. Defendant and Finley paged or called each other ten more times between 5:45 p.m. and 7:58 p.m. When the undercover officer spoke with Finley again at approximately 7:00 p.m., Finley stated that he still did not have the cocaine. Before meeting with the undercover officer, defendant and Finley met in the Tel-Twelve Mall parking lot; Finley got into defendant's car and remained there for nine minutes. Finley subsequently delivered 79.7 grams of a mixture containing cocaine to the undercover officer. When defendant was arrested the following day, he was in possession of $1,800 in prerecorded bills that the undercover officer had used to pay Finley for the cocaine. From this evidence, a rational trier of fact could conclude that defendant delivered the cocaine to Finley and aided and abetted the delivery of cocaine to the undercover officer.

C

In addition, defendant contends that insufficient evidence was presented to support his conviction of possession with intent to deliver fifty grams or more but less than 225 grams of cocaine. To support a conviction for possession with intent to deliver more than fifty but less than 225 grams of cocaine, it is necessary for the prosecutor to prove the following elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing more than fifty but less than 225 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 it. See *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992).

Defendant argues that insufficient evidence was presented to support a finding that he possessed the cocaine that was seized from Finley's apartment. We disagree. Possession may be actual or constructive; thus, a person need not have actual physical possession of a controlled substance to be guilty of possessing it. *Id*. at 519-520. Additionally, possession may be found even when the defendant does not actually own the prohibited substance, and one may possess the substance jointly with others. *Id*. at 520. Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id*. at 521.

In the instant case, sufficient evidence was presented to link defendant with the cocaine. On December 10, 1996, defendant paged or called Finley at least nine times before the latter called the undercover officer at 1:00 p.m. and indicated that it would be a half hour before he would be ready to do the deal. Defendant went to Finley's apartment, came back outside and retrieved something from his car, and again went inside the apartment. Finley called the undercover officer and said that he was bagging up the cocaine and that he would call in about ten or fifteen minutes to tell the undercover officer where to meet him. The police then executed the search and discovered defendant and Finley standing "within arm's reach" of a table which held a large amount of cocaine, packaging material, and other paraphernalia; Finley and defendant appeared to be packaging the cocaine for sale. Defendant had on his person $1,900 in prerecorded bills which had been used in two previous buys between Finley and the undercover officer. Viewing this evidence in a light most favorable to the prosecution, a reasonable factfinder could find that defendant was in possession of the cocaine.

III

Finally, defendant argues that the sentencing court erred in refusing to deviate from the mandatory minimum sentences. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Legislatively mandated sentences, such as the ones imposed in this case, are presumptively proportionate. *People v Ealy*, 222 Mich App 508, 512; 564 NW2d 168 (1997). Nevertheless, a sentencing court may depart from a mandatory minimum sentence where substantial and compelling reasons exist justifying such a departure. *Id*. However, deviations from mandatory sentences are the exception and not the rule. *People v Johnson (On Remand)*, 223 Mich App 170, 172-173; 566 NW2d 28 (1997). If a sentencing court chooses to deviate from a mandatory sentence, it must articulate on the record "objective and verifiable factors" that provide "substantial and compelling" reasons to do so. *Id*. at 173.

We conclude that defendant failed to present substantial and compelling reasons to justify a departure from the mandatory minimum sentences. Accordingly, we cannot find that the trial court abused its discretion in refusing to deviate from the mandatory minimum sentences.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Michael J. Talbot

[1] Defendant also claims that the trial court erred in denying his motion for directed verdict on the original charge of conspiracy to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii); MCL 750.157a; MSA 28.354(1). However, this issue is not preserved because it was not raised in his statement of questions presented on appeal as required by MCR 7.212(C)(5). See *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995). In any case, defendant bases his argument on *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), which our Supreme Court overruled in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998).