

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LABRUNT L. SMITH,

Defendant-Appellant.

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UNPUBLISHED

November 28, 2000

No. 217177

Recorder's Court

LC No. 98-002464

Before: Collins, P.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant Labrunt Smith of possession with intent to deliver 50 to 225 grams of cocaine.<sup>1</sup> However, the trial court acquitted him of possessing a firearm during the commission of a felony (felony-firearm).<sup>2</sup> The trial court sentenced Smith to ten to twenty years' imprisonment. Smith appeals as of right. We affirm.

I. Basic Facts And Procedural History

This case grew out of the Detroit Police Department's surveillance of a house on Camden Street in Detroit. On two occasions on February 3, 1998, the police observed Smith answering the door and allowing two men to enter the house. The police obtained a search warrant, which they executed the next day after observing Smith enter the house. According to the police, they found Smith on the second floor of the house where he was seated on a sofa with a table in front of him. On that table, as well as under the sofa cushions, the police found what they suspected were narcotics and related paraphernalia. When the police removed the material covering a doorway near where Smith was sitting, they found several large chunks of cocaine on the floor. The police also found plastic bags containing cocaine rocks hidden in the ceiling insulation and three additional plastic bags containing cocaine in a first floor closet. The police located a gun under a mattress in a first floor bedroom and confiscated keys, which fit the locks to the house, and \$590 from Smith.

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<sup>1</sup> MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii).

<sup>2</sup> MCL 750.227b; MSA 28.424(2).

When Smith testified at trial, he claimed that Robert Davis owned the house, but he did not know who actually lived there. Smith conceded that he was at the house on February 3, 1998, but said that he was there to make repairs and had brought supplies and tools into the house. This was consistent with the police testimony that there was plywood and other construction equipment at the house at the time of the raid. Contrary to the police testimony, Smith denied letting anyone in the house that day. Smith said that he went back to the house the following day and, shortly after he arrived, the police entered the premises. Smith denied knowing that there was cocaine in the house and stated that he was standing at the top of the stairs, not sitting in front of a table, when the police first encountered him. Smith said that the money the police confiscated from him was money had he earned from another job.

The trial court, acting as factfinder, ultimately convicted Smith of possession with intent to deliver 50 to 224 grams of cocaine. The trial court explained its decision to acquit Smith of felony-firearm, saying that “[a]s it relates to the gun, the court is not convinced beyond a reasonable doubt that the defendant did, in fact, possess the gun.” When Smith moved for a new trial, the trial court denied his motion and, in the process, again commented on the felony-firearm charge:

As it relates to the gun, Mr. Barney, Mr. Smith, the gun was found in another bedroom away from where the defendant was. It is my understanding from the testimony that the police – there was nothing to place the gun on the defendant. There was nothing to indicate that the defendant knew the gun was underneath the mattress. It was not in close proximity of [sic] the defendant. And that is the reason the Court found the defendant not guilty of possession of felony firearm [sic] during the commission of a felony.

## II. Sufficiency Of The Evidence

### A. Standard Of Review

Smith argues that the evidence was insufficient to show that he possessed the cocaine in question. “In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to 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 proved beyond a reasonable doubt.”<sup>3</sup>

### B. Constructive Possession

The prosecutor in this case had the burden of proving beyond a reasonable doubt that Smith knowingly possessed the cocaine at issue.<sup>4</sup> “A person need not have actual physical possession of a controlled substance to be guilty of possessing it.”<sup>5</sup> Rather, constructive

<sup>3</sup> *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

<sup>4</sup> *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).

<sup>5</sup> *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

possession is sufficient to satisfy the possession required under the statute.<sup>6</sup> “[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband.”<sup>7</sup> The ultimate question is whether the evidence, viewed in a light most favorable to the prosecutor, established a sufficient connection between Smith and the contraband to support a reasonable inference that Smith exercised dominion and control over the substance.<sup>8</sup>

Here, there was evidence that the police found drugs and related paraphernalia in such close proximity to Smith that they were literally within his reach. Smith was the only person present in the house when the police executed the search warrant, he possessed a key to the house, he answered the door to the house on the day before the raid, and he permitted other people to enter the house. These facts all suggest that Smith exercised dominion and control over the house and its contents, contrary to his argument that he was merely working in the house. While the controversy in the record concerning the reasons why Smith was in the house and where he was located when the police conducted the raid may have permitted the trial court to come to a different conclusion concerning Smith’s relationship to the cocaine, we must view the evidence in a way that favors the prosecutor’s case.<sup>9</sup> Applying this favorable perspective makes it clear that the evidence was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that Smith constructively possessed the cocaine.

### III. Sentencing

Smith argues that the court abused its discretion by refusing to depart downward from the statutory ten-year minimum sentence for this narcotics offense. However, Smith forfeited this issue for appeal by failing to provide this Court with a copy of the presentence report prepared for this case.<sup>10</sup>

### IV. The Motion For New Trial

#### A. Standard Of Review

Smith argues that the trial court abused its discretion when it denied his motion for a new trial. Primarily at issue is whether the trial court acted inconsistently when it acquitted him of felony-firearm but convicted him of the narcotics offense. Further, Smith claims that trial court should have granted the motion for a new trial because the evidence of his guilt was insufficient

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<sup>6</sup> *Id.* at 520.

<sup>7</sup> *Id.* at 521.

<sup>8</sup> *Id.* at 521, quoting *United States v Disla*, 805 F2d 1340 (CA 9, 1986); *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

<sup>9</sup> *Jaffray, supra* at 296.

<sup>10</sup> MCR 7.212(C)(7); see *People v Rodriguez*, 212 Mich App 351, 355; 538 NW2d 42 (1995); *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995).

and the verdict against the great weight of the evidence. We review a trial court's decision on a motion for a new trial to determine if the trial court abused its discretion.<sup>11</sup>

### B. Inconsistent Verdict

Smith correctly asserts that a trial judge sitting as the trier of fact may not enter an inconsistent verdict.<sup>12</sup> In this case, however, there was no inconsistency in the trial court's decision to convict Smith of the narcotics offense but to acquit him of felony-firearm. The evidence adduced at trial only proved that Smith had possessed the specified amount of cocaine with the intent to deliver it and not that he had possessed a firearm while committing this other felony.<sup>13</sup> There was no evidence that the gun the police found in a bedroom of the first floor of the house was related to Smith – whom the police found on the second floor – in any manner.<sup>14</sup> In contrast to the distance between Smith and the gun, much of the cocaine the police found in the house was in the immediate area around him, so close that the trial court properly found that he constructively possessed the cocaine. While the police seized cocaine from areas of the house that were not within Smith's immediate reach, his claim that he was doing work on the house tied him to the cocaine hidden behind the doorway covered with plywood or a similar material. Further, his free entry into the house with a set of keys and his ability to allow others to enter suggest that he had dominion and control over the whole premises. Critically, the fact that Smith had cocaine and drug paraphernalia around him connected him to the cocaine found in more distant areas of the house. While it is true that the cocaine found on the first floor of the house and the firearm were similarly distant from Smith, there was no evidence that linked Smith to the gun. For instance, the police did not find ammunition or a holster that fit the firearm anywhere near Smith. The trial court simply recognized that evidence purportedly supporting the two different charges were of different nature, quality, and amount. This properly led the trial court to conclude that it could only convict Smith of the narcotics offense. Because these verdicts were not inconsistent, we have no grounds to conclude that the trial court abused its discretion by denying the motion for a new trial on this basis.

### C. Sufficiency Of The Evidence

Smith also contends that the court should have granted him a new trial because the evidence was insufficient to support the verdict. However, as we outlined above, this claim is without merit. Therefore, we conclude that the trial court did not abuse its discretion in refusing to grant a new trial on this basis.

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<sup>11</sup> *People v LeGrone*, 205 Mich App 77, 79; 517 NW2d 270 (1994).

<sup>12</sup> *People v Walker*, 461 Mich 907; 603 NW2d 784 (1999).

<sup>13</sup> *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

<sup>14</sup> While the trial court commented that Smith had no ready access to the firearm as one of the reasons why the acquittal was proper and a new trial not necessary, we note that ready access is not the only evidence required to satisfy the statute. See *People v Burgenmeyer*, 461 Mich 431, 438-439; 606 NW2d 645 (2000). The trial court's remarks as whole indicate that it found no logical way to connect Smith to the firearm.

#### D. Great Weight Of The Evidence

Finally, Smith contends that the verdict was against the great weight of the evidence. In undertaking our review, we consider whether the verdict was manifestly against the clear weight of the evidence.<sup>15</sup> Only if there is no evidence providing reasonable support for the conviction, suggesting that influences outside the record like passion, prejudice, sympathy or some extraneous influence, would we vacate Smith's conviction for this reason.<sup>16</sup>

The verdict in this case was not against the great weight of the evidence in light of the location of the cocaine and Smith's activities at the house demonstrating that he exercised some level of authority, as we have outlined in the foregoing discussion. Given these circumstances, and the fact that Smith does not contend that the verdict was attributable to improper influence, we cannot conclude that the trial court abused its discretion in denying Smith's motion for a new trial based on a great weight of the evidence theory.

Affirmed.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ William C. Whitbeck

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<sup>15</sup> *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

<sup>16</sup> *Id.*