

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILLIAM J. BLADE,

Defendant-Appellee.

UNPUBLISHED

February 16, 2001

No. 222543

Wayne Circuit Court

Criminal Division

LC No. 99-005616

Before: Smolenski, P.J., and Holbrook, Jr., and Gage, JJ.

PER CURIAM.

Defendant was charged with one count 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). The circuit court granted defendant's motion to suppress an incriminating statement that he made to police and accordingly dismissed the charge against defendant. The prosecutor appeals. We reverse and remand.

On April 26, 1999, Officer Brian Terry of the Ecorse City Police Department stopped a vehicle with an expired license plate. Because the driver could not produce a driver's license, registration or proof of insurance, Officer Terry removed him from the vehicle and placed him under arrest. Defendant, the vehicle's front seat passenger, attempted to exit the vehicle during the stop. Officer Terry repeatedly instructed defendant to return to the vehicle before defendant complied. Officer Terry then noticed an open container of alcohol near the front passenger seat, over which defendant admitted ownership. Accordingly, Officer Terry removed defendant from the vehicle, intending to arrest him for possessing open intoxicants in a motor vehicle in violation of MCL 257.624a; MSA 9.2324(1).

Because he had placed the driver under arrest, Officer Terry arranged to tow the vehicle. Before doing so, he began a brief inventory search, at which point he discovered a small quantity of cocaine.¹ Officer Terry testified that he discovered the drugs between the driver's seat and the console which separated the driver's seat from the front passenger seat. The cocaine was wrapped in 25-35 small plastic baggies, which in turn were contained in a larger plastic baggie.

¹ Below, the parties stipulated that the substance discovered in the vehicle was cocaine.

Officer Terry testified that he did not see the drugs from a standing position outside the vehicle, but once he leaned into the car and looked down, he saw the bag of drugs next to the driver's seat.² Upon discovering the narcotics, Officer Terry arrested both the driver and defendant for possession of cocaine.

According to police, defendant initially denied any knowledge of the cocaine. However, defendant later changed his story and admitted that the cocaine belonged to him, admitted that he placed the drugs next to the driver's seat when police stopped the vehicle, and stated that the vehicle's other occupants had nothing to do with the drugs. Following a preliminary examination, the district court bound defendant over on one count 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). Defendant subsequently moved to suppress evidence of his incriminating statement.³ After an evidentiary hearing, the circuit court concluded that Officer Terry lacked probable cause to believe that defendant possessed the cocaine found in the vehicle. The circuit court therefore granted defendant's motion, suppressed evidence of his incriminating statement as the fruit of an unlawful arrest, and dismissed the charge against him. The prosecutor appeals from that decision.⁴

To the extent that a lower court's decision on a motion to suppress evidence is based on an interpretation of law, we must apply a de novo standard of review. However, we review for clear error those factual findings made in conjunction with a motion to suppress evidence. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). In reviewing the existence of probable cause to arrest, an appellate court must decide "whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony." *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998).

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment. By statute, an arresting officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it. Probable cause to arrest exists

² There is no testimony in the record indicating that Officer Terry touched or manipulated any object inside the vehicle before discovering the drugs. Rather, the record indicates that he immediately saw the drugs upon leaning into the vehicle.

³ Defendant filed several additional motions in the circuit court, including: (1) a motion to suppress the evidence discovered during the vehicle search, i.e., the cocaine, (2) a motion to conduct a *Walker* hearing, on the basis that police had coerced defendant's incriminating statement, and (3) a motion to quash the information, on the basis that the prosecutor had failed to prove either defendant's possession of the cocaine or defendant's intent to deliver the cocaine. This appeal involves only the circuit court's decision to suppress evidence of defendant's incriminating statement on the basis of an invalid arrest.

⁴ It is clear from the above facts that Officer Terry possessed probable cause to arrest defendant for possessing open intoxicants in a motor vehicle. On appeal, the prosecutor does not rely on that ground to validate defendant's arrest. Therefore, our review is limited to determining whether Officer Terry possessed probable cause to arrest defendant for possession of cocaine.

where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man 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) (citations omitted).]

In the present case, the prosecutor argues that Officer Terry had probable cause to believe that defendant had constructive possession of the cocaine found in the vehicle.

A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance. [*People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (citations omitted).]

The trial court rejected that argument below, ruling that defendant's proximity to the cocaine, by itself, was insufficient to establish a reasonable belief that defendant constructively possessed the drugs. The trial court noted that defendant was not the vehicle's owner or its driver, that defendant was not sitting as close to the narcotics as the driver, that defendant did not possess any drug paraphernalia at the time of his arrest, and that police did not observe defendant making any "furtive gestures" which might have indicated an attempt to hide the drugs.

On appeal, the prosecutor relies on *People v Iaconis*, 29 Mich App 443; 185 NW2d 609 (1971), for the proposition that a suspect's close proximity to narcotics does support a finding that the suspect had constructive possession of the drugs. In *Iaconis*, a police raid uncovered the six defendants "in a small living room in which a quantity of heroin was located, to which all of the defendants were situated in close proximity." *Id.* at 449. Although the opinion addressed the sufficiency of a search warrant, rather than the existence of probable cause to support a warrantless arrest, this Court determined that the prosecution had presented sufficient evidence to convict the defendants of drug possession. *Id.* at 459. The circuit court declined to rely on *Iaconis*, reasoning that the police officers in that case had observed the defendants at the suspected drug house over a period of time and that the officers had seized a large quantity of drug paraphernalia, which was also in close proximity to the defendants. In contrast, the circuit court found that Officer Terry had not observed defendant in the vehicle at any point preceding the stop and that defendant did not have any drug paraphernalia on his person at the time of arrest. In short, the circuit court ruled that *Iaconis* involved additional circumstances beyond the defendants' mere proximity to the narcotics, while the present case did not.

We need not resolve the prosecutor's contention that a vehicle passenger's mere proximity to narcotics discovered in the vehicle is sufficient to create probable cause to arrest him for drug possession. We believe that the present case involves additional facts, beyond mere proximity, which would "justify a fair-minded person of average intelligence" in believing that defendant had constructive possession of the narcotics. *Kelly, supra* at 631. Specifically, Officer

Terry's testimony supports a finding that the cocaine was in plain view of defendant's position in the front passenger seat.⁵ Further, his testimony supports a finding that defendant exited the vehicle during the stop and refused to resume his seat until the officer repeatedly ordered him to do so. Because the officer reasonably believed that the narcotics were in defendant's plain view within the vehicle, that the narcotics were within arm's reach of defendant within the vehicle, and that defendant acted in a suspicious manner during the vehicle stop, we believe that defendant's arrest for joint constructive possession of cocaine was supported by probable cause. Accordingly, we reverse the trial court's holding that defendant's arrest was invalid.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage

⁵ The circuit court described the location of the drugs as "a hybrid of plain view," because the bag of cocaine "was in plain view but not open view." We interpret the circuit court's comments to mean that the drugs were not in the officer's plain view while he was standing outside the vehicle. However, the drugs were in the officer's plain view once he leaned into the vehicle.