

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY CLAUDE MCKINNEY,

Defendant-Appellant.

UNPUBLISHED

March 20, 2001

No. 223017

Kent Circuit Court

LC No. 98-012185-FH

Before: Saad, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted 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); carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424; possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and entry without permission, MCL 750.115; MSA 28.310. He was sentenced as a repeat drug offender to a prison term of five to ten years for the cocaine conviction, and to prison terms of two to five years for the CCW conviction, two years for the felony-firearm conviction, and to time served on the entry without permission conviction. Defendant appeals as of right. We affirm in part, vacate in part, and remand for resentencing on the possession with intent to deliver cocaine conviction.

Defendant first argues that sufficient evidence was not presented to support a finding that he knowingly possessed the cocaine with the intent to deliver it. Possession, for purposes of drug offenses, may be either actual or constructive. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, amended 441 Mich 1201 (1992). "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 521. Viewed in a light most favorable to the prosecution, the evidence reveals that cocaine was found on the chair next to which defendant was standing when he was arrested and in a location near where a police officer saw defendant throw something. A police officer also testified that defendant was drawing his hand back from behind the chair when the police entered the room. Crack cocaine was later found behind the chair. Under the totality of the circumstances, a reasonable juror could conclude beyond a reasonable doubt that defendant possessed the drugs found in the bag, on the chair, and behind the chair.

Actual physical delivery of the contraband is not necessary to prove that a defendant intended to deliver the drugs. *Id.* at 524. Instead, an intent to deliver may be "inferred from the

quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Id.*

Here, a police officer qualified as an expert in the area of drug transactions testified that the cocaine found the night defendant was arrested was consistent with a quantity normally held by drug dealers. The officer also testified that activity such as yelling and flagging down cars was consistent with drug dealing and that the police observed such activity before approaching the house that evening. Moreover, according to the officer, the time of night defendant was arrested was consistent with the time when drug dealing is at its peak. Finally, defendant was located on a porch where this activity was occurring. Given these circumstances, we conclude that the evidence was sufficient to allow reasonable jurors to find beyond a reasonable doubt that defendant intended to deliver the drugs.

Defendant next contends that the evidence was insufficient to support the CCW conviction. Concealment is an essential element of the crime of carrying a concealed weapon. Viewed in a light most favorable to the prosecution, the evidence was not sufficient to allow a reasonable juror to conclude beyond a reasonable doubt that defendant concealed a weapon on his person. *People v Jackson*, 43 Mich App 569, 571; 204 NW2d 367 (1972). No evidence was presented that defendant concealed the weapon. Rather, the prosecution argued that the weapon must have been concealed because none of the officers noticed defendant carrying a weapon. However, the fact that no witness testified that they saw defendant with a concealed weapon is not sufficient evidence to allow a reasonable juror to conclude beyond a reasonable doubt that defendant concealed a weapon from view. Accordingly, we vacate defendant's CCW conviction.

Defendant also asserts that the evidence was insufficient to prove that he possessed a handgun during the commission of a felony. A conviction for felony-firearm requires proof that a defendant possessed a firearm and that he possessed the firearm during the time he was committing or attempting to commit a felony. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000).

Possession, for purposes of the elements of felony-firearm, may be either actual or constructive. *Id.* at 437-438. Constructive possession can be found "if the location of the weapon is known and it is reasonably accessible to the defendant." *People v Hill*, 433 Mich 464, 471; 446 NW2d 140 (1989). In this case, evidence that defendant drew his hand back from the area where the gun was located suggests that defendant knew the handgun was in the pile of clothes and that the gun was readily accessible to defendant. Under these circumstances, a reasonable juror could have concluded beyond a reasonable doubt that defendant possessed the cocaine at the same time he possessed the handgun while possessing the cocaine with the intent to deliver.

Last, defendant asserts, and the prosecutor agrees, that he is entitled to resentencing on the cocaine conviction because the trial court sentenced defendant under the mistaken belief that a five-year mandatory sentence was applicable to defendant's conviction as a second drug offender. MCL 333.7413(2); MSA 14.15(7413)(2) authorizes the enhancement of a second drug offender sentence to a term "not more than twice the term otherwise authorized." The otherwise authorized term is from 1 to 20 years in prison. See MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Given the trial court's comments at sentencing, it appears that the trial

court did not recognize its discretion to sentence defendant to a lesser sentence. Hence, we remand this for resentencing on the conviction for possession with intent to deliver less than fifty grams of cocaine. *People v Mauch*, 23 Mich App 723, 730-731; 179 NW2d 184 (1970).

Affirmed in part, vacated in part, and remanded for resentencing on the conviction for possession with intent to deliver less than fifty grams of cocaine. Jurisdiction is not retained.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell