

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY MCGEE,

Defendant-Appellant.

UNPUBLISHED

July 10, 2001

No. 219569

Wayne Circuit Court

LC No. 98-006577

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced to a one-year suspended sentence on the marijuana conviction, and thirty-two months' to four years' imprisonment on the cocaine conviction, to be served consecutive to a two-year felony-firearm sentence he received in another case. Defendant appeals his convictions and the consecutive sentencing order as of right. We affirm the conviction and remand for entry of a judgment ordering that the sentence for cocaine possession be served concurrent to the felony-firearm sentence.

When reviewing a challenge to the sufficiency of evidence, we 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 proved beyond a reasonable doubt. *People v Mackle*, 241 Mich App 583, 597; 617 NW2d 339 (2000).

Possession of a controlled substance means a defendant has "dominion or right of control over the drug with knowledge of its presence and character." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). Possession may be either actual or constructive, and may be proved by circumstantial evidence and reasonable inferences drawn from this evidence. *Id.* at 615-616. Defendant does not have to actually own the substance, but may possess it jointly with others. *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999). However, a defendant's mere presence is insufficient to show constructive possession without other facts. *Id.* at 34-35. Instead, constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 35.

At trial, police officers described defendant's behavior, proximity to the narcotics, and the money and narcotics they confiscated. This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478, amended 441 Mich 1201 (1992). Under the totality of the circumstances test, there was sufficient evidence for a rational jury to convict defendant for possession of less than twenty-five grams of cocaine and possession of marijuana. We affirm the guilty verdicts.

Defendant next asserts that the trial court should not have ordered that his sentences in this case were to be served consecutive to his two-year felony-firearm sentence in a prior case. We agree, and remand for entry of a judgment ordering that these sentences be served concurrent with the felony-firearm sentence.

Consecutive sentencing may be imposed only where expressly authorized by statute. *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). Defendant's crimes in this case were not "major controlled substance offenses," MCL 761.2, and therefore the applicable consecutive sentencing statute is MCL 768.7b(2)(a). That statute permits but does not require consecutive sentencing where a defendant commits a second felony while the charges for an earlier felony are pending, MCL 768.7b(2)(a). Defendant had earlier been sentenced in an unrelated matter to a mandatory two years' imprisonment under the felony-firearm statute, MCL 750.227b, which ran consecutively to 17½ to 30 years' imprisonment for the underlying felony. The trial court, as authorized by MCL 768.7b(2)(a), permitted defendant's drug-related sentences to run concurrent with the underlying felony, but erroneously concluded that the felony-firearm sentence had to run consecutively to *all* other sentences. However, only the offenses underlying the felony-firearm conviction must be served consecutive to the felony-firearm sentence. *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). Defendant's sentence in this case should have started running concurrently with his felony-firearm sentence. Because the trial court decided not to sentence consecutively, we need not address the issue of defendant's notice of the earlier charge.

No resentencing hearing is required, however. *Alexander*, *supra* at 678. Instead, the portion of defendant's sentence that requires him to serve his sentence consecutive to the felony-firearm sentence in the prior conviction must be corrected. *Id.* We remand for entry of a judgment ordering that this sentence be served concurrent to the felony-firearm sentence.¹

Affirmed but remanded for correction of judgment of sentence. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Kathleen Jansen

¹ We note that this holding will have no effect on the amount of time defendant must spend in prison. Regardless of whether his minimum term for the drug charges is completed in thirty-two months or two years plus thirty-two months, he will still have considerable time remaining on the 17½-year minimum sentence for the felony underlying the prior felony-firearm conviction.