

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON JOEL LEWIS,

Defendant-Appellant.

UNPUBLISHED

December 14, 2001

No. 224533

Lake Circuit Court

LC No. 99-003500-FH

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Defendant appeals by right his conviction of possessing less than twenty-five grams of a controlled substance, MCL 333.7403(2)(a)(v), for which he was sentenced to one year and eleven months to four years' imprisonment. We affirm.

Defendant first contends that the evidence, at most, established only that he used cocaine and that there was insufficient evidence to prove that he possessed cocaine. The evidence must be viewed in the light most favorable to the prosecution and the decision must be affirmed if a rational trier of fact could find the essential elements of the offense have been proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The standard of review is highly deferential, and the reviewing court must draw all reasonable inferences and make all credibility choices in support of a guilty verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The prosecution may prove its case through the presentation of either direct or circumstantial evidence. *Johnson, supra* at 731-732, n 7.

The elements of the offense are: (1) the defendant possessed a controlled substance; (2) the substance possessed was cocaine; (3) the defendant knew he was possessing cocaine; and (4) the substance was in a mixture that weighed less than twenty-five grams. CJI2d 12.5. A person does not have to have physical possession of a controlled substance to be guilty of possessing it. *People v Fetterly*, 229 Mich App 511, 515; 583 NW2d 199 (1998). A defendant need only have dominion or control over the controlled substance in order to prove constructive possession. *Id.* Constructive possession exists where the totality of the circumstances surrounding the defendant's relation to the controlled substance establishes a sufficient nexus between a defendant and the controlled substance. *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Under *Wolfe* and its progeny, there was sufficient evidence to establish that defendant was guilty of possession of under twenty-five grams of a controlled substance, MCL 333.7403(2)(a)(v), as a lesser included offense of possession of between 50 and 224 grams, MCL 333.7403(2)(a)(iii). Likewise, there was sufficient evidence to convict defendant of a separate offense of possessing under twenty-five grams of cocaine, MCL 333.7403(2)(a)(v).

Defendant next claims that his due process rights were violated because the amended information contained an additional charge without sufficient evidence introduced at the preliminary examination to support bindover on the charge. According to defendant, he was not given notice and was not able to prepare a defense against the charge. A trial court's grant of an amendment will not be reversed on appeal unless the defendant was prejudiced or a failure of justice resulted. MCL 767.76; *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982).

It is not entirely clear whether the added charge was a lesser-included offense or if it was an entirely new offense. Regardless of which theory is correct, the conclusion remains the same. Under MCL 768.32, for a defendant indicted under MCL 333.7403(2)(a)(i) or (ii), a jury can be instructed on a lesser-included offense only if the lesser included offense is a "major controlled substance offense." *People v Gridiron (On Rehearing)*, 190 Mich App 366, 368; 475 NW2d 879 (1991). Major controlled substance offenses included MCL 333.7403(2)(a)(i) to (iv). MCL 761.2. This limitation, however, does not apply in this case because defendant was originally charged under MCL 333.7403(2)(a)(iii); the jury could have been instructed that defendant could have been found guilty under the lesser-included offense of possession of less than twenty-five grams, MCL 333.7403(2)(a)(v). There would have been no error had this occurred, because a defendant cannot be prejudiced by the addition of a charge he is already defending. *People v Coles*, 28 Mich App 300, 302; 184 NW2d 214 (1970).

The right to a preliminary examination is statutory, not constitutional. *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993). The preliminary examination functions to determine whether probable cause exists to charge a defendant with a particular crime; a defendant cannot be charged with an offense absent probable cause. *Id.* Magistrates, however, are not bound by the limitations in the written complaint when issuing an information. *Id.* at 363. A magistrate can examine other pertinent matters related to the charge. *Id.* The information merely has to be "framed with reference to the facts disclosed at the examination which succeeds the arrest." *Id.*, quoting *People v Kahler*, 93 Mich 625, 627; 53 NW2d 826 (1892). Thus, as the *Hunt* Court concluded, amending an information to add a new charge is allowable as long as (1) the proofs presented at the preliminary examination are sufficient to support a bindover on the added charge; and (2) the added charge does not cause the defendant "unfair surprise, inadequate notice, or insufficient opportunity to defend." *Id.* at 364-365.

The preliminary examination here covered the basic elements of possession of under twenty-five grams of cocaine, MCL 333.7403(2)(a)(v): (1) the defendant possessed a controlled substance; (2) the substance possessed was cocaine; (3) the defendant knew he was possessing cocaine; and (4) the substance was in a mixture that weighed less than twenty-five grams. Defendant was given adequate notice that he may have to defend the charge and was able to prepare an adequate defense; defendant offers nothing his attorney could have done differently under other circumstances. The court was justified in concluding that the preliminary examination had established probable cause that defendant possessed less than twenty-five grams

of cocaine when he ingested the white substance in the plastic bag. The *Hunt* standard has been met. Accordingly, because defendant suffered no prejudice and there occurred no failure of justice, defendant's conviction must be affirmed. MCL 767.76; *Prather, supra* at 333-334.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Richard Allen Griffin

/s/ Michael R. Smolenski