STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2002
v	No. 231392 Wayne Circuit Court
JASON CLAY, Defendant-Appellant.	LC No. 99-010103

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). The trial court sentenced defendant as a third habitual offender, to 7½ to 20 years' imprisonment, to be served consecutively to the offense for which he was on parole. Defendant appeals as of right. We affirm defendant's conviction but remand for resentencing.

I

Defendant first argues that the trial court clearly erred by admitting into evidence statements defendant made in the course of plea negotiations with prosecuting authorities. Defendant brought a motion in limine seeking to exclude a letter defendant wrote to the prosecutor arguing, inter alia, that the evidence was inadmissible under MRE 410.

A

MRE 410(4) provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in plea discussions:
>
> * * *
>
> (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

To determine whether statements are made in the course of plea negotiations, the trial court must determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances. *People v Dunn,* 446 Mich 409, 415-416; 521 NW2d 255 (1994)[1] (applying the two-tiered analysis of *United States v Robertson*, 582 F 2d 1356, 1366 [CA 5, 1978], which was first adopted in *People v Oliver,* 111 Mich App 734; 314 NW2d 740 [1981][2]); see also *People v Hannold,* 217 Mich App 382, 391; 551 NW2d 710

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[1] In *Dunn, supra*, the defendant was convicted of possession with intent to deliver cocaine. Several days after his arrest, the defendant contacted police in an effort to work out a plea bargain. The police indicated to the defendant that they could not talk to the prosecutor about a plea bargain until they knew "what information he had." *Dunn, supra* at 413. The defendant then told officers that he was hired by a drug dealer in Florida to smuggle cocaine from South America into the United States and that he was willing to help police set up a delivery in exchange for a plea bargain that would allow him to plead guilty to a lesser charge. *Id.* at 414. After recording a conversation between the defendant and the dealer in Florida, the police told the defendant they would communicate with the prosecutor. The plea negotiations eventually fell through and the defendant was prosecuted.

The trial court ruled that the defendant's statements to the police could be admitted into evidence. However, the Michigan Supreme Court, affirming this Court, held that the defendant's statements were made in connection with an offer to plead guilty, and thus their admission violated MRE 410. *Id.* In applying the two-tiered analysis of *United States v Robertson*, 582 F2d 1356 (CA 5, 1978), the Court reasoned that the defendant had a subjective expectation to negotiate a plea at the time of the discussion. The court further reasoned that the defendant's expectation was reasonable given the totality of the objective circumstances, namely, that the defendant contacted detectives shortly after his arrest for the express purpose of negotiating a plea bargain with the prosecutor, that the detectives encouraged him to talk so they could discuss the possibility of a plea with the prosecutor, and that with the information the defendant supplied, the detectives went to the prosecutor and obtained a warrant to record a second phone call. The Court held that the admission of the defendant's statements was error and not harmless.

[2] In *Oliver, supra,* the defendant was charged with three counts of first-degree murder. At an interrogation session the defendant asked a police officer, "if I said I did it, would it still be first degree murder?" and "if [I say] I did it, do I have to say it in front of a full court?" *Oliver, supra* at 750. The officer responded that he didn't have the authority to engage in negotiations of that type. At trial, the prosecution was permitted to elicit testimony from the officer describing the interrogation. On appeal, this Court held that the officer's testimony should have been excluded under MRE 410(4), and that the error was not harmless. *Id.* at 752. Applying *Robertson*, this Court reasoned that the nature of the defendant's initial question, "if I said I did it, will it still be first degree murder," indicated a subjective expectation to negotiate a plea. This Court further reasoned that the defendant's expectation was reasonable because the officer told the defendant that he always tries to "help a guy that tells [him] the truth," and the officer conceded that he generally attempts to leave a defendant with the impression that he is a "good guy" who can be talked to openly. *Id.* at 751. The Supreme Court in *Dunn, supra*, approved this Court's application, in *Oliver, supra*, of the two-tiered analysis of *Robertson*, while noting that the defendant, Dunn, had been convicted in 1989, before MRE 410 was amended, effective October 1, 1991. *Dunn,* 446 Mich 409, 416, n 16.

(1996), and *People v Manges*, 134 Mich App 49; 350 NW2d 829 (1984)[3] (applying *Robertson, supra*).

A trial court's determination whether the parties were engaged in plea discussions is a factual finding reviewed for clear error. See e.g., *United States v Aponte-Suarez*, 905 F2d 483, 493 (CA 1, 1990).

The trial court admitted redacted portions of defendant's letter, which stated:

> Mr. O'hair,
>
> My name is Jason Clay. I am writing this letter in concern of myself, and helping you and your team out.
>
> I am lock up [sic] for controlled substance – Delivery/manufacture of Cocaine, and I have names of people who supplies [sic] the cocaine and I want to make a deal. [redacted portion]
>
> I am willing to help you out I know where these people stay, all I'm asking for is a chance, I realize I have a mistake [sic] and I want to correct it.
>
> Thank you for taking the time to read this letter.

The trial court concluded that defendant met the first prong of *Robertson*, but not the second, i.e., that defendant possessed an actual subjective expectation to negotiate a plea when he sent the letter, but that given the totality of the circumstances, defendant's subjective expectation was unreasonable. The trial court's determination under the first prong of *Robertson, supra,* is not challenged. We conclude that the trial court's determination that, given the totality of the objective circumstances, defendant's expectation was unreasonable did not constitute clear error. There were no plea negotiations at any time (it appears that the letter was ignored), and in the letter, defendant did not offer to plead guilty to anything. See *United States v Ceballos*, 706 F2d 1198, 1203 (CA 11, 1983).

Lastly, we observe that there was ample evidence of defendant's guilt and it is unlikely that the admission of the letter, or the prosecutor's reference to it in closing argument, prejudiced defendant.

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[3] In *Manges*, this Court held that admission of the defendant's statements constituted error under MRE 410. 134 Mich App at 59. After being arrested in connection with criminal sexual conduct, the defendant in *Manges* made inculpatory statements in a discussion with the prosecuting attorney. The trial court allowed the prosecutor to testify regarding the inculpatory statements the defendant made. This Court ruled that the statements should have been excluded under MRE 410(4), finding that the defendant's statements expressing a desire to "make a deal" reflected a subjective expectation to negotiate a plea, and that the prosecutor gave the defendant conflicting signals by stating that he was not in a position to make a deal, while inviting the defendant to talk about the case. *Id.* at 60.

II

Defendant also argues that the trial court clearly erred in instructing the jury as to its own definition of constructive possession, violating defendant's rights to due process and a fair trial, and resulting in a miscarriage of justice.

Defendant argues that the constructive possession instruction failed to include the portion on mere presence. However, defendant did not object to the instruction as given or request a mere presence instruction, thus this Court's review is for plain error resulting in a miscarriage of justice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The trial court's preliminary instructions to the jury included the possession instruction defendant challenges on appeal as unnecessary, inaccurate and incomplete:

> In terms of possession, ladies and gentlemen, possession does not necessarily mean ownership. Possession means that either the person had actual, physical control of the substance; for example, like the pen that I'm holding in my hand right now.
>
> Or that the person had the right to control the substance, even though it was in a different room or place. That's what's called constructive possession.
>
> And an example of that, ladies and gentlemen, would be for those of you who drove today, you parked your car in a parking lot. Locked the car. Put the keys in your pocket or in your purse and came here.
>
> Even though your car is not with you here in this courtroom by virtue of the fact that you placed it somewhere, that you locked it, that you have the keys to open that car up, means that the law considers that you constructively possessed the car, even though it may be across the street in the lot.

The trial court's final jury instructions included:

> Possession does not necessarily mean ownership. Possession means one of two things. Number one, the defendant had actual, physical control over the cocaine.
>
> Actual physical control means actually holding on to it, like I'm holding on to this pen right now, or that the person has the right to control the cocaine, even though it's in a different place or in a different room.
>
> If you will recall, I used the example of if you came here and parked your car across the street, locked it up and took the car keys with you, you still possess your car, even though the keys are in your pocket, and the car is across the street.
>
> Possession may be sole, where one person alone possesses it, or it may be joint where two or more people each share possession.

> It is not enough if the defendant merely knew about the cocaine. The defendant possessed the cocaine only if he had control of it or the right to control it, either by himself or together with someone else.

CJI2d 12.7 states:

> Possession does not necessarily mean ownership. Possession means that either:
>
> (1) the person has actual physical control of the [substance/thing], as I do the pen I'm now holding, or
>
> (2) the person has the right to control the [substance/thing], even though it is in a different room or place.
>
> Possession may be sole, where one person alone possesses the [substance/thing]. Possession may be joint, where two or more people each share possession. It is not enough if the defendant merely knew about the [state substance or thing]; the defendant possessed the [state substance or thing] only if [he/she] had control of it or the right to control it, either alone or together with someone else.

Defendant did not request the mere presence jury instruction, CJI2d 8.5.[4] Moreover, constructive possession was not an issue in this case. Defendant testified that he did not possess or sell drugs on the day in question, and did not know where the drugs the police confiscated came from. The police testified that defendant attempted to hide a pill vial containing cocaine packets between his legs, while seated in a chair on the porch, and when defendant stood up, the vial was on the seat of the chair. Because the jury could not have been confused or mistaken about the possession element given the testimony, the mere presence instruction was not warranted. Defendant has not established plain error resulting in a miscarriage of justice.

III

Defendant argues that the trial court erred in exceeding the sentencing guideline range of zero to twenty-five months with its sentence of 7½ to 20 years when there was not a substantial and compelling reason for the departure. Defendant notes that the reasons the trial court referred to, defendant's parole status and prior record, are taken into account under the guidelines, and that the instant offense involved a minor amount of cocaine and did not justify such a lengthy sentence.

The statutory guidelines apply to the instant offense, as it was committed on or after January 1, 1999. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327

[4] CJI2d 8.5 provides:

> Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he/she] was present when it was committed is not enough to prove that [he/she] assisted in committing it.

(2000). Defendant stated at sentencing, and both parties state on appeal, that the sentencing guidelines recommendation for the habitual enhancement was zero to twenty-five months. The trial court imposed a 7½ to 20 year sentence as a third time felony offender. A court may depart from the appropriate sentence range if the court has "substantial and compelling reasons" and states on the record the reasons for departure. MCL 769.34(3).

The trial court did not state on the record substantial and compelling reasons for its upward departure. The prosecution in effect concedes that remand is necessary for the trial court to articulate reasons for its upward departure. We also note that the amended judgment of sentence mistakenly states that the court, rather than a jury, convicted defendant of the drug charge.

We affirm defendant's conviction, but remand for resentencing. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White