STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 7, 2002
v	No. 235376 Wayne Circuit Court
RANDAL JOYCE, Defendant-Appellant.	LC No. 01-000807

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv), and sentenced to three to twenty years' imprisonment. Defendant appeals as of right. We affirm defendant's conviction, but vacate defendant's sentence and remand for resentencing.

I. Basic Facts and Procedural History

On December 27, 2000, a raid crew went to 5021 Baldwin in the city of Detroit to execute a search warrant. The warrant authorized the officers to search the premises and seize an individual named "Randy." According to the information provided to the police, "Randy" was a thirty-year-old black male and weighed approximately one hundred and sixty pounds.

When the police arrived at the location, they announced their presence and when they did not get a response, forced the door open and entered the residence. Once inside, members of the raid crew located defendant in the kitchen. According to the testimony adduced at trial, defendant was the only individual in the kitchen and he was standing between the kitchen table and the stove. Upon entering the kitchen area, the officer observed twenty-four yellowish brown coin envelopes and nineteen foil packets both containing quantities of heroin. While in the kitchen, the officer smelled something burning whereupon he recovered fifty-two partially burned coin envelopes containing heroin. The police did not find any money or heroin pursuant to a search of defendant's person.

Defendant took the stand in his own defense and testified that he went to the Baldwin location to visit a friend. According to defendant, he was only at the location for approximately fifteen minutes before the police executed the search warrant and forced open the door. When the police made their entrance, defendant offered that he was in the den which is located in the

rear of the house right off of the kitchen. He testified that when he heard the commotion, he immediately attempted to walk to the front living area of the home. However, when he was walking through the kitchen on his way to the living room, one of the raid crew members ordered him to stop. When defendant received the order to stop, he was in the kitchen and standing between the kitchen table and the stove.

Defendant testified that he did not, in any way, live at the Baldwin residence, although he admitted that he visited that location before. Further, according to defendant, approximately ten other individuals were in the home when the police executed the search warrant. In addition, defendant indicated that he did not have control over any of the heroin located on the kitchen table or in the stove, and that he was never involved in any packaging of heroin at that location. Finally, defendant testified that his name is "Randal" and that he is not referred to as "Randy." Defendant was charged with possession with intent to deliver less than fifty grams of heroin. After a bench trial, the trial court found defendant guilty and sentenced him to three to twenty-years' imprisonment. Defendant appeals as of right.

II. Sufficiency of the Evidence

First, defendant contends that the prosecutor did not come forth with sufficient evidence to establish that defendant constructively possessed the heroin. We disagree.

This Court reviews de novo claims pertaining to the sufficiency of the evidence. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In a criminal case, the test for determining the sufficiency of evidence is "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

To convict defendant of possession with intent to deliver less than fifty grams of heroin in contravention of MCL333. 7401(2)(a)(iv), the prosecutor must establish that: 1) the substance recovered is heroin; 2) the heroin is in a mixture weighing less than fifty grams; 3) defendant was not authorized to possess the substance, and 4) defendant knowingly possessed the heroin with the intent to deliver. See *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992).

Either actual or constructive possession of the controlled substance will suffice for purposes of demonstrating the requisite possession. *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999). Possession requires that the defendant exert some dominion or control over the controlled substance. *Id*. Although proximity to the controlled substance, presence at the location where the substance is discovered, and mere association, standing alone, are insufficient to support a finding of possession, *Id*. at 34-35, possession may nevertheless be demonstrated by circumstantial evidence. *People v Nunez*, 242 Mich App 610, 615-616; 619 NW2d 550 (2000). An individual may be in constructive possession of a controlled substance where the totality of the circumstances suggests a sufficient "nexus" between the defendant and the contraband. *Griffin, supra* at 34-35.

In the case at bar, there was sufficient circumstantial evidence to establish that defendant constructively possessed the contraband. At trial, defendant testified that he had been to the Baldwin residence before. In addition, when the raid crew entered the house, defendant was in the kitchen positioned in between the kitchen table and the stove. Located, in plain view, on the

kitchen table was heroin. An additional amount of heroin was discovered in the broiler portion of the stove. Defendant was the only one in the kitchen along with the heroin. While we recognize that mere proximity to the contraband is insufficient, in this case, the police were executing a search warrant which specified that the police would find a thirty-year-old, one hundred and sixty pound black male by the name of "Randy" at the specified location. Indeed, the existence of a search warrant implies that the police had information rising to the level of probable cause to believe that "Randy" would be at the Baldwin residence. *People v Whitfiled*, 461 Mich 441, 444; 607 NW2d 61 (2000). At trial, the officer testified that defendant fit the description provided. Defendant did not contest the validity of the search warrant and admitted that he had visited the Baldwin location previously. Thus, defendant's previous visits to the Baldwin residence supported the inference that defendant would be at that location in connection with narcotics. *Wolfe, supra* at 521.

Additionally, defendant contends that the presence of six to ten other individuals in the home when the police executed the search warrant demonstrates that the prosecution lacked sufficient evidence to establish that he possessed the heroin. Again, we do not agree. That other individuals were in the residence at the time that the raid crew executed the search warrant is inapposite. Indeed, mere presence at a location where contraband is discovered, without more, is insufficient to support a finding of possession. *Griffin, supra* at 34.

In the instant case, the trial court did not find defendant's testimony sufficiently credible to exonerate him and dismiss the charges brought against him. On the contrary, the trial court, as the fact finder and final arbiter on the credibility of testifying witnesses, did not accept defendant's version of the facts. Considering the evidence presented in a light most favorable to the prosecution, we find that a rational trier of fact could conclude, beyond a reasonable doubt, that defendant possessed with the intent to deliver less than fifty grams of heroin. *Wolfe, supra* at 515. Accordingly, we affirm the trial court's decision in this regard.

III. Disproportionality of the Sentence

Next, defendant argues that his sentence is invalid because the trial court imposed a sentence that exceeded the statutory guidelines without articulating any substantial and compelling reasons warranting a departure. We agree.

Because this offense occurred after January 1, 1999, the legislative sentencing guidelines apply. *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001). As our Supreme Court iterated in *Hegwood*, "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. [Citation omitted.] The authority to impose sentences and to administer the sentencing statutes enacted by the Legislature lies with the judiciary." *Id.* at 437. Although a circuit court judge has the responsibility to impose sentence, the judge's sentencing discretion is limited by the sentencing guidelines imposed by the Legislature and a jurist may only depart therefrom by articulating a substantial and compelling reason for the departure. *People v Babcock*, 244 Mich App 64, 74; 624 NW2d 479 (2000).

In the case sub judice, possession with the intent to deliver less than fifty grams of heroin is a Class D offense. See MCL 777.13. A review of the sentencing information report contained in the lower court file, reveals that defendant's prior record variables coupled with his offense variable, yielded a statutory minimum sentence of zero to six months' imprisonment. MCL

777.65. In addition, since the upper limit of the recommended sentence was less than eighteen months, the trial court was required to impose an intermediate sanction absent a departure supported by substantial and compelling reasons. MCL 769.34(4)(a); *Babcock*, *supra* at 72. Furthermore, defendant's offense violated § 7401(2)(a)(iv). MCL 769.34(4)(b) mandates that absent a departure, where the upper limit of the recommended sentence range is eighteen months or less, the court "shall" impose a sentence of life probation. In accord with the applicable statute, the Department of Corrections recommended life probation. On this recommendation, the trial court stated:

> And this Court finds it inappropriate for the people who work for the Department of Corrections, where there is a definite conflict of interest, to appoint themselves as the sentencing judge, and present me with a recommendation which is taken to be a de facto sentence.
>
> It is not a de facto sentence. It is not even a good recommendation.
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> * * *
>
> The sentence will be three to twenty.
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> * * *
>
> And I think the message should be sent to individuals that it is not routine to walk in this court, and walk out the court on probation.
>
> Especially on recommendations that are made by other persons, and not the Court.
>
> [Y]ou have to be afraid, and take it "`I'm afraid to sell this, but I'm going to do it. But if I get caught, I'm going to jail."
>
> But don't walk in here expecting that it's going to happen. Three to [twenty.]

The trial court's final commentary was:

> "[I]f the Court of Appeals thinks that my sentence is incorrect, let them reverse me."

We accept the trial court's invitation and find that the trial court's imposition of a sanction in derogation of the sentencing guidelines without providing a substantial and compelling reason justifying the departure is disproportionate and thus invalid. See *People v Bennett*, 241 Mich App 511; 616 NW2d 703 (2000) (recognizing that a sentence imposed within the guidelines range is presumptively "neither excessively severe nor unfairly disparate." *Id.* By implication therefore, a sentence imposed outside of the sentencing guidelines absent substantial and compelling reasons justifying the departure, would be presumptively disproportionate.)

Because the trial court failed to articulate any substantial and compelling reasons justifying the departure, we vacate defendant's sentence and remand for resentencing.

In addition, because of the trial judge's clear intent to disregard the sentencing recommendation provided by the Department of Corrections, along with the trial judge's stated preference to impose a sentence which includes incarceration, we think it appropriate that a different judge impose sentence upon remand. See *People v Scott*, 197 Mich App 28, 33; 494 NW2d 765 (1992).

We affirm defendant's conviction but remand for resentencing before a different judge. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly