STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2004
V	No. 240137 Kalamazoo Circuit Court
EDDIE JONES, Defendant-Appellant.	LC No. 00-000618-FH

Before: O'Connell, P.J., and Jansen and Wilder, 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),[1] possession of a firearm during the commission of a felony, MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). He appeals as of right. We affirm.

On March 2, 1999, after three trash pulls revealing crack cocaine, plastic baggies with torn ends, baggies with residue on them, several lottery tickets, marijuana, and correspondence with defendant's name on it were conducted from outside a residence located at 1620 North Rose in Kalamazoo, police sought a search warrant for the premises. The search warrant was obtained, and the house was raided. Both defendant and a woman named Alice Joyce were present in the home when the raid was conducted.

When officers searched the only bedroom in the home, they observed a fold-out couch, shelves, and piles of junk and clothing, but found no bed. In the pocket of a sweatshirt, several plastic baggies of a chunky white substance were found. The combined weight of the substance was 39.16 grams. 21.95 grams of the substance was later tested and positively identified as being cocaine. On the shelves in the bedroom, Inositol, an agent used to cut cocaine, was discovered, along with rolling papers, drug paraphernalia, a lottery ticket containing an off-white substance, suspected marijuana, and boxes of sandwich baggies. The substance on one of the lottery tickets tested positive for the presence of cocaine. The suspected marijuana was also

[1] Defendant was initially charged with possession with intent to deliver fifty or more but less than 225 grams of cocaine. MCL 333.7401(2)(a)(iii). He was convicted of the lesser charge of possession with intent to deliver less than fifty grams of cocaine.

tested and was positively identified as being marijuana. When the fold-out couch was opened, a pistol was found tucked into the springs. Finally, a utility bill with defendant's name and the address of 1620 North Rose was also recovered in the bedroom.

In addition to conducting a search of the interior of 1620 North Rose, the officers searched a 1985 white Cadillac, which was parked in the backyard by the kitchen. Four weapons were seized from the trunk of the Cadillac, along with bullets and a nine-millimeter magazine. In a tube sock in the trunk, several individually packaged baggies of a white chunky substance were discovered. A separate baggie containing a similar white substance was found under a piece of carpet in the trunk. The suspected cocaine found in the tube sock weighed a total of 65.45 grams. The portion tested weighed 46.81 grams and was positively identified as being cocaine. The substance in the small separate baggie was also positively identified as cocaine and weighed 1.40 grams.[2] The officers investigating 1620 North Rose had not seen the Cadillac before the time the search warrant was executed. The Cadillac was registered to someone other than defendant, and defendant denied ever being in the trunk of the car. According to the prosecution's expert witness, the few latent fingerprints lifted from items in the Cadillac were not defendant's.

I

Defendant first argues that the evidence was insufficient to support a finding beyond a reasonable doubt that he possessed the drugs or weapons that were found when the search warrant was executed. We disagree. When reviewing the sufficiency of the evidence in a criminal case, we "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 Hoffman,* 225 Mich App 103, 111; 570 NW2d 146 (1997) (citations omitted). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry,* 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences drawn from that evidence may be sufficient to prove the elements of a crime. *People v Carines,* 460 Mich 750, 757; 597 NW2d 130 (1999).

A person's presence at a location where drugs are found is insufficient to prove control or possession. *People v Hardiman,* 466 Mich 417, 421; 646 NW2d 158 (2002). Additional connections between the defendant and the contraband must be shown. *Id.* Actual physical possession, however, is not an essential element of possession with intent to deliver. *People v Johnson,* 466 Mich 491, 500; 647 NW2d 480 (2002). Possession may be joint or exclusive and is attributed to those who control the disposition of the drugs. *Id.* "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband," *Id.,* or where the defendant has the right to exercise control over the narcotics and has knowledge of their presence. *People v Wolfe,* 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

[2] Defendant's motion to suppress the evidence found in the Cadillac was denied by the trial court. This decision was affirmed by this Court in *People v Jones,* 249 Mich App 131; 640 NW2d 898 (2002).

Viewed in a light most favorable to the prosecution, the circumstantial evidence and reasonable inferences were sufficient to enable a rational jury to conclude beyond a reasonable doubt that defendant constructively possessed the guns and illegal narcotics seized during the raid. With respect to the items seized from the home, the evidence established more than defendant's "mere presence" at the location where the items were found. The deed to the property indicated that defendant was the owner of the property. The home was very small and consisted of only four rooms: a bedroom, bathroom, kitchen and living room. The front door of the house was heavily barricaded, and the bedroom windows, the room in which the drugs were found, were covered up with newspapers and duct tape. Bottles of Inositol and other drug paraphernalia were visible to people walking into the bedroom.

Lottery tickets were found both in the trash pulls and inside the house. A lottery ticket seized from the bedroom contained cocaine residue. Defendant admitted to the police that he had a "bad" habit of playing the lottery. A utility bill with defendant's name and the address of 1620 North Rose was also found in the bedroom, and a letter with defendant's name on it was found during a trash pull from the front of the house. When defendant was taken into custody, he indicated that his address was 1620 North Rose. Additionally, one of the investigating officers indicated that he was investigating 1620 North Rose because he had a previous, suspicious contact with defendant at the home. The totality of the circumstances supports a sufficient nexus between defendant and the evidence seized in the house. *Johnson, supra.* Defendant had control over the premises and the circumstantial evidence, including the barricaded door, covered windows, and visible drug paraphernalia, are sufficient to show that he had knowledge of the presence of the drugs. *Wolfe, supra.* The evidence of constructive possession was therefore sufficient.

With respect to the evidence seized from the Cadillac, we also conclude that the circumstantial evidence, viewed most favorably to the prosecution, was sufficient to show constructive possession. The Cadillac was found parked in an unusual manner in the backyard, near the kitchen of defendant's house. The keys to the Cadillac were located in the kitchen. The car was operable, but appeared not to have been driven for a period of some time. During the trash pulls, papers with lottery numbers written on them were confiscated, and correspondence with defendant's name was found. Baggies with missing corners or ends were also found in the trash pulls. Similar, mutilated baggies were found in the trunk of the Cadillac. Lottery tickets were also found in the trunk of the car. When they were compared to the lottery number sheets found in the trash pulls, there were several matches. In addition, during defendant's conversation with an officer, he assured the officer that there would be no drugs or weapons found in the trunk. And, like the cocaine found in the home, the cocaine found in the Cadillac was individually packaged in plastic baggies. When considered in a light most favorable to the prosecution, the evidence was sufficient to support a finding that defendant constructively possessed the contraband found in the trunk of the vehicle. Defendant had access to the vehicle and made a statement to the police indicating a degree of control over the car. The totality of the circumstances supports a sufficient nexus between defendant and the contraband. *Johnson, supra.*

II

Defendant next argues that the trial court abused its discretion when it denied his motion to represent himself. We disagree.

The right to self-representation is constitutionally guaranteed. *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996); *People v Ramsdell*, 230 Mich App 386, 405; 585 NW2d 1 (1998). The right, however, is not absolute. *Id*. In *People v Hicks*, 259 Mich App 518, 523; 675 NW2d 599 (2003), this Court stated:

> Proper compliance with the waiver of counsel procedures . . . is a necessary antecedent to a judicial grant of the right to proceed in propria persona. Proper compliance requires that the court engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant." Before a trial court grants a request for self-representation, the trial court must find (1) that the request is unequivocal; (2) that the assertion of the right of self-representation is knowing, intelligent, and voluntary, with the defendant having been made aware by the trial court of the "dangers and disadvantages of self-representation"; and (3) that the defendant "will not unduly disrupt the court while acting as his own counsel." Additionally, MCR 6.005 imposes a duty on the trial court to inform the defendant of the charge and penalty he faces, advise him of the risks of self-representation, and offer him the opportunity to consult with retained or appointed counsel. These requirements are "vehicles to ensure that the defendant knowingly and intelligently waived counsel with open eyes." [Citations omitted.]

In this case, the trial court extensively questioned defendant with respect to his request to represent himself. Defendant initially informed the trial court that he wanted to represent himself "with the guide of joint counsel." Defendant subsequently clarified that he wanted a lawyer to assist him while he proceeded pro se. After the trial court listened to defendant's numerous complaints about his attorney's performance, it informed defendant of the charges he was facing. The trial court subsequently asked defendant if he still wished to represent himself. Defendant indicated that he did, but that he also wanted an "expert assistant." He explained that the "expert assistant is the joint counsel." Defendant later reiterated that he wanted a lawyer to assist him. The following day, at the continuation of the hearing, the trial court warned defendant about the dangers of self-representation and the possible sentences he faced if convicted. The trial court also explained to defendant that he did not have a right to both an appointed attorney and to proceed pro se. Nevertheless, defendant continued to request that he be allowed to have "joint representation" in the form of an "assistant."

The trial court denied defendant's request because it was not unequivocal, and noted that even if the request for self-representation had been unequivocal, standby counsel for defendant would not be appointed. Because defendant had previously attempted to have his appointed attorney engage in conduct that the attorney believed compromised his ethical obligations, the trial court concluded he was likely to make unreasonable requests of standby counsel. Upon review of the record, we conclude that the court did not abuse its discretion in denying defendant's motion. See *People v Russell*, 254 Mich App 11, 18; 656 NW2d 817 (2002), lv gtd 468 Mich 942 (2003).

III

Defendant next challenges in propria persona the prosecutor's failure to endorse or produce three "res gestae" witnesses: "Alisa" [sic] Ford, Henry Doworski, and Alice Joyce.

This issue was not raised before, or decided by, the trial court. Therefore, it is not preserved. Unpreserved issues are reviewed for plain error affecting a defendant's substantial rights. *Carines, supra* at 763-764.

Assuming, without deciding, that the three witnesses are res gestae witnesses, we find no error. Contrary to defendant's broad assertions, the prosecutor is not required to endorse and produce all res gestae witnesses.

> MCL 767.40a(1) and (2) impose a duty to disclose all known res gestae witnesses. Subsections 40a(3) and (4) require the prosecutor to disclose its witness list thirty days in advance of trial, changing that list only for good cause shown or by stipulation. Subsection 40a(5) requires the prosecutor and the police to provide the defendant with assistance "to locate and serve process upon a witness" at the defendant's request. Notably, it does not impose a duty to actually produce such witnesses. [*People v Perez*, 255 Mich App 703, 710; 662 NW2d 446 (2003), lv pending.]

The prosecution identified Annalissa Ford and Alice Joyce as known witnesses, but omitted their names from the list of witnesses that he intended to produce at trial. Defendant never requested assistance in locating or serving process on either of these witnesses. The prosecutor met his obligations with respect to these witnesses and had no further obligations. *Id.* With respect to Henry Doworski, it is not apparent from the record that the prosecutor knew of this alleged witness and failed to disclose him. Moreover, defendant never requested assistance in locating or serving this witness, who was obviously known to defendant. There has been no showing that the prosecutor violated his duties with respect to this witness. *Id.*

IV

Defendant next argues in propria persona that the prosecutor engaged in judge shopping. This issue was not raised before, or decided by, the trial court, and therefore, it is not preserved and reviewed for plain error affecting defendant's substantial rights. *Carines, supra.*

When defendant's case was brought before the district court for preliminary examination on November 9, 1999, the prosecutor was unable to proceed and the charges were dismissed on the prosecutor's motion. No preliminary examination was held. The charges were reissued several months later, and defendant was arraigned on May 3, 2000. Defendant contends that the prosecutor was judge shopping and that he dismissed the initial charges in order to obtain a more favorable judge to preside over the preliminary examination, but offers only speculation and no evidence to support these allegations.

In certain circumstances, the reinstitution of charges may violate due process. *People v Vargo,* 139 Mich App 573, 578; 362 NW2d 840 (1984). In order to protect a defendant's right to due process, MCR 6.110(F) provides:

> If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense. Except

> as provided in MCR 8.111(C), the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge.

"In addition to the provisions of th[is] court rule, subjecting a defendant to repeated preliminary examinations violates due process if the prosecutor attempts to harass the defendant or engage in judge shopping." *People v Dunbar,* 463 Mich 606, 613; 625 NW2d 1 (2001), citing *People v Robbins,* 223 Mich App 355; 566 NW2d 49 (1997).

In this case, defendant concedes that he was not subject to repeated preliminary examinations. No testimony was taken before the originally assigned district court judge. Because no preliminary examination was held and no testimony taken before the initial charges were dismissed, the provisions of MCR 6.110(F) did not require the subsequent case to be brought before the same district court judge. The first judge never considered the evidence or determined the issue of probable cause. For these reasons, this case is distinguishable from the cases cited by defendant where preliminary examinations, or portions thereof, occurred before the dismissal of the charges. More importantly, our review of the record does not support a finding that the prosecution was motivated to dismiss the initial charges because it wanted a different judge. The record does not support either defendant's allegations that the judge initially assigned to the case would have ruled in favor of defendant, or defendant's assertion that the prosecution engaged in judge shopping. Accordingly, we find no plain error.

V

Defendant additionally argues in propria persona that the circuit court never obtained jurisdiction in this case because the preliminary examination return was dated May 31, 2000, which was the day before the preliminary examination hearing was actually held, and that the misdated return constitutes error requiring reversal. This issue, which also was not raised before or decided by the trial court, is reviewed for plain error. *Carines, supra.*

The circuit court acquires jurisdiction of a criminal prosecution "upon the making of a proper return" from the magistrate who conducted the preliminary examination. *Genesee Co Prosecutor v Genesee Circuit Judge,* 391 Mich 115, 119; 215 NW2d 145 (1974). Stated another way, the circuit court gains jurisdiction over the defendant upon the filing of a return by the magistrate showing that the defendant waived his preliminary examination or that an examination was held and the defendant was properly bound over for trial. *People v Farmilo,* 137 Mich App 378, 380; 358 NW2d 350 (1984). In this case, at the close of the preliminary examination, the district court made detailed findings based on the evidence that was presented at the preliminary examination. It orally indicated, after announcing its findings, that it would bind defendant over on the charges contained in the complaint and warrant. A return was filed with the circuit court on June 6, 2000, indicating that an examination was held and that probable cause existed to believe that the offenses charged in the complaint were committed. The document was signed by the district judge, but was dated May 31, 2000. The date is erroneous because it is undisputed that the preliminary examination was held on June 1, 2000.

Defendant cites no applicable authority to support his claim that the misdated return deprived the circuit court of jurisdiction over his case, and, to the contrary, we find that this clerical error did not deprive the circuit court of jurisdiction. In *People v Livermore,* 9 Mich App

47, 53; 155 NW2d 711 (1967), the court failed to sign the initial return. A motion to quash was filed before an amended return bearing the magistrate's signature was filed with the trial court. This Court held that the signature of an examining magistrate on his return is a ministerial matter that could be, and was, corrected. *Id.* at 53-54. See also *People v Mattison,* 117 Mich App 642, 645; 324 NW2d 114 (1982) (the signing of an examination return is ministerial and an oversight may be corrected). The *Livermore* Court noted that the failure to sign the return did not result in prejudice to the defendant and did not violate any substantial rights. *Livermore*, *supra*. In this case, the return was filed and signed, and the circuit court properly obtained jurisdiction. See *Mattison, supra*. The only error related to the dating of the document. We believe that the dating of the document is a ministerial task subject to correction on order of this Court. MCR 7.216(A)(4); MCR 6.435(A). Accordingly, we remand for correction of the preliminary examination return with respect to the date of the document. We fail, however, to find error requiring reversal because defendant has not demonstrated that the error affected his substantial rights. *Carines, supra.*

VI

Defendant next argues in propria persona that reversal is required because a preliminary examination was not held within twelve days of his arraignment. We disagree. Defendant was arraigned on May 3, 2000 and the preliminary examination was scheduled for May 16, 2000. MCL 766.4 provides that the preliminary examination must be held within fourteen days after the arraignment.[3] Thus, the scheduled preliminary examination date complied with the time requirements of MCL 766.4. On May 16, 2000, the prosecutor represented that one of the critical witnesses was ill and could not attend. Accordingly, the matter was rescheduled and the preliminary examination was held on June 1, 2000. MCR 6.110(B)(2) provides that issues relating to the timing of a preliminary examination must be raised in a written or oral motion no later than immediately before the commencement of the preliminary examination. It also provides specific rules with respect to challenging a trial court's denial of a motion related to the timeliness of the preliminary examination. The rule further provides that "[a] defendant may not after conviction seek relief on the basis of a violation of subrule (B)(1)." In this case, defendant never made a proper motion with respect to his claim that the preliminary examination was untimely. Therefore, this claim is not properly before this Court, and we decline to address it. *People v Crawford,* 429 Mich 151, 156-157, 161; 414 NW2d 360 (1987).

VII

Finally, defendant argues in propria persona that the cumulative effect of the trial errors resulted in a denial of his right to a fair trial. We have found no errors of consequence, and therefore defendant was not denied a fair trial. *People v Cooper,* 236 Mich App 643, 659-660;

[3] Defendant erroneously asserts that the preliminary examination must occur within twelve days. MCL 766.4 was amended in 1994, and, since that time, the time limit has been fourteen days. 1994 PA 167.

601 NW2d 409 (1999); *People v Miller (After Remand)*, 211 Mich App 30, 43-44; 535 NW2d 518 (1995).[4]

Affirmed, but remanded for correction on the date of the examination return. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

[4] Within his argument that there was cumulative error, defendant raises several additional issues which are not raised in his statement of the questions presented. Failure to raise issues in the statement of questions presented renders review of those issues inappropriate. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). More importantly, even if the additional allegations of error were properly before us, they are abandoned by defendant's cursory treatment and lack of citation to applicable authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). We also find that defendant has abandoned the issue of his entitlement to a hearing on remand. Although defendant raised this issue in his statement of questions presented in his initial pro se brief, he failed to argue the merits in the brief. See *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995).