

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD JACK VARNEY,

Defendant-Appellant.

UNPUBLISHED

August 17, 2004

No. 247986

Oakland Circuit Court

LC No. 91-107235-FH

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver more than 50 but less than 225 grams of cocaine¹ and of possession of a firearm during the commission of a felony ("felony-firearm.")² The trial court sentenced defendant to eight to twenty years in prison for the possession with intent to deliver cocaine conviction, and to two years in prison for the felony-firearm conviction. Defendant appeals his convictions and sentences, and we affirm.

I. Intent

Despite Michigan law to the contrary, defendant argues that he was denied his constitutional right to present a defense when the trial court instructed the jury that knowledge of the amount of cocaine was not required to convict defendant of possession with intent to deliver between 50 to 224 grams of cocaine.³ In *People v Marion*, 250 Mich App 446, 450-451; 647 NW2d 521 (2002), we held that knowledge of the amount of a controlled substance is not an element of a possession with intent to deliver charge.

¹ MCL 333.7401(2)(a)(iii)

² MCL 750.227b

³ The elements of possession with intent to deliver more than 50, but less than 225 grams of cocaine are: "(1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed between 50 and 225 grams." *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998).

During deliberations, the jury asked the trial court whether defendant had to know the amount of cocaine to be convicted of possession with intent to deliver between 50 to 224 grams of cocaine, and the trial court properly answered no. Under *Marion*, the trial court properly instructed the jury that defendant did not have to know that the mixture weighed between 50 to 224 grams. The trial court did not deny defendant his constitutional right to present his case because the trial court correctly instructed the jury.⁴

II. Possession

Defendant maintains that there was insufficient evidence to show that he possessed cocaine, and therefore, his conviction for possession with intent to deliver cocaine should be reversed. When we review claims that the prosecution presented insufficient evidence to support a conviction, we view the evidence presented in the light most favorable to the prosecution to determine whether a rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003), citing *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *Id.* at 521. Evidence that defendant had the right to exercise control over the narcotics and knew that they were present is sufficient to establish constructive possession. *Id.* at 520. Likewise, possession may be found even when the defendant is not the owner of the recovered narcotics. *Id.* at 520-521. Moreover, possession may be joint, with more than one person actually or constructively possessing the controlled substance. *Id.* at 520.

We conclude that there is a sufficient nexus between defendant and the contraband to support the inference that defendant had control over it and knew that it was present. Here, although there was no direct evidence that defendant actually possessed the cocaine, the evidence showed that he had the right to exercise control over the cocaine, and that he knew the cocaine was in the house. Defendant resided at the house and was present when the warrant was executed. Defendant's parents owned the house in which the cocaine was found. Moreover, defendant's driver's license was in the same safe as the cocaine, and the safe was in the master bedroom, which also contained men's clothing and pictures that belonged to defendant. Police found \$1,000 inside a man's duffle bag on the dresser in the master bedroom, and paperwork in the kitchen that showed that defendant's friend Robert Tripp, a known drug dealer, had wired defendant \$1,000. A reasonable jury could infer that a narcotics sale had recently taken place. Packaging materials and materials used to mix, cut, and weigh narcotics were found throughout the upper floor of the house. Therefore, we hold that a rational jury could have found beyond a

⁴ Defendant also erroneously asserts that this Court, in a prior appeal, erred when it reversed the trial court's order that granted defendant's motion for a new trial on the basis that the law requires knowledge of the amount of cocaine in order to be convicted of possession with intent to deliver between 50 to 224 grams of cocaine. A question of law decided by an appellate court will not be decided differently on a subsequent appeal in the same case where the facts, as here, remain materially the same. *People v Ham-Ying*, 178 Mich App 601, 606; 444 NW2d 529 (1989). Moreover, as stated above, *People v Marion* controls and disposes of defendant's claim of error.

reasonable doubt that defendant had the right to exercise control of the narcotics, and that he knew they were present in the house.⁵

III. Felony Firearm

Defendant asserts that there was insufficient evidence to support his felony-firearm conviction. To support a felony-firearm conviction, the prosecution must prove that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), citing *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996); MCL 750.227b. As with the question of possession of drugs, possession of a firearm may be actual or constructive and may be proved by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000), citing *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). A defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him at the time of the commission of the felony. *Burgenmeyer*, *supra* at 438. "A drug possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it." *Id.* at 439.

Here, the evidence is sufficient to show that defendant had constructive possession of a firearm during the commission of a felony. A loaded rifle and a box of ammunition were located under defendant's bed. Police found approximately 120 grams of cocaine, together with scales and packaging materials, in defendant's bedroom closet. Defendant was in the living room at the time the warrant was executed, but one need not be in close proximity to the firearm at the time. The prosecution need only show that defendant knew of the firearm and had access to it at any point during the offense. Because drug possession offenses can take place over a period of time and because both the firearm and the cocaine were found in defendant's bedroom, a rational jury could conclude, based on the evidence, that defendant knew of the rifle and had access to it during the commission of the offense.

Additionally, a loaded firearm was located in a kitchen drawer. Though defendant's friend testified that the firearm belonged to him, and that he left it there over the holiday, the jury could have chosen not to believe the testimony. Regardless of whether the jury believed the testimony, ownership is not an element of felony-firearm. So long as defendant had possession, actual or constructive, of the firearm during the commission of a felony, he can be convicted of felony-firearm. Because defendant resided at the house in question, it is reasonable to assume that he had access to the kitchen drawers. Because there was testimony that the gun was left at defendant's house for an extended period of time, a reasonable jury could conclude that defendant knew of the gun and had access to it during the commission of the offense.

⁵ Evidence showed that Tripp may have resided at defendant's house, and that he was involved in narcotics trafficking. Defendant also claimed that the cocaine belonged to Tripp. However, possession may be found even when the defendant is not the owner of the recovered narcotics. *Wolfe*, *supra* at 520-521. Moreover, possession may be joint, with more than one person actually or constructively possessing the controlled substance. *Id.* at 520. Therefore, were it true that Tripp was the "true owner" of the cocaine, there was nevertheless sufficient evidence to show that defendant had the right to exercise control over the narcotics.

IV. Aiding and Abetting

Defendant says that the trial court erroneously instructed the jury regarding aiding and abetting felony-firearm. However, defendant waived his right to appellate review on this issue by stipulating to the aiding and abetting instruction and by approving of the jury instructions in the lower court. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Defendant's waiver "extinguished" any error, and we are precluded from reviewing this issue. *Id.* at 215-216.

V. Sentencing

Defendant claims that the trial court erred in failing to sentence defendant pursuant to the amended narcotics sentencing statutes. On March 3, 2003, the court sentenced defendant to eight to twenty years in prison for possession with intent to deliver more than 50 but less than 225 grams of cocaine under MCL 333.7401(2)(a)(iii). This statute requires a mandatory minimum sentence of not less than ten years, nor more than twenty years. On March 1, 2003, before defendant's sentencing, but after his conviction, an amendment that eliminated the mandatory minimum became effective. Defendant now argues that the amendment should apply to his case because it was in effect before he was sentenced.

Whether a statute should be applied retroactively is a legal issue that is reviewed de novo. *People v Thomas*, 260 Mich App 450, 458; 678 NW2d 631 (2004). The court is generally required to impose a sentence "within the appropriate sentence range *under the version of those sentencing guidelines in effect on the date the crime was committed.*" MCL 769.34(2) (emphasis added). Furthermore, this Court, in *Thomas*, *supra*, 260 Mich App at 459, held that the amended sentencing provisions of MCL 333.7401(2)(a)(iii) do not apply retroactively. The *Thomas* Court reasoned that the Legislature declined to specifically apply the amendments retroactively and instead provided early parole eligibility to such defendants. *Id.* Here, defendant was properly sentenced under the version of MCL 333.7401(2)(a)(iii) in effect at the time he committed the offense in accordance with MCL 769.34(2)⁶.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad

⁶ Defendant also claims erroneously that the trial court's downward departure was insufficient. Defendant was sentenced to eight to twenty years in prison for possession with intent to deliver between 50 to 224 grams of cocaine. The trial court sentenced defendant below the mandatory minimum, which was ten to twenty years in prison, and gave substantial and compelling reasons for its departure, as required by MCL 333.7401(4). On appeal, defendant erroneously claims that the trial court erred in failing to further depart from the mandatory minimum. Defendant has waived this issue and moreover, the trial court properly departed downward and no further downward departure is warranted.