

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN MACK,

Defendant-Appellant.

UNPUBLISHED

October 30, 2007

No. 272406

Wayne Circuit Court

LC No. 06-002304-01

Before: Zahra, P.J., and White and O'Connell, JJ.

PER CURIAM.

Defendant was convicted of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to three years' probation for the possession of cocaine conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise from the execution of a search warrant at an abandoned house in which he was present. According to police witnesses, defendant was seated on a couch when the search team entered. He then ran toward the back of the house and jumped out of a rear window, where other officers apprehended him. Defendant was arrested and searched; a paper wrap of loose cocaine was found in defendant's pocket, along with \$610 and a key to the front door of the house. Police officers also discovered a handgun on the couch that defendant had been sitting on.

Defendant challenges the sufficiency of the evidence to support his convictions. In determining whether there was a sufficient evidentiary basis for a conviction, this court reviews the trial court record and analyzes the evidence in the light most favorable to the prosecution to determine whether a rational finder of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

In making his sufficiency challenge, defendant argues that the testimony of Charles Brooks, an individual present in the home when the raid occurred, was such that a rational trier of fact could not find beyond a reasonable doubt that defendant possessed cocaine or a firearm. We disagree. Although Brooks testified that defendant was not in the house at the time of the raid, and implied that drugs were found in the house, and not on defendant's person, other witnesses that the jury may have found more credible contradicted this version of the facts.

Specifically, Sergeant Turner testified that, to his knowledge, no narcotics were found in the home. Officer Penn testified that he discovered a paper wrap of loose cocaine in the defendant's pocket that contained .74 grams of cocaine. Therefore, when viewing the evidence in the light most favorable to the prosecution, a rational jury could conclude that the defendant had actual possession of less than 25 grams of cocaine, thus satisfying the elements of the charged offense.

There was also sufficient evidence for a rational trier of fact to find defendant guilty of felony-firearm. Felony-firearm is established where the prosecutor proves beyond a reasonable doubt that the defendant carried or possessed a firearm while committing or attempting to commit a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant again relies on the testimony of Charles Brooks in challenging this conviction. Brooks testified that defendant was not present in the house when the police raid occurred. As a result, defendant argues, it was impossible for him to actually or constructively possess the firearm that was found on the couch inside the house in which he was not present. In contrast, a police officer testified that, mere moments before the gun's discovery, he observed defendant sitting on the couch on which the gun was present.

Under Michigan law, the term "possession" refers to both actual and constructive possession. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Constructive possession of a firearm exists where a defendant has knowledge of the location of a firearm and that firearm is reasonably accessible to him. *Id.* at 470-471. Furthermore, possession may be proven by circumstantial evidence. *Id.* at 469. The proper inquiry in a felony-firearm charge is not whether the defendant possessed a firearm at the time he was arrested, but whether he possessed a firearm while he was committing the underlying felony. *People v Burgenmeyer*, 461 Mich 431, 438-439; 606 NW2d 645 (2000).

In the present case, defendant was not arrested while in possession of the firearm. However, the testimony of a police officer places defendant in close proximity to the firearm just prior to the raid occurring. There is no evidence that the firearm was concealed at the time of its discovery. Therefore, a jury could conclude that, based on the circumstances, defendant was in close proximity to the firearm prior to the raid and had knowledge of the firearm's presence. Additionally, because evidence shows that defendant was found to be in possession of cocaine at the time of his arrest, mere minutes after he was observed sitting on the couch where the gun was found, a jury could similarly conclude that the same cocaine was in defendant's possession at the time he was sitting on the couch with the firearm. It thus follows that a rational trier of fact could find that defendant constructively possessed a firearm while committing a felony.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell