

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 3, 2013

v

KELVIN PRENTISS GREEN,

Defendant-Appellant.

No. 311217
Wayne Circuit Court
LC No. 12-001484-01-FH

Before: GLEICHER, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of his right his jury trial conviction of felon in possession of a firearm (felon in possession), MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent sentences of 46 months to 10 years for felon in possession and 46 months to 10 years for CCW. Defendant also was sentenced to a consecutive sentence of five years for felony-firearm. We affirm defendant's convictions but remand for the limited task of correcting his judgment of sentence to reflect that his felony-firearm sentence should run consecutive to the felon in possession sentence, not the CCW sentence.

I. FACTUAL BACKGROUND

Four police officers were instructed to pay special attention to a gas station in Detroit, Michigan, based on suspicion of possible narcotic activity. When the police officers drove to the gas station, defendant was inside and he noticed their squad car. He then walked down an aisle, bent over, and returned to the counter. Because defendant's behavior was suspicious, the four officers entered the store.

When one of the officers asked defendant what he was doing, defendant replied that he was working. Another officer walked down the same aisle defendant had, found a loaded revolver in the chip rack where defendant had bent down, and alerted his partners. Defendant was then handcuffed and patted down, which revealed an inside-the-pants gun holster on his right leg. During his interview with the police, defendant said that he was working "doing security" and that he carried the holster in his waistband for "intimidation, the psych thing." The owner of the gas station testified that defendant had been working at the gas station as a handyman, not a security guard, on an as-needed basis.

The jury found defendant guilty on all counts, and he was sentenced to concurrent sentences of 46 months to 10 years for felon in possession and 46 months to 10 years for CCW. He was sentenced to a consecutive sentence of five years for felony-firearm. Defendant now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Hemdon*, 246 Mich App 371, 415; 633 NW 2d 376 (2001). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW 2d 748 (1992).

B. Possession

On appeal, defendant argues that his convictions must be vacated because the prosecution failed to present any evidence that he possessed or carried a firearm. We disagree.

Felon in possession, felony-firearm, and CCW all require the prosecution to prove, *inter alia*, that the defendant possessed a firearm. See *People v Minch*, 493 Mich 87, 91; 825 NW2d 560 (2012); see also *People v Moore*, 470 Mich 56, 62; 679 NW2d 41 (2004); see also *People v Hernandez-Garcia*, 477 Mich 1039, 1040 n 1; 728 NW2d 406 (2007). The Michigan Supreme Court has held that “[a] person need not have actual physical possession of [a firearm] to be guilty of possessing it. Possession may be either actual or constructive.” *Wolfe*, 440 Mich at 519-520. Constructive possession can be found where there is proximity to the firearm and an indicia of control. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW 2d 645 (2000). “Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant.” *Id.* (quotation marks and citation omitted).

In the instant case, the prosecution presented evidence that defendant was in close proximity to the firearm. When defendant realized that the police had arrived, he walked down an aisle and bent down. The gun was later found at the location where defendant had bent down. Furthermore, defendant had a gun holster on his person, which was an “indicia of control.” *Burgenmeyer*, 461 Mich at 438. In light of defendant’s suspicious behavior, close proximity to the weapon, and the fact that he had a holster, we find that there was sufficient evidence of constructive possession.

While defendant emphasizes the lack of evidence of actual possession, “[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Carines*, 460 Mich 750, 757; 597 NW 2d 130 (1999) (quotation marks and citation omitted). Furthermore, because this challenge must be viewed in a light most favorable to the prosecution, we draw all inferences in favor of the jury’s verdict. *Wolfe*, 440 Mich at 515. Thus, there was sufficient evidence of the possession element required for defendant’s convictions.

C. The “Place of Business” Exception

Defendant next argues that the place of business exception applied and his CCW conviction and sentence should be vacated. Because the evidence presented at trial did not demonstrate the applicability of the place of business exception, defendant’s argument is without merit.

Michigan’s CCW statute states:

A person shall not carry a dagger, dirk, stiletto, a double-edged nonfolding stabbing instrument of any length, or any other dangerous weapon, except a hunting knife adapted and carried as such, concealed on or about his or her person, or whether concealed or otherwise in any vehicle operated or occupied by the person, except in his or her dwelling house, place of business or on other land possessed by the person. [MCL 750.227(1).]

“In order to qualify for the [place of business] exception, the defendant must present evidence that the location where the [firearm] was carried was defendant’s [place of business].” *People v Pasha*, 466 Mich 378, 382; 645 NW 2d 275 (2002). It is well-settled law in Michigan that one asserting the exception must demonstrate that he had a possessory interest in the property claimed to be the place of business. *People v Clark*, 21 Mich App 712, 715-716; 176 NW 2d 427 (1970).

While defendant presented evidence at trial that he worked at the gas station, this alone does not satisfy the place of business exception. Defendant had to demonstrate that he had a possessory interest in the gas station. *Clark*, 21 Mich App at 715-716. Because he presented no evidence to that effect, he failed to demonstrate that the place of business exception applies.

III. CONSECUTIVE SENTENCING

Defendant correctly argues that the trial court erred in ordering his sentence for felony-firearm to be served consecutive to his sentence for CCW.

Michigan’s felony-firearm statute, MCL 750.227b, states:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, *section 227* [unlawful carrying of a concealed weapon], 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years.

(2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony. [MCL 750.227b (emphasis added).]

Here, the trial court ordered defendant's sentence for felony-firearm to begin after he served his CCW sentence. This violates the statute. Pursuant to the felony-firearm statute, a felony-firearm sentence can only be consecutive to the predicate felony, which cannot be CCW. *People v Cortez*, 206 Mich App 204, 207; 520 NW 2d 693 (1994) ("the trial court erred in ordering [defendant's] felony-firearm sentence to run consecutively to the CCW sentence."); *People v Sturgis*, 130 Mich App 54, 60; 343 NW 2d 230 (1983) ("[T]he offense of [CCW] may not be the underlying felony to support a felony-firearm conviction[.]").

Thus, defendant is correct that the trial court erred in ordering his felony-firearm sentence consecutive to his CCW sentence. However, defendant also was convicted of felon in possession, which is a predicate felony for felony-firearm, and can be served consecutive to felony-firearm. See MCL 750.227b. Moreover, this is consistent with the felony information filed in this case, which listed felon in possession as the predicate felony for felony-firearm. Accordingly, we remand for the trial court to correct the judgment of sentence to reflect that the felony-firearm sentence is consecutive to the felon in possession sentence and concurrent with the CCW sentence.

IV. CONCLUSION

Because sufficient evidence was presented to demonstrate that defendant possessed the firearm, the prosecution satisfied its burden of proving the three charges beyond a reasonable doubt. Defendant also has failed to demonstrate the applicability of the "place of business" exception. However, defendant is correct that his sentences for CCW and felony-firearm may not be consecutive, although the latter may be consecutive to felon in possession.

We affirm defendant's convictions and sentences but remand for the limited task of correcting his judgment of sentence to reflect that the felony-firearm sentence should run consecutive to the felon in possession sentence, not the CCW sentence.

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause
/s/ Michael J. Riordan