STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 11, 2007
v	No. 271837 Wayne Circuit Court
WALTER HOLLIDAY, Defendant-Appellant.	LC No. 06-000268-05

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' probation for the marijuana and felon-in-possession convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

After receiving complaints of narcotics activity in front of 59 Seward, Sergeant Andrew White set up surveillance and observed Vashon Dejarnett and three other men standing in front of that location, exchanging suspected narcotics for money with other individuals who approached the area. Dejarnett and the other suspected sellers huddled up, then Dejarnett broke away from the group and walked into the next building over, an apartment building at 93 Seward. The other suspects walked in front of 93 Seward. Approximately 40 to 45 seconds later, an arrest team arrived. When the arrest team approached the other suspects, two of them fled into the apartment building, and police officers pursued them.

Police officer Sargent followed directly behind the two individuals and saw them run into an apartment on the first floor. They attempted to close the door but Sargent pushed it open. He saw Dejarnett and defendant seated at a round table, four to five feet in diameter, in close proximity to the door. A loaded handgun, a pile of unpackaged marijuana weighing over 100 grams, and numerous empty clear plastic bags were on the table. The handgun was between and within an arm's length of both Dejarnett and defendant, but was closest to defendant and on his left side. The marijuana was "piled up in the middle of the table." Officer Sargent estimated that ten seconds elapsed between the time he got out of the raid van until he went into the apartment.

Defendant argues that there was insufficient evidence that he possessed the gun and the marijuana.

We review claims of insufficient evidence de novo. *People v Lueth,* 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must 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 proven beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines,* 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry,* 224 Mich App 447, 452; 569 NW2d 641 (1997).

> "A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance.
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> The courts have frequently addressed the concept of constructive possession and the link between a defendant and narcotics that must be shown to establish constructive possession. It is well established that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." [*People v Hardiman,* 466 Mich 417, 421; 646 NW2d 158 (2002), quoting *Wolfe, supra* at 519-520 (citations omitted).]

Constructive possession exists when the defendant has the right to exercise control over the narcotics and has knowledge of their presence. *Hardiman, supra* at 421 n 4. "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Wolfe, supra* at 521. Circumstantial evidence and reasonable inferences that arise from such evidence may constitute satisfactory proof of possession. *People v McGhee,* 268 Mich App 600, 623; 709 NW2d 595 (2005).

The evidence was sufficient to support an inference that the apartment and, more specifically, the table where defendant was sitting, were being used as the situs for the packaging of marijuana being sold by Dejarnett and the other men. Defendant was found seated at the table that was covered by a pile of marijuana, and there was no indication that the other individuals, who were observed by police shortly before the raid, brought that marijuana into the apartment after concluding their drug trafficking activities outside on the street. Also, Dejarnett entered the apartment and sat at the table only a short time before the raid. Therefore, one could reasonably infer that defendant had been in the home caring for or controlling the marijuana found directly within his presence and grasp while the others were outside dealing drugs. Viewing the totality of the circumstances in a light most favorable to the prosecution, and resolving all conflicts in favor of the prosecution, there was sufficient evidence giving rise to a reasonable inference that defendant was constructively possessing the marijuana.

With respect to the firearm, defendant also challenges the element of possession. Possession of a firearm may be actual or constructive, and it may also be joint or exclusive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). A defendant has constructive possession of a firearm when the location of the weapon is known to the defendant and the firearm is reasonably accessible to the defendant. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Here, when the police entered, the gun was visible on the table, within an arm's length of both defendant and Dejarnett, but closer to defendant. Clearly, the location of the firearm in this case was known and reasonably accessible to defendant. Under all of the circumstances presented, including those referenced in our discussion regarding possession of the marijuana, and viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence that defendant was constructively possessing the firearm.

Finally, defendant argues that counsel was ineffective for failing to move for the suppression of the evidence seized during the warrantless search, and he requests a remand for an evidentiary hearing on this issue.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant does not claim that the existing record supports his argument.[1] Rather, he relies on his unsworn statement that he has attached to his appellate brief. Assuming that it is even proper to consider defendant's unsworn statement, in which he provides a different account with respect to the time and manner of entry into the apartment by police, the statement does not indicate that the information was conveyed to defense counsel before trial. Defense counsel is

[1] See *People v Raybon*, 125 Mich App 295, 301; 336 NW2d 782 (1983), discussing "hot pursuit" as a form of exigent circumstances that is an exception to the warrant requirement.

not ineffective for failing to make a motion to suppress based on a factual account of which she was unaware. Moreover, without a claim that the information was communicated to counsel, remand is unwarranted.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette