STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN EUGENE COLE,

Defendant-Appellant.

UNPUBLISHED
September 17, 1996

No. 179732
LC No. 94008904 FH

Before: Cavanagh, P.J., and Marilyn Kelly and J.R. Johnson,* JJ.

PER CURIAM.

Defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, possession of a firearm during the commission of a felony and possessing a firearm as a convicted felon. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv); MCL 750.227b; MSA 28.424(2); MCL 750.224f; MSA 28.421(6). He then pleaded guilty to habitual offender, second offense. MCL 769.10; MSA 28.1082. The trial judge sentenced him to concurrent terms of eight to thirty years' imprisonment for the possession with intent to deliver count and four to seven and one half years for possession of a weapon as a felon. Defendant was given a two year sentence for the felony-firearm count which ran consecutive to the other two counts.

He appeals as of right, arguing that there was insufficient evidence to sustain his drug conviction. He asserts that the trial judge erred in permitting the prosecutor to elicit testimony regarding previous drug activity at his apartment. He argues that improper rebuttal testimony was admitted. He asserts that numerous instances of prosecutorial misconduct denied him a fair trial. He urges that the judge failed to consider established factors in imposing his sentence and violated the principle of proportionality. We affirm in part, and reverse in part.

We agree with defendant that there was insufficient evidence to sustain his conviction for possession of cocaine with the intent to deliver.

* Circuit judge, sitting on the Court of Appeals by assignment.

In determining whether the prosecution has presented sufficient evidence to sustain a conviction, we review the evidence in the light most favorable to the prosecution. We determine whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995).

To support a conviction for possession with intent to deliver less than fifty grams of cocaine, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the cocaine with the intent to deliver. *Wolfe, supra*, pp 515-516.

Possession of a controlled substance may be either actual or constructive. *Wolfe, supra*, p 520. Here, there is no evidence that defendant actually possessed the cocaine. Therefore, the prosecutor was obligated to produce evidence that he constructively possessed it.

Constructive possession exists where a defendant has the right to exercise control over cocaine and knows that it is at hand. *Wolfe, supra*. A person's mere presence at a location where drugs are found is insufficient to show constructive possession; the prosecutor must show some additional connection between the accused and the drugs. *Id*. Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Richardson*, 139 Mich App 622, 625; 362 NW2d 853 (1984).

The evidence presented at the trial in this case established that, when the raid took place, there were seven people in defendant's apartment. The cocaine was found in a blue London Fog jacket which was draped over a dining room chair. The prosecution did not provide evidence linking the coat to defendant. There was also no evidence that defendant had dominion and control over the cocaine in the coat. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Therefore, we must reverse defendant's conviction for possession of cocaine with intent to deliver.

Defendant argues that the judge erred in allowing testimony to be introduced regarding previous drug activity at defendant's apartment. He asserts that the only reason the evidence was introduced was to establish that, because defendant had sold drugs in the past, he must have been guilty of the present drug offense. Because we have already reversed defendant's drug conviction, this issue is moot. The evidence had no bearing on the other charges.

Defendant argues that improper rebuttal testimony was admitted. However, defendant's failure to object precludes review absent manifest injustice. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). We find no manifest injustice in this case. Detective Moton's testimony was limited to refuting or contradicting evidence presented by defendant and did not impeach him on a collateral matter. *People v Losey*, 413 Mich 346, 353; 320 NW2d 49 (1982); *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991).

Defendant's failure to object to any of the alleged instances of prosecutorial misconduct precludes appellate review absent a miscarriage of justice. *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995). No miscarriage of justice would result in this case from our failure to review this issue.

With regard to sentencing, the trial judge did not ignore the established factors to be considered in fashioning a sentence. *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989). Moreover, defendant's argument that his eight to thirty year sentence for possession with intent to deliver is disproportionate is moot, because of our vacation of the conviction and sentence. We find that defendant's remaining sentence is not disproportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

We affirm defendant's conviction and sentence for possession of a firearm as a felon and habitual offender, second offense. We vacate the conviction and sentence for possession with intent to distribute less than fifty grams of cocaine. Because defendant's felony-firearm conviction was attached to the count of possession with intent to distribute cocaine, we must vacate the conviction and sentence for it as well. *People v Harding*, 443 Mich 693, 717 (Brickley, J) 735 (Cavanagh, J); 506 NW2d 482 (1993); *People v Burgess*, 419 Mich 305, 311; 353 NW2d 444 (1984).

Affirmed in part and reversed in part.

/s/ Mark J. Cavanagh
/s/ Marilyn Kelly
/s/ J. Richardson Johnson