

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOSE ANIBOL RIVERA MORALES,

Defendant-Appellee.

UNPUBLISHED

December 13, 1996

No. 187931

LC No. 93-123128

Before: Doctoroff, C.J., and Corrigan and Danhof,* JJ.

PER CURIAM.

This case arises out of the seizure of fifty-nine grams of cocaine found at a Pontiac house allegedly inhabited by defendant. In February 1992, police searched the residence pursuant to a search warrant and found the contraband stuffed in a pipe in the basement. Also found in the house were plastic baggies containing cocaine residue, a scale containing cocaine residue and a cutting agent, Manatol. Although no residents of the house were present during the police search, correspondence found in the house bore the names of defendant and his wife. The police located defendant at his place of employment and interviewed him, though he was not arrested at that time. Defendant told the police that he was aware that cocaine had been found in the basement of the Pontiac residence, but he denied that the cocaine belonged to him. He stated that someone had broken in and put the cocaine in the basement pipe. Defendant admitted that he lived in the house for a time and further admitted selling small amounts of cocaine from the residence. However, defendant told the officer that he had moved from the Pontiac address because of marital difficulties and high rent. Defendant was subsequently arrested pursuant to an arrest warrant issued on December 3, 1992.

Defendant was originally charged with possession with intent to deliver between 50 and 224 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). After the preliminary examination, the district court refused to bind defendant over on the charged crime, but bound him over on the reduced charge of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The prosecution moved to reinstate the original charge, and Oakland Circuit Court Judge Jessica Cooper granted that motion. The case was

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

reassigned to Judge David Kerwin who was an appointed visiting judge. Judge Kerwin vacated Judge Cooper's order upon defendant's motion to quash. By leave granted, the prosecution now appeals the order dismissing the charge. We reverse.

Plaintiff first argues that Judge Kerwin lacked jurisdiction to vacate the order entered by Judge Cooper which reinstated the original charge against defendant. We agree.

MCR 2.613(B) provides:

A judgment or order may be set aside or vacated, and a proceeding under a judgment or order may be stayed, only by the judge who entered the judgment or order, unless that judge is absent or unable to act. If the judge who entered the judgment or order is absent or unable to act, an order vacating or setting aside the judgment or order or staying proceedings under the judgment or order may be entered by a judge otherwise empowered to rule in the matter.

Under the law of the case doctrine, an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994). The doctrine applies only to those questions specifically determined in the prior decision and to questions necessarily determined to arrive at the prior decision. *People v Douglas (On Remand)*, 191 Mich App 660, 661-662; 478 NW2d 737 (1991). We find that Judge Kerwin lacked jurisdiction to vacate or set aside Judge Cooper's order reinstating the original charge against defendant because there was no showing that Judge Cooper was "absent or unable to act." See MCR 2.613(B).

Defendant, however, argues that Judge Kerwin had the power to dismiss the charge against him (in essence vacating Judge Cooper's order of reinstatement) because Judge Cooper only determined that defendant knew that the cocaine was in the basement pipe and not additionally that he had dominion or control of the cocaine. The offense of possession of a controlled substance requires proof that the defendant had actual or constructive possession of the substance. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). Constructive possession exists when the defendant has the right to exercise dominion or control over a substance and knows that it is present. *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992); *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991). The totality of the circumstances must indicate a sufficient nexus between the defendant and the contraband. *Wolfe, supra* at 521.

While it is true that Judge Cooper's opinion focused on the "knowledge" element of constructive possession, Judge Cooper necessarily had to determine that the "dominion or control" element was satisfied in order to reinstate the original charge against defendant. See *Wolfe, supra* at 521. Circumstantial evidence and reasonable inferences arising from that evidence are sufficient to establish the requisite possession element. *People v Richardson*, 139 Mich App 622, 625; 362 NW2d 853 (1984). The evidence available to Judge Cooper was sufficient to support a finding that defendant had "dominion and control" of the substance, and thus had constructive possession.¹ *Id.*

Therefore, the law of the case doctrine prohibited Judge Kerwin from altering that determination. See *Douglas (On Remand), supra* at 661-662.

The order dismissing the charges against defendant is reversed and Judge Cooper's order reinstating the charge of possession with intent to deliver between 50 and 224 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), is reinstated. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Maura D. Corrigan

/s/ Robert J. Danhof

¹ This evidence included correspondence found in the house with defendant's name on it, defendant's admission that he formerly lived in the house with his wife and child, and clothes found in the house which apparently belonged to a man, a woman and a child.