STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK VINSON KELLY,

Defendant-Appellant.

UNPUBLISHED
June 17, 1997

No. 193395
Recorder's Court
LC No. 88-009259

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for possession with intent to deliver over 225 grams but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). He was sentenced to ten to thirty years in prison. We affirm defendant's conviction, but remand for resentencing.

I

Defendant's first argument on appeal is that he is entitled to resentencing because the trial court failed to exercise its discretion at the time of sentencing. We agree. At the time of the offense, § 7401(2)(a)(ii) provided that a person found guilty of possession with intent to deliver more than 225 grams but less than 650 grams of cocaine "shall be imprisoned for not less than 10 years nor more than 30 years." Pursuant to MCL 769.9(3); MSA 28.1081(3),

> [i]n cases involving a major controlled substance offense for which the court is directed by law to impose a sentence which cannot be less than a specified term of years nor more than a specified term of years, the court in imposing the sentence shall fix the length of both the minimum and maximum sentence within those specified limits, in terms of years or fraction thereof, and the sentence so imposed shall be considered an indeterminate sentence.

Whether the sentencing court correctly interpreted these statutes is a question of law. Questions of law are reviewed de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995). When sentencing defendant, the trial court stated the following on the record:

> I don't have any discretion in this matter. It is the sentence of this court that you be committed to the Michigan Corrections Commission for a period of not more than 30 years which is a maximum set by statute over which I have no control and you serve a minimum of ten years and I will give him – He's got 30 days credit.

The trial court failed to recognize its discretion when it sentenced defendant. In *People v Perez*, 417 Mich 1100.21 (1983), the Supreme Court, in lieu of granting leave to appeal, remanded for resentencing because "the statutory minimum and maximum sentences for major controlled substance offenses are not mandatory except insofar as they establish the outer limits within which a sentence must be fixed." In *People v LW Smith*, 437 Mich 1047; 471 NW2d 620 (1991), the Supreme Court followed *Perez* and remanded for resentencing because the statutory minimum and maximum are not mandatory "except insofar as they establish the outer limits of the sentencing judge's discretion."

The trial court's comments at the time of sentencing indicate a mistaken belief that the statutory minimum and maximum were mandatory and that the court had no discretion. Where the trial court fails to exercise its discretion because of a mistaken belief in the law, the defendant is entitled to resentencing. *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994). Therefore, given the trial court's mistaken belief that the law afforded it no discretion in sentencing defendant, we remand for resentencing so that the trial court can properly exercise its discretion.

II

Defendant's second argument on appeal is that the trial court's findings of fact were clearly erroneous because there was not sufficient evidence that defendant possessed the bag containing the cocaine and that defendant knew that the bag contained cocaine. We disagree.

When reviewing a sufficiency of the evidence argument, this Court must consider whether the evidence, when viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to find that the elements of the offense were proven beyond a reasonable doubt. *People v Vaughn*, 200 Mich App 32, 35; 504 NW2d 2 (1993). A trial court's findings of fact should not be set aside unless they are clearly erroneous. A finding of fact is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Henderson v Biron*, 138 Mich App 503, 507; 360 NW2d 230 (1984).

A

Defendant first challenges the trial court's finding that defendant was carrying the same brown paper sack which was later found to contain 499.2 grams of cocaine. Possession may be actual or constructive. *People v Richardson*, 139 Mich App 622, 625; 362 NW2d 853 (1984). Moreover, "[c]ircumstantial evidence and reasonable inferences arising from the evidence may constitute

satisfactory proof of the elements of the offense." *Id*. The prosecutor is not required to negate every reasonable theory consistent with the defendant's innocence. *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991).

In the case at bar, an undercover police officer, who was inside a house waiting to purchase one half kilogram of cocaine, testified that he looked out a window and saw defendant carrying a brown paper sack. The officer also saw defendant in the kitchen after hearing the sound of someone entering through a back door. The officer testified that following the entry of a raid team, he recovered a brown paper sack containing cocaine in the kitchen where he had seen defendant sitting. These facts support the trial court's finding that the bag defendant was seen carrying is the same bag which contained the cocaine.

B

Defendant further contends that even if defendant was carrying the bag containing the cocaine, the trial court clearly erred in finding that defendant was aware of the contents of the bag. We disagree.

In *People v Catanzarite*, 211 Mich App 573; 536 NW2d 570 (1995), the defendant was pulled over in his vehicle by a police officer and at one point stood outside his car carrying a leather bag. The officer forcibly took the bag from the defendant and found cocaine inside. This Court held that there was sufficient evidence that defendant knowingly possessed the cocaine with the intent to deliver it because one could reasonably infer from the evidence that the defendant knew that there was cocaine in the bag and that he had the right to exercise control over it. *Id*. at 578. The intent to deliver could be inferred from the amount of cocaine involved. *Id*.

Similarly, in the case at bar, a rational trier of fact could infer from the evidence that defendant was aware of the contents of the brown paper sack. Defendant was seen carrying the sack outside and was later seen sitting in the kitchen where the sack was eventually recovered. A woman came out of the kitchen and told the undercover officer to go out to his car and get his money because "the boys had bought the cocaine." When a raid team entered shortly thereafter, defendant ran down a hallway. A rational trier of fact could infer from this evidence that defendant was aware of the contents of the bag when he was carrying it.

We affirm defendant's conviction, but remand for resentencing in conformity with this opinion. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff
/s/ Jane E. Markey