

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY PATTON,

Defendant-Appellant.

UNPUBLISHED

December 19, 1997

No. 198351

Recorder's Court

LC No. 95-012240

Before: Holbrook, Jr., P.J., and Young and J.M. Batzer*, JJ.

MEMORANDUM.

Following a bench trial, defendant was convicted of unlawful possession of less than fifty grams of heroin with the intent to deliver, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and sentenced to lifetime probation. He appeals as of right.

Defendant argues that insufficient evidence was presented to support his conviction.¹ We disagree. The elements of the offense of possession of heroin with intent to deliver include: (1) that the recovered substance is heroin, (2) that the heroin is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the heroin with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992). The trier of fact may properly infer a defendant's intent to deliver from the quantity and packaging of the drugs. *Id.* at 524. Actual physical possession of the contraband is not required; proof of constructive possession is sufficient. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

Here, the evidence established that, in response to several complaints to the police about drug trafficking at a particular street corner, two officers conducted undercover surveillance of the location. With their binoculars, the officers watched four men at that location on the morning in question. The officers noticed that two of the men appeared to be lookouts while the other two, whom the officers identified as defendant and a codefendant originally charged with defendant, were busy approaching cars. Over a fifteen-minute period, defendant and his codefendant approached a car that stopped at the

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

curb, engaged in conversation with the occupants, and made an exchange of items that the officers could not positively identify from their location. After each transaction, defendant and his codefendant would talk and exchange items as they walked out of the officers' view for five to ten seconds. When the officers approached the men during a transaction and identified themselves as police officers, defendant and his codefendant tried to quickly walk away. The codefendant tossed something that was in his hand into the open grate of a sewer while he was walking away. The item, which was later retrieved by the officers, was identified as a bundle of small coin envelopes, each folded and bound with a rubber band and stamped with the words "Mortal Combat," a brand of heroin that the officers testified was sold in that area and in that manner. The officers detained and arrested both men, confiscating from defendant a total of \$110, including a \$20 bill in his hand when he was first detained and \$90 on his person. Accordingly, viewing the evidence in a light most favorable to the prosecution, we conclude that sufficient evidence was presented to allow a rational trier of fact to find defendant guilty beyond a reasonable doubt of the charged offense.

Next, we agree with defendant that he is entitled to have certain allegedly inaccurate information, which the trial court stated was irrelevant to its sentencing decision, stricken from his presentence information report (PSIR). At sentencing, defendant informed the sentencing court that his 1971 conviction was a misdemeanor, not a felony, and that the conviction involved possession of marijuana, not heroin. With regard to these two challenges, the court stated that the conviction had occurred many years ago and would not affect the sentencing decision. Nonetheless, we remand for the sole purpose of ensuring that the challenged information is stricken from the PSIR. MCL 771.14(5); MSA 28.1144(5), MCR 6.425(D)(3)(a); *People v Martinez (After Remand)*, 210 Mich App 199, 202-203; 532 NW2d 863 (1995); *People v Hoyt*, 185 Mich App 531, 534-535; 462 NW2d 793 (1990).

Defendant's conviction is affirmed, but we remand to the trial court for amendment of the PSIR as directed. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Robert P. Young, Jr.

/s/ James M. Batzer

¹ To the extent that defendant asserts in his brief on appeal that he was convicted as an aider and abettor, the record fails to support this claim. In making its findings of fact, the trial court merely found that, according to the officers' testimony, defendant and his codefendant "were acting in concert."