

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY JEREL ALEXANDER,

Defendant-Appellant.

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UNPUBLISHED

January 28, 2003

No. 231514

Washtenaw Circuit Court

LC No. 99-012941-FH

Before: O’Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of being a felon in possession of a firearm, MCL 750.224f. The trial court sentenced him to thirty months to five years imprisonment. He appeals as of right. We affirm.

Defendant was charged with two counts of open murder, one count of being a felon in possession of a firearm, one count of carrying a concealed weapon (CCW), and one count of possessing a firearm during the commission of a felony. The felon in possession charge was submitted to the trial court for decision so the jury hearing the other charges would not learn of defendant’s prior felony conviction for unarmed robbery. The bench trial was held concurrently with the jury trial.

The evidence indicated that on October 3, 1999, there was an altercation on the corner of Eugene and Onondaga Streets in Ypsilanti. Defendant and Quentin Wolfolk accompanied Carlos Thomas from Donna Watson’s home on Eugene Street to the corner in question. Thomas planned to fight Alvin Cleveland there. Adam Cleveland and Earl Lemons accompanied Alvin to the corner. All three men lived in the home next to Watson. It was undisputed that Alvin and Thomas exchanged words and assumed fist-fighting stances once they arrived. Neither had a weapon. However, before the fight actually started, shots rang out. Two shots were initially fired that sounded like popping noises, and numerous other shots immediately followed, which sounded like booming noises. There was evidence that Lemons possessed and shot a small handgun at the scene. There was also evidence that a nine-millimeter weapon was discharged at least eleven times during the altercation. Lemons was shot and killed. The bullet recovered from him was consistent with a nine-millimeter bullet. Nine-year-old Cullen Etherington was also shot and killed while playing outside of Watson’s home at the time of the shootings. The bullet that killed Etherington was fired from the same gun as the bullet that killed Lemons. Eleven nine-millimeter casings, which were recovered from the scene, were determined to have

been discharged from the same weapon. Defendant was charged as the shooter of the nine-millimeter weapon.

The prosecutor presented testimony to establish that defendant was the fatal shooter. Adam picked defendant out of a pretrial photographic lineup and identified him as the shooter. At trial, Adam and Alvin both testified that defendant shot the nine-millimeter weapon. In addition, Wolfolk identified defendant as the shooter. Wolfolk also testified that he knew defendant owned a nine-millimeter weapon and that on October 3, sometime before the shooting, defendant indicated he had a gun on him. Further, when defendant was arrested he was wearing clothes that matched witness descriptions of the clothing worn by the suspect. According to members of defendant's family, he gave his sister a bag on the evening of the shooting that appeared to contain a nine-millimeter gun. His sister subsequently abandoned the gun on Belle Aisle in Detroit. Defendant's brothers admitted to trying to fabricate an alibi for defendant for the time of the shooting, and letters sent by defendant to one of his brothers established this. Finally, when the police executed a search warrant of the apartment where defendant resided, they found a gun cleaning kit, which was appropriate for nine-millimeter weapons as well as .38 and .357 weapons.

At trial, defendant's counsel attacked Wolfolk's testimony that defendant was the shooter. Defendant pointed the finger at Wolfolk, and said that they had driven to the corner of Eugene and Onondaga together and left together. There was testimony that Wolfolk was initially identified as the shooter. Defendant also challenged the credibility of Alvin's testimony, because Alvin originally told the police that he did not know which man from the silver car fired the shots.

The jury acquitted defendant of the charges related to the deaths of Lemons and Etherington as well as the CCW charge and the felony-firearm charge. The trial court, sitting as the trier of fact, determined that there was evidence beyond a reasonable doubt that defendant was a felon in possession of a firearm. The trial court indicated that it was not satisfied beyond a reasonable doubt that defendant, and not Wolfolk, was the shooter. Nevertheless, it found that defendant constructively possessed the weapon.<sup>1</sup>

## I

Defendant argues that his conviction must be reversed because Wolfolk had the gun and defendant's mere proximity to Wolfolk in the car while driving from the scene was insufficient to establish constructive possession. Defendant argues that because he did not have any physical domination or control over the weapon, he could not have possessed it.

In reviewing the sufficiency of the evidence in a criminal case, this Court must review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. This standard applies to bench

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<sup>1</sup> The certified record of defendant's prior conviction for unarmed robbery and his judgment of sentence for that crime were admitted into evidence without objection. The only element in contention was whether defendant possessed the firearm.

trials. [*People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001) (citations omitted).]

The parties do not contest that the term “possession” as used in MCL 750.224f includes both actual and constructive possession. In *People v Hill*, 433 Mich 464; 446 NW2d 140 (1989), the Court discussed what constitutes “possession” for purposes of MCL 750.224b, which prohibits possession of short-barreled shotguns or rifles. “Possession may be proven by circumstantial as well as direct evidence.” *Id.* at 469.

Michigan courts also have recognized that the term “possession” includes both actual and constructive possession. As with the federal rule, a person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Physical possession is not necessary as long as the defendant has constructive possession. [*Id.* at 470-471 (citations omitted).]

Possession need not be exclusive. *Id.* at 470.

The direct and circumstantial evidence in this case, when viewed in a light most favorable to the prosecution, supports a finding that defendant had constructive, if not actual, possession of the weapon. Defendant was known to have a nine-millimeter weapon. A cleaning kit for a nine-millimeter weapon was seized from the apartment where he was living. On the afternoon of the shooting, defendant told Wolfolk that he had a weapon. After the shooting, defendant and Wolfolk left in the same vehicle. The evidence indicated that the gun was in the vehicle when they drove away from the scene.<sup>2</sup> While Wolfolk was driving, defendant “demanded” that Wolfolk stop the car so that defendant could throw the gun out. Wolfolk did not stop the car. He believed they were being chased. Defendant acted cool and tough after the shooting. The inferences to be drawn are that defendant not only considered how to get rid of the gun but had the ability to do so. Further, it was undisputed that defendant later gave his sister a gun, which appeared to be a nine-millimeter gun. The evidence, and reasonable inferences arising therefrom, were sufficient to establish that defendant was in constructive possession of the firearm. There was proximity and an indicia of control. Reversal is not required on the ground that the evidence was insufficient to sustain the conviction.

We note that defendant argues that he was really convicted as an accessory after the fact because he allegedly disposed of the murder weapon. He argues that his culpable actions did not take place until he reached Wayne County. Thus, he did not become a felon in possession until he arrived in Wayne County and, therefore, Washtenaw County did not have jurisdiction to convict him of the crime. This argument has no merit. First, defendant fails to cite any authority to support his position. Where a party fails to cite any authority, he has abandoned his claim. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Second, the position is directly contrary to the position defendant took at trial. See *id.* (party may not “request[] certain actions of the trial court and then argu[e] on appeal that these actions constituted error”). At trial, defendant conceded that there was no issue with respect to Washtenaw County because if

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<sup>2</sup> The trial court credited Wolfolk’s testimony in this regard.

he was found to be a felon in possession at any point while fleeing the scene, it was part of a continuous offense that began at the corner of Eugene and Onondaga. Thus, this issue extinguished any error and is waived. See *id.*; *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). In any event, as previously discussed, the evidence supported that defendant was a felon in possession while fleeing the scene.

## II

Defendant also raises several issues with respect to the scoring of the sentencing guidelines. Specifically, he argues that several offense variables were improperly scored. Defendant was sentenced on September 8, 2000, to a minimum term of thirty months' imprisonment. He was credited with 343 days served. Because defendant has fully served his minimum sentence, the sentencing issues are therefore moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/ Peter D. O'Connell  
/s/ Richard Allen Griffin  
/s/ Jane E. Markey