

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITHOLUS DEMETRIUS WATTS,

Defendant-Appellant.

UNPUBLISHED

September 16, 2003

No. 240741

Macomb Circuit Court

LC No. 01-002435-FH

Before: Fitzgerald, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv) (count 1), two counts of delivery or manufacture of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv) (counts 2 – 3), delivery or manufacture of methamphetamine, MCL 333.7401(2)(b) (count 4), possession of a firearm by a felon, MCL 750.224f (count 5), possession of a firearm during the commission of a felony, MCL 750.227b (count 6),¹ and maintaining a drug house, MCL 333.7405(d) (count 7). He was sentenced to prison terms of sixteen to 480 months each of counts 1 – 3, seventy-two to 480 months for count 4, twenty-four to sixty months for count 5, two-years for count 6, and fourteen to twenty-four months for count 7. The sentences for counts 1 – 4 and count 6 were to be served consecutively, and counts 5 and 7 were to be served concurrently with each other but consecutive to counts 1 – 4 and count 6. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred by denying his motion to suppress the evidence seized at 20200 Rowe Street. On appeal from a trial court's ruling on a motion to suppress seized evidence, the trial court's findings of fact are reviewed for clear error, but pertinent questions of law and the trial court's ultimate decision are reviewed de novo. *People v Hawkins*, ___ Mich ___ (#120437, dec'd 6/20/03) slip op p 9; *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001), after rem 253 Mich App 97, 108; 654 NW2d 337 (2002).

¹ The underlying felony for the charge of felony-firearm was possession with intent to deliver less than fifty grams of cocaine.

The affidavit included the following pertinent facts to support a finding that defendant resided at 20200 Rowe Street:

That on 04-05-01, Affiant (U.C.) purchased a quantity of crack cocaine from Keitholus Watts (B/M 11-20-78) at Hoover and State Fair, Detroit, MI. Watts stated to Affiant that he had to walk over because his car was in the shop. Per SOS [Secretary of State], Watt's legal residence is 20200 Rowe, Detroit, MI. That address is two blocks from the meet spot, and is the direction from which Watts came, and which he returned.

That on 05-10-01, Affiant (U.C.) purchased a quantity of crack cocaine from Keitholus Watts at Groesbeck and Schoenherr, Warren, MI. Watts arrived as the sole occupant of a 1999 Chrysler LHS, plate #TEK209 00/MI. The vehicle was registered to a Mary Frances Watts at 20200 Rowe. Keitholus Watts stated to Affiant that he was coming from 8 mile and Groesbeck, which is where 20200 Rowe is located.

That per SOS, Keitholus Watts' legal address is 20200 Rowe, Detroit, MI, dating back at least 1995.

That on 05-16-01, Affiant (U.C.) purchased a quantity of crack cocaine from Keitholus Watts at Groesbeck and Schoenherr, Warren, MI. That Watts was surveyed directly from 20200 Rowe to the meet spot. Watts was arrested at the scene after the transaction.

Defendant challenged the accuracy of the information contained in the search warrant affidavit with regard to defendant's residence and moved for a *Franks*² evidentiary hearing on the matter. At the evidentiary hearing, Sgt. Hurley testified that defendant was advised after his arrest that his residence would be searched and that he asked defendant if anyone was at home. Defendant stated that he lived with his mother and that she was at work. Defendant admitted to having a weapon behind his bed.

On his booking card, defendant listed 20200 Rowe Street in Detroit as his home address. Defendant also provided the Rowe Street telephone number as his own phone number. The Secretary of State records indicated defendant's address as 20200 Rowe Street. Defendant drove a car registered to a female with the same last name living at the Rowe Street address to one of the drug deals. On another occasion, defendant was seen leaving the Rowe Street address to walk to a drug deal and then returned back to that area after the drug deal.

On the date of the present incident, Detective Sylvester conducted surveillance for approximately one hour at the Rowe Street address. The only person that he observed coming in or leaving the home was defendant. The defendant left the home and drove to the Midway Bar, which was the prearranged location for the drug delivery.

² *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

Defendant's mother testified that on March 16, 2001, defendant was "in and out of her home" and was at her home at 20200 Rowe Street when she left for work. She testified that defendant's mail comes to the Rowe Street address and that defendant uses that address for his legal correspondence. A bedroom in the basement of the house is available for defendant's use.

Defendant testified that he moved out of his mother's house at 20200 Rowe Street in November 2000. He stated that he occasionally stayed at that address, but that he did not live there.

At the conclusion of the hearing, the trial court concluded that the Rowe Street address was defendant's residence. The court noted that defendant admitted to living at the Rowe Street address when he was arrested on May 16, 2001. Defendant also indicated where contraband could be found in his bedroom at his residence. The Secretary of State information indicated that defendant resided at the Rowe Street address. In addition, defendant was observed leaving the Rowe Street address for one of the hand-to-hand deliveries, and defendant's mother testified that defendant was in and out of the home and had his mail delivered to the home. Based on these findings, the trial court denied defendant's motion to suppress the evidence obtained pursuant to the warrant.

After a review of the entire evidentiary hearing transcript, we reject defendant's argument that the search warrant was based on false information. The facts support a finding that defendant's residence was at 20200 Rowe Street. The trial court did not err in finding that the affidavit contained sufficient reliable evidence that defendant resided at the Rowe Street address.

Defendant also argues that he was denied a fair trial when the prosecutor was allowed to introduce evidence of defendant's prior conviction for attempted carrying a concealed weapon despite defendant's willingness to stipulate, with regard to the charge of felon in possession of a firearm, that defendant had been convicted of a prior felony. The prosecutor concedes that the trial court erred by declining to allow defendant to stipulate that he had been convicted of a felony, see *People v Swint*, 225 Mich App 353; 572 NW2d 666 (1997), but argues that any error was harmless.

In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error was outcome determinative, i.e., the error undermined the reliability of the verdict. *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000), quoting *People v Lukity*, 460 Mich. 484, 495-496; 596 NW2d 607 (1999). Here, there was strong evidence of defendant's guilt, and defendant has not established that it is more probable than not that the alleged error was outcome determinative. Thus, we conclude that reversal is not warranted.

Next, defendant asserts that the evidence was not sufficient to support a finding that defendant possessed a firearm at the time he committed the felony of possession with intent to deliver less than fifty grams of cocaine. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

The felony-firearm prohibition applies to "[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony...." MCL 750.227b(1). Possession does not necessarily mean actual possession. A defendant may have constructive possession of a firearm if the defendant knows its location and if it is reasonably accessible to him. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000); *People v Hill*, 433 Mich. 464, 469-471, 446 NW2d 140 (1989).

In *Burgenmeyer, supra*, the Court stated:

In a prosecution for delivery of a controlled substance and for felony-firearm, the question is whether the offender possessed a firearm at the time of delivery. When a defendant is prosecuted for *possession* of a controlled substance, however, the inquiry is potentially more complex. A drug-possession offense can take place over an extended period, during which an offender is variously in proximity to the firearm and at a distance from it. In a case of that sort, the focus would be on the offense dates in the information. [*Burgenmeyer, supra* at 439.]

Here, the offense date stated in the information is May 16, 2001. Defendant was taken into police custody on May 16, 2001. When the police executed a search warrant at his residence that same day, they found controlled substances and firearms in his bedroom.

In pertinent part, the relevant charge in this case is that defendant possessed a firearm on May 16, 2001, when committing the felony of possession with intent to deliver cocaine. The evidence submitted to the jurors was sufficient to allow them to infer that defendant committed the offense of felony-firearm. The drugs and the weapons were close enough that a jury reasonably could conclude that defendant possessed both at the same time, as the prosecutor had charged. *Burgenmeyer, supra* at 439-440.

Lastly, defendant contends that the prosecution failed to establish that the Rowe Street House was used for the selling of controlled substances. The statute under which defendant was charged and convicted provides that a person:

(d) Shall not knowingly keep or maintain a ... dwelling ... or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article. [MCL 333.7405(1)(d).]

Viewed in the light most favorable to the prosecution, the evidence presented could support a rational jury in finding that the Rowe Street House was used for the selling of controlled substances. In April 2001 and May 2001 Detective Collura arranged to purchase cocaine from defendant. On both occasions, defendant met Detective Collura in a location near 20200 Rowe Street, and came from and returned in the direction of Rowe Street. On May 16, 2001, Detective Sylvester, an expert in drug trafficking, surveilled the house for approximately one hour. In this time period, he observed defendant step outside of his home twice, stand on the corner, go to a car that pulled up, and lean in the passenger window and talk for three to five minutes. Detective Sylvester testified that this behavior is consistent with drug trafficking.

Detective Sylvester then followed defendant from the house on Rowe Street to the Midway Bar, where defendant sold crack cocaine to Detective Collura.

In the ceiling of boards of the bedroom in the basement, the police found heroin, crack cocaine, cocaine, and ecstasy. On an end table the police found small zip lock baggies that are used to package narcotics. A digital scale was found on the bottom of a nightstand, and \$601 in cash was found in the bedroom. In addition, six weapons were found in the bedroom. From this evidence a reasonable inference arose that the house was a locus for drug trafficking. Viewed in the light most favorable to the prosecution, the evidence was sufficient to permit a rational jury to find defendant guilty beyond a reasonable doubt of maintaining a drug house.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard Allen Griffin
/s/ Henry William Saad