

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADRIAN LARMARTHE CARLISLE,

Defendant-Appellant.

UNPUBLISHED

June 20, 2006

No. 260162

Wayne Circuit Court

LC No. 04-009404-01

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of marijuana, MCL 333.7403(2)(d).¹ He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prisons terms of 1 to 7-1/2 years for the felon in possession conviction, and six months for the drug conviction. He appeals as of right. We affirm.

I. Underlying Facts

On September 3, 2004, a “source” used secret service funds to purchase marijuana from a residence at 721 Pingree in Detroit. The marijuana was packaged in a plastic zip-lock bag, and the source provided a description of the seller. Thereafter, on September 5, 2004, the police executed a search warrant at the Pingree residence. Upon entry into the home, the police found defendant lying on the living room floor; defendant’s wife and his two teenage sons were also in the home. An officer testified that he could smell marijuana in the living room. According to the police testimony, after being arrested, defendant told the police that there was “no need to tear up the house” and directed officers to an upstairs bedroom, where they found 16 individually wrapped, zip-locked baggies of marijuana on the top of a dresser in a glass bowl. The parties stipulated that the marijuana weighed a total of 1.58 grams. Defendant directed the police to a .12 gauge shotgun inside the bedroom closet, which was next to the dresser where the marijuana

¹ Defendant was acquitted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b.

was found. The police also seized a small .38 caliber handgun from the same bedroom closet. In a statement to the police, defendant admitted that he resided at 721 Pingree, and that drugs and weapons were found in his bedroom. Defendant claimed that he planned to smoke the confiscated marijuana.

At trial, defendant testified that he had lived at the residence for the past six months with his wife and children. Defendant denied selling marijuana to anyone on September 3, 2004, and claimed that he purchased the marijuana for personal use. Defendant explained that the marijuana was separated and wrapped when he purchased it. Defendant admitted that he showed the police the location of the shotgun, but maintained that the closet belonged to his wife. Defendant admitted, however, that the bedroom belonged to him and his wife. He denied ownership of either gun, and claimed that he had never seen the small handgun.

II. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to convict him of felon in possession because there was no evidence that he possessed the two seized firearms. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515.

To sustain a conviction of felon in possession of a firearm, the prosecution must establish beyond a reasonable doubt that the defendant (1) possessed a firearm and (2) had been convicted of a prior felony. MCL 750.224f; *People v Perkins*, 473 Mich 626; 635-636, 640; 703 NW2d 448 (2005). The prosecutor and defendant stipulated that defendant was convicted of a specified felony, and thus, was ineligible to possess a firearm. Defendant challenges only the possession element.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to infer that defendant had constructive possession of both firearms. Possession of a weapon may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). “[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant.” *Id.* at 470-471.

Defendant admitted that he had lived in the house for the past six months, and that the bedroom where the firearms were found belonged to him and his wife. It is undisputed that defendant advised the police that the shotgun was inside the closet in his bedroom. The handgun was found in the same closet, on the floor. During his own trial testimony, defendant explained that “the closet door was opened [sic]. So the shotgun was right there.” An officer explained that the handgun was “right at the opening” of the closet, and was visible upon looking in the closet. Defendant admitted ownership of the marijuana found in his bedroom and an officer

explained that the shotgun was approximately twelve inches from the marijuana. From this evidence, a jury could reasonably conclude that defendant knew the location of the firearms, and that the firearms were reasonably accessible to him. In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction of felon in possession of a firearm.²

III. Upward Departure

We reject defendant's claim that he is entitled to be resentenced because the trial court did not articulate a substantial and compelling reason for exceeding the guidelines when sentencing him to 1 to 7-1/2 years' imprisonment for his felon-in-possession conviction rather than an intermediate sanction. The sentencing guidelines range was zero to six months. The PSIR recommended an 18-month term of probation.

Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the calculated guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A court may depart from the appropriate sentence range only if it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A court may not depart from the guidelines range based on certain specified factors including gender, race, ethnicity, national origin, or lack of employment, MCL 769.34(3)(a), nor may it base a departure on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight, MCL 769.34(3)(b).

Our Supreme Court has reiterated that the phrase "substantial and compelling" constitutes strong language intended only to apply in "exceptional cases." *Babcock, supra* at 257-258. The reasons justifying departure should "keenly and irresistibly grab" the court's attention and be recognized as having "considerable worth" in determining the length of a sentence. *Id.* Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Id.* at 257, 273. This requires that the facts considered must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

Whether a factor exists is reviewed for clear error on appeal. *Babcock, supra* at 266. Whether a factor is objective and verifiable is subject to review de novo. *Id.* The trial court's determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the minimum sentence range is reviewed for an abuse of discretion. *Id.* at 266,

² Although defendant primarily relies on his own denial of possession of the firearms, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Further, contrary to defendant's claim, the fact that the firearms were not found on his person is not dispositive.

274. In ascertaining whether a departure is proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

At sentencing, the trial court stated its reasons for departure on the record:

[Defendant], you were previously convicted of a felony. You were previously on probation. You requested a jury trial in this matter. You were convicted by a jury of your peers of possession of marijuana, and firearm possession by a felon.

Firearm possession by a felon is a very serious offense. I cannot in any way find that this is a reasonable recommendation, nor did I hear anything from either of you or your attorney that would make me believe that it is.

You have been on probation before. You continue to have drugs in your home with children; guns in your home with children, and after a felony conviction.

On the departure evaluation form, the trial court stated as follows:

Conviction was for Felon in possession of a Firearm[.] Defendant has failed to conform with probationary conditions previously he continues to use and sell drugs and have loaded guns in his home with children residing with him probation is not reasonable after this conviction[.]

Initially, we agree with defendant that one of the court's articulated reasons for departure, i.e., that he had "*loaded* guns in his home with children," is partially unsupported because, as defendant notes, there was no evidence that either firearm that defendant possessed was loaded. But the trial court relied on other factors that are objective and verifiable, and the court did not abuse its discretion by finding that these factors amounted to substantial and compelling reasons to depart from the sentencing guidelines.³

The record supports the trial court's finding that probation was not reasonable for defendant because he had been on probation for a previous felony conviction and failed to comply with the required probationary conditions. Defendant argues that this factor is invalid because his prior conviction was considered in prior record variable (PRV) 2. Defendant was scored five points for PRV 2 (prior low severity felony convictions), MCL 777.52(1)(d), for having one prior low severity conviction. Although defendant's prior conviction was contemplated by PRV 2, the trial court's departure was not based on the mere fact that defendant had a prior conviction. Rather, the departure was based on the fact that defendant was previously afforded probation and violated the probation order. Although defendant contends that there is no record support for the trial court's conclusion that he previously violated probation, the PSIR

³ The sentencing judge presided over defendant's trial and, thus, was familiar with the facts of the case.

states that defendant was previously “afforded a probationary term and records indicate he violated the conditions of probation while under supervision.”

The record also supports the trial court’s finding that defendant chose to keep, use, and sell marijuana in his home, despite the fact that his two children resided there. It is undisputed that defendant’s two sons lived with him in the home. At trial, defendant admitted that he had been using marijuana in the home since he moved into the house six months previously. When the police executed the search warrant, defendant’s two children were in the home and an officer testified that he could smell marijuana in the home. The police seized 1.58 grams of marijuana, which was sitting in plain view, in a glass bowl, on defendant’s bedroom dresser. Defendant admitted that he purchased the marijuana, brought it into his home, and knew the children were aware of his drug use.

Further, although defendant was acquitted of the higher offense of possession with intent to deliver marijuana, a trial court is permitted to consider evidence presented at trial that the defendant committed another crime even if he was acquitted of that charge. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). The facts showed that a “source” purchased a plastic zip-lock bag of marijuana from defendant’s residence. Subsequently, the police confiscated 16 individually wrapped, zip-locked baggies of marijuana. An officer testified that “16 zip-lock baggies, can be construed as for sale instead of personal use . . . because of the way it was wrapped, as well as the amount that was there.” Thus, the record supports the trial court finding that defendant sold drugs out of his home while residing with his children.

We also note that there was evidence that defendant had a shotgun and a handgun in the home with his children; although there was no evidence that the guns were loaded. As previously indicated, both the shotgun and the handgun were in an open bedroom closet, easily visible and accessible to him and his two children. In sum, the objective and verifiable reasons justifying departure keenly and irresistibly grab one’s attention and are of considerable worth in deciding the length of defendant’s sentence. For the same reasons, the extent of the departure, six months, is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Babcock, supra* at 264, 272.

If a trial court articulates multiple reasons for a departure, but some of the reasons are found to be invalid, this Court must determine whether the trial court would have departed, and would have departed to the same degree, on the basis of the valid reasons alone. *Id.* at 260, 273. If this Court cannot determine whether the trial court would have departed from the guidelines range to the same extent, remand for rearticulation or resentencing is necessary. *Id.* at 260-261. In this case, although there is no record support for the trial court’s statement that the two guns were loaded, it was the existence of the guns and their location in an area that was accessible to the children that principally concerned the trial court. Having reviewed the record and scrutinized the sentencing transcript, we are satisfied that the trial court would have imposed the same sentence on the basis of the valid factors alone.

IV. Resentencing before a Different Judge

Because we have concluded that remand for resentencing is not warranted, it is unnecessary to consider defendant's claim that this case should be reassigned to a different judge for resentencing.

Affirmed.

/s/ Jessica R. Cooper

/s/ Janet T. Neff

/s/ Stephen L. Borrello