

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK DUANE POSTON,

Defendant-Appellant.

UNPUBLISHED

April 22, 2010

No. 285472

Wayne Circuit Court

LC No. 04-009948-FH

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 23 months to 20 years for each drug conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. For the reasons set forth in this opinion, we affirm.

Defendant was taken into custody during the execution of a search warrant at a house in Detroit. Packages of cocaine and heroin were seized from defendant's pants pocket. The police found a rifle and a handgun in an upstairs bedroom that contained furnishings for a male, and mail and billing statements addressed to defendant. After the house was secured, the police also searched a Dodge Durango that was parked in the driveway. The police had observed defendant arrive at the house in that vehicle shortly before the search was conducted. Another handgun was recovered from the Durango.

I. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to convict him of felony-firearm because the evidence did not show that he possessed or had access to the firearms at the time he was arrested by the police. We disagree. In reviewing a challenge to the sufficiency of the evidence, we review the record de novo to determine whether the evidence, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find the essential elements of the crime charged beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

To convict defendant of felony-firearm, the prosecution was required to prove that defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The inquiry must focus on whether the defendant possessed the firearm at the time he committed the felony, not whether he was in possession of the firearm at the time the police conducted a search related to the offense, or at the time of his arrest. *People v Burgenmeyer*, 461 Mich 431, 439-440; 606 NW2d 645 (2000).

Possession may be either actual or constructive. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). A defendant may have constructive possession of a firearm if the location of the weapon is known to the defendant and reasonably accessible to him. *Burgenmeyer*, 461 Mich at 438; see also *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). Possession may be proven with circumstantial evidence and reasonable inferences that arise from the evidence. *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005).

In a case involving the delivery of drugs, the inquiry must focus on whether the defendant possessed a firearm at the time of delivery. *Burgenmeyer*, 461 Mich at 439. In contrast, a case involving possession of controlled substances is possibly more complex. *Id.* “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.” *Id.* In possession cases, “the focus would be on the offense dates specified in the information.” *Id.*

In *Burgenmeyer*, 461 Mich at 439-440, the Supreme Court held that there was sufficient evidence to convict the defendant of felony-firearm when he was charged with possessing between 50 and 250 grams of cocaine that was found inside a bedroom dresser drawer, and firearms were on top of the dresser on the dates charged in the information. The drugs and weapons were close enough for the jury to reasonably infer that both were possessed by the defendant at the same time. *Id.* at 440.

In this case, defendant was not charged with delivery of drugs, but with possession with intent to deliver. Thus, the offense occurred over an extended period of time. The information charged that the offenses were committed on the day of the search. On the day of the search, defendant had actual possession of the drugs; the evidence also showed that on that same day, defendant had access to two guns found in a bedroom. Defendant was also observed driving a Dodge Durango shortly before the search was conducted, and a search of the Durango, which was parked in the driveway of the premises to be searched, uncovered another gun. Therefore, the evidence was sufficient to show that defendant also had access to the gun recovered from the vehicle while possessing the drugs that were found in his pants pocket. Accordingly, the evidence was sufficient to allow the jury to find defendant guilty of felony-firearm beyond a reasonable doubt.

II. Search of Defendant’s Automobile

Defendant next argues that the trial court erred in denying his motion to suppress the evidence of the handgun that was recovered during a search of the Durango. We disagree.

We review de novo the trial court's legal ruling denying defendant's motion to suppress.¹ *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003).

The trial court denied defendant's motion on the record at trial, apparently accepting plaintiff's argument that the automobile exception to the warrant requirement applied because there was probable cause to search the vehicle because defendant was observed driving the vehicle shortly before the police discovered cocaine and heroin in his possession. *People v Garvin*, 235 Mich App 90, 101-105; 597 NW2d 194 (1999). We need not determine the propriety of the trial court's ruling regarding the applicability of the automobile exception because there was a search warrant in this case, and the search warrant encompassed the search of the automobile.

The search warrant in this case authorized a search of:

The entire premises and curtilage of 9232 Trinity described as a 1 ½ story, single family white aluminum sided, located on the east side of the street between Westfield and Cathedral, located in the City of Detroit, County of Wayne and The State of Michigan. Also to be searched is the seller described as a B/M, DOB 2-16-63, 5'10", 190 lbs, med. Complexion, with a bald head, named Derrick Duane Poston and to seize tabulate and make return according to the law the following property and things; all controlled substances, all moneys, books and records used in connection with illegal narcotic trafficking, all equipment, safes and supplies used in connection with the above described activities, all evidence of ownership, occupancy, possession or control of the premises. [Emphasis added.]

In *People v Jones*, 249 Mich App 131, 136-140; 640 NW2d 898 (2002), this Court adopted the majority view that a search warrant authorizing the search of "premises" authorizes the search of all automobiles found on the premises. In so holding, we were persuaded by the following analysis of the United States Court of Appeals for the Seventh Circuit:

"Professor LaFave asserts, and we agree, that the better practice would be to include a description of the occupant's vehicle in the warrant when the warrant is intended to extend to the car. LaFave, *supra* at 159. We do not believe, however, that such a practice is mandated in every instance by the Fourth Amendment. We therefore agree with other courts that have addressed this issue and hold that a search warrant authorizing a search of particularly described premises may permit the search of vehicles owned or controlled by the owner of, and found on, the premises." [*Jones*, 249 Mich App at 139, quoting *United States v Percival*, 756 F2d 600, 612 (CA 7, 1985).]

The search warrant in this case, like the search warrant in *Jones*, authorized the search of particularly described premises. Moreover, the search warrant in the instant case specifically used the word "premises." Although the better practice would have been to include language in

¹ The trial court did not hold an evidentiary hearing in denying defendant's motion to suppress, but decided the issue as a matter of law on the record on the first day of trial.

the search warrant clearly including any automobile owned or controlled by defendant, because the search warrant authorized the search of particularly described premises, the warrant extended to the Durango, which was parked in the driveway of the particularly described premises. *Jones*, 249 Mich App 131. The trial court therefore properly denied defendant's motion to suppress the gun recovered from the Durango.

III. Scoring of Offense Variable 2

Defendant finally argues that the trial court erred in scoring five points for offense variable (OV) 2. We disagree. When scoring the sentencing guidelines, a trial court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* Questions involving statutory interpretation or application of the sentencing guidelines are reviewed de novo. *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009).

Offense variable 2 assesses points for the lethal potential of a weapon possessed or used. MCL 777.32. Five points are to be scored if the offender "possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d). Relying on *McGraw*, 484 Mich 120, defendant argues that OV 2 should have been scored at zero points because he did not physically possess any of the firearms when the drugs were found in his possession at the time he was seized. In *McGraw*, our Supreme Court clarified that offense variables are to be scored solely on the basis of conduct occurring during the sentencing offense, unless a variable specifically instructs otherwise. *Id.* at 122. In this case, however, the jury found that defendant possessed a firearm during the commission of the sentencing offense, i.e., possession with intent to deliver a controlled substance. Thus, the trial court's five-point score is not inconsistent with *McGraw*.

Furthermore, the focus of MCL 777.32(1)(d) is on an offender's possession of a weapon. Giving the term "possessed" its plain and ordinary meaning, *People v Libbett*, 251 Mich App 353, 365-366; 650 NW2d 407 (2002), which encompasses either actual or constructive possession, *Hardiman*, 466 Mich at 421, the trial court could properly score five points based on defendant's constructive possession of one of the weapons enumerated in MCL 777.32(1)(d). Nothing in MCL 777.32 suggests that only actual possession will support a five-point score for OV 2. Accordingly, consistent with the jury's finding that defendant possessed a firearm during the commission of the sentencing offense, the trial court did not err in scoring five points for OV 2.

Affirmed.

/s/ Richard A. Bandstra
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro