

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HEZEKIAH WILLARD MILLER,

Defendant-Appellee.

UNPUBLISHED

January 27, 2011

No. 294273

St. Clair Circuit Court

LC No. 09-001270-FH

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

In this evidence suppression matter, the prosecution appeals as of right from the trial court's suppression of crack cocaine, two cell phones, and \$157.00 cash as a result of an unconstitutional search of defendant's person. We affirm the trial court's decision to suppress this evidence. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The prosecution argues that the controlled substances and other drug dealing evidence discovered during the execution of a search warrant at defendant's girlfriend's residence amounted to probable cause to arrest defendant. The prosecution contends that defendant could have been arrested for "knowingly loiter[ing] in or about a place where an illegal occupation or business is being conducted," MCL 750.167(1)(j), possession of marijuana, MCL 333.7403(2)(d), possession of marijuana with the intent to deliver, MCL 333.7401(2)(d), or maintaining a drug house, MCL 333.7405(d). Therefore, under *People v Arterberry*, 431 Mich 381; 429 NW2d 574 (1988), the search incident to arrest was constitutional and its fruits admissible. We disagree.

A trial court's findings of fact on a motion to suppress will not be reversed on appeal unless they are clearly erroneous, while questions of law and the trial court's ultimate decision on the motion are reviewed de novo. *People v Waclawski*, 286 Mich App 634, 693; 780 NW2d 321 (2009). A finding is clearly erroneous when it leaves this Court with a definite and firm conviction that the trial court made a mistake. *Id.*

Search incident to arrest is an exception to the warrant requirement, and may occur whenever there is probable cause to arrest, even if the arrest has not been made at the time the search is conducted. *People v Champion*, 452 Mich 92, 98, 115; 549 NW2d 849 (1996); *People v LaBelle*, 478 Mich 891; 732 NW2d 114 (2007). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably

trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Champion*, 452 Mich at 115.

Probable cause did not exist to arrest defendant for loitering in a place of illegal occupation or business. Unlike the defendant in *Arterberry*, defendant here was not “loitering” when he was arrested. Cf. *Arterberry*, 431 Mich at 382-383 (the defendant was standing inside a residence where drugs had been sold during the execution of a search warrant when he was searched and subsequently arrested). In this case, defendant was not at the residence during the execution of the search warrant, and he was searched and subsequently arrested outside the residence while on his way unlock the front door.

The prosecution’s argument that probable cause existed to arrest defendant for maintaining a drug house is also without merit. The residence may have been a drug house but defendant was not “keeping or maintaining” it. See *People v Bartlett*, 231 Mich App 139, 152; 585 NW2d 341 (1998) (“[A] person may be deemed to keep and maintain a drug house if that person has the ability to exercise control or management over the house.”). The drug task force witnessed defendant driving his girlfriend’s car and having keys to the residence, found a duffle bag containing \$900.00 in cash and check stubs and a work shirt with defendant’s name on them, but these facts do not rise to the level of probable cause required to arrest defendant for maintaining a drug house. See *id.* (finding that the defendant had control of the house that was used to sell drugs because he rented a room on the first floor where drug transactions took place, and police officers found a gun and drug paraphernalia in his room).

Finally, we need not address the prosecution’s argument that defendant could have also been arrested for possession of marijuana or possession of marijuana with the intent to deliver. The issue of whether probable cause existed to arrest defendant for these offenses was not raised or decided below. See *People v Greene*, 477 Mich 1129, 1131; 730 NW2d 478 (2007).

Because probable cause did not exist to arrest defendant, the search of defendant’s person was unconstitutional. Therefore, the trial court properly granted defendant’s motion to suppress the evidence found on defendant’s person.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro