

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY MITCHELL,

Defendant-Appellant.

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UNPUBLISHED

August 7, 2003

No. 228727

Saginaw Circuit Court

LC No. 98-015508-FH

ON REMAND

Before: Kelly, P.J. and Saad and Smolenski, JJ.

KELLY, J. (*dissenting.*)

I respectfully dissent from the majority's conclusion that the evidence was sufficient to support defendant's conviction.

Defendant argues that the evidence was insufficient to establish that he knowingly possessed cocaine. After thoroughly reviewing the record and applying the principles set forth in *Hardiman, supra*, I am compelled to agree.

As noted by the majority, possession may be either actual or constructive. *Wolfe, supra* at 519-520. When determining whether the defendant constructively possessed a controlled substance, "the essential question is whether the defendant had dominion or control over the controlled substance." *Konrad, supra* at 271. "A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." *Wolfe, supra* at 520. Constructive possession exists when there is a sufficient nexus between the defendant and the contraband. *Johnson, supra* at 499-500. Generally, "a person has constructive possession if there is proximity to the article together with indicia of control." *Burgenmeyer, supra* at 438.

In *Hardiman*, our Supreme Court, overruling *People v Atley*, 392 Mich 298; 220 NW2d 465 (1974), ruled that it is permissible to make an inference built upon another inference to establish an element of an offense. *Id.* at 421-431. The Court explained that forbidding an inference upon an inference meant "that a fact desired to be used circumstantially must itself be established by testimonial evidence. . . ." *Id.* at 425 quoting 1A Wigmore, Evidence (Tiller rev), § 41, pp 1106, 1111. Conversely, it further explained that allowing an inference upon an inference simply means that circumstantial evidence alone is sufficient to support a conviction because circumstantial and direct evidence have equal probative worth. *Id.* at 425-426. It further

noted that a reasonable inference is distinguishable from mere conjecture or speculation. *Id.* at 427. Summarizing these principles, the Court held: “Accordingly, when reviewing sufficiency of the evidence claims, courts should view all the evidence—whether direct or circumstantial—in a light most favorable to the prosecution to determine whether the prosecution sustained its burden.” *Id.* at 428. Applying these principles, the Court decided that letters addressed to the defendant at the apartment, her presence in the apartment parking lot, and women’s clothing in the closet including a dress containing packaged heroin supported a reasonable inference that the dress containing the contraband belonged to the defendant. *Id.* at 424.

In this case, the evidence presented, regardless of being circumstantial, does not support a reasonable inference that defendant possessed the drugs found, even when viewed in the light most favorable to the prosecution. At most, it “raises merely a conjecture or possibility” that defendant possessed the drugs. *Id.* at 427. The prosecution’s theory was that defendant drove down Simoneau and threw the bag of drugs out the window. The evidence showed that defendant in fact drove down Simoneau while fleeing from police officers at high speed. However, the fact that defendant sped away from police officers, with his window down, on the street on which the drugs were found does not support a reasonable inference that defendant threw the drugs out the window. Other than defendant’s presence on the street where the drugs were found, there was no additional connection between defendant and the drugs. Both officers testified that they did not see defendant throw anything out his car window. There was no evidence that anyone else saw defendant throw anything out his window. There were no fingerprints recovered from the bag. The prosecution argued that muddy tire tracks close to the curb near where the drugs were found provided a nexus between defendant and the drugs. However, no rational trier of fact could infer that the tire tracks near the curb were caused by defendant’s vehicle when the tracks were not matched to defendant’s tires, there were no photographs taken of the tracks, and the tracks were noticed approximately ninety minutes after defendant and the officers drove down the street. Furthermore, there was no evidence of drugs on defendant’s person, in his car, or in his house.

The prosecution also argued that officer Clement testified that Mixon told him that defendant called him from jail stating that he had been caught with drugs. However, following a sustained hearsay objection by defense counsel, the trial court instructed the jury that officer Clement’s testimony about what Mixon said defendant said could only be used to impeach Mixon’s other testimony. Being used solely for impeachment, the statement does not provide any evidence, circumstantial or direct, that defendant possessed the drugs. Nonetheless, the majority appears to rely on this evidence to find sufficient evidence of possession. The majority also relies on the money that was found on defendant and near his car which totaled \$580. However, defendant’s possession of money, even considering Mixon’s equivocal testimony that he gave defendant the money, does not provide any nexus between defendant and the drugs found on the street.

Because the evidence fails to show defendant’s “proximity to the article together with indicia of control” as required to show constructive possession, I find that no rational trier of fact could find the element of possession was proved beyond a reasonable doubt.

/s/ Kirsten Frank Kelly