

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CESAR GARCIA HERNANDEZ,

Defendant-Appellant.

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UNPUBLISHED

July 26, 2005

No. 250008

Oakland Circuit Court

LC No. 2002-187112-FC

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i).<sup>1</sup> Defendant was sentenced to a prison term of twenty-five to fifty years. We affirm.

On the date of the offense, October 2, 2002, MCL 333.7401(2)(a)(i) mandated a minimum twenty-year sentence for persons found guilty of the crime of possession with intent to deliver 650 or more grams of cocaine. However, on March 1, 2003, prior to defendant's conviction and sentencing, an amended version of MCL 333.7401(2)(a)(i) became effective, which eliminated the mandatory minimum sentence of twenty years, and under MCL 777.13m the instant offense became subject to the statutory sentencing guidelines.

Defendant argues that he is entitled to sentencing under the amended version of MCL 333.7401(2)(a)(i) that was in effect at the time of his sentencing. We disagree. Because the determination whether a statute should be applied retroactively is a legal issue, our review is de novo. *People v Doxey*, 263 Mich App 115, 118; 687 NW2d 360 (2004).

This Court recently addressed this issue in *Doxey* and held that 2002 PA 665 (amending MCL 333.7401) applies only to those offenses committed on or after March 1, 2003. *Doxey*, *supra* at 122; see also *People v Thomas*, 260 Mich App 450; 678 NW2d 631 (2004) (finding that MCL 333.7401(2)(a)(iii) should not be applied retroactively); *People v Dailey*, 469 Mich 1019;

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<sup>1</sup> MCL 333.7401(2)(a)(i) has since been amended to increase the statutory minimum from 650 grams to 1,000 grams. 2002 PA 665.

678 NW2d 439 (2004) (stating that defendant should be sentenced under the statutes that predate the amendments to MCL 333.7401 because MCL 769.34(2) demonstrates a legislative intent to have defendants sentenced under the law in effect on the date of the offense). Here, because the offense of which defendant was convicted occurred before March 1, 2003, we find that he was properly sentenced under the statute that was in effect at the time of the offense.

In this regard, defendant claims that the general rule that statutory amendments are presumed to apply prospectively should not apply to this case because the amendments to MCL 333.7401 are remedial in nature. Our Supreme Court has stated that “[t]he general rule of statutory construction in Michigan is that a new or amended statute applies prospectively unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect.” *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992). And while an exception does exist for remedial and procedural statutes, *id.*, this Court concluded in *Doxey* that such an exception does not apply in this circumstance because the amendments to MCL 333.7401 are not purely remedial in nature. See *Doxey, supra* at 120-121. Therefore, because the amendments to MCL 333.7401 are not purely remedial in nature, the general rule of prospective application applies, and we conclude that defendant is not entitled to be resentenced according to the amended statute.

Defendant next claims that he is entitled to be sentenced under the amendments in effect at the time of his sentencing because the statutory mandatory minimum sentence of twenty years under the former version of MCL 333.7401(2)(a)(i) is disproportionate since it does not take into consideration the offense or the offender. We review the proportionality of a sentence for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). “A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender.” *Id.*

We conclude that defendant’s proportionality argument is without merit because statutorily mandated sentences are presumed to be proportionate and valid. *People v Davis*, 250 Mich App 357, 369; 649 NW2d 94, mod 250 Mich App 801 (2002); *People v Arcos*, 206 Mich App 374, 377; 522 NW2d 655 (1994); *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). Moreover, defendant has not raised any unusual circumstances that would overcome this presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Defendant also argues that he is entitled to resentencing because the trial court erred when it made an upward departure from the mandatory minimum sentence of twenty years and did not articulate its reasons on the record, nor did it complete a sentencing departure form. However, we conclude that this argument is also without merit because there was no departure in this case. The version of MCL 333.7401(2)(a)(i) in effect at the time of the offense mandated a minimum sentence of twenty years. Because of this mandatory minimum sentence provision, the sentencing guidelines were inapplicable to this case. MCL 769.34. Thus, while the trial court imposed a higher minimum sentence than the mandatory minimum sentence, this did not constitute an “upward departure” from any applicable sentencing guidelines.

We also reject defendant's argument that he is entitled to resentencing because there was judicial fact-finding concerning the amount of cocaine in defendant's possession. First, *Blakely v Washington*, 542 US \_\_\_; 124 S Ct 2531, 159 L Ed 2d 403 (2004), is not implicated because, as defendant acknowledges, the statutory maximum for the instant offense was not increased or exceeded. Further, our Supreme Court noted in *People v Claypool*, 470 Mich 715, 731 n 14; 684 NW2d 278 (2004), that Michigan's sentencing system is unaffected by *Blakely*. See also *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd in part 472 Mich 881 (2005) (treating *Claypool's* discussion of *Blakely* as binding precedent).

Next, defendant argues that he was denied his constitutional right to present a "presence only" defense when the trial court refused to admit a co-defendant's statements. Again, we disagree.

While a criminal defendant has the constitutional right to present a defense, which may, if necessary in order to receive a fair trial, include hearsay evidence if critical to the defense, a trial court's exclusion of hearsay evidence generally does not deprive a defendant of the right to present a defense if the defendant is otherwise able to present his theory to the jury with other evidence or the proffered evidence is not trustworthy. *People v Herndon*, 246 Mich App 371, 411-412; 633 NW2d 376 (2001).

Defendant argued below that the statements were admissible under MRE 804(b)(3). MRE 804(b)(3) provides the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Under MRE 804(b)(3), defendant was required to show the following: (1) that the declarant is unavailable to testify; (2) that the statement was against the declarant's penal interest; and (3) corroborating circumstances supporting the trustworthiness of the statement. MRE 804(a) and (b)(3). In this case, co-defendant Cervantes was not unavailable because he testified at trial. Therefore, MRE 804(b)(3) is inapplicable, and the trial court did not abuse its discretion in refusing to admit his statements into evidence. *People v Blankenship*, 108 Mich App 794, 797; 310 NW2d 880 (1981).

Further, Cervantes testified to the contents of the statements that defendant moved to admit. In fact, he read one of them into the record. So defendant was still able to present his "presence only" defense without the statements themselves actually being admitted. Thus, defendant was not denied his right to present the defense of "presence only." *Herndon, supra* at 411.

Lastly, we reject defendant's argument that there was insufficient evidence to support his conviction of possession with intent to deliver 650 or more grams of cocaine. In reviewing a claim of insufficient evidence, we view the evidence presented at trial in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). However, we will not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses. *Id.* at 561.

To obtain a conviction for possession with intent to deliver 650 or more grams of cocaine, the prosecution was required to prove the following elements: (1) that the recovered substance is cocaine; (2) that the cocaine is in a mixture weighing 650 grams or more; (3) that defendant was not authorized to possess the cocaine; and (4) that defendant knowingly possessed the cocaine with the intent to deliver. MCL 333.7401(2)(a)(i); *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, mod 441 Mich 1201 (1992).

Defendant argues that the evidence was insufficient to support a finding that he knowingly possessed the cocaine with the intent to deliver it. We disagree.

Regarding defendant's intent to deliver the cocaine, it can be inferred in this case from the quantity of narcotics involved and the packaging materials found in the apartment. *People v Konrad*, 449 Mich 263, 271 n 4; 536 NW2d 517 (1995); *Wolfe, supra* at 524.

Turning now to whether defendant possessed the cocaine, "[a] person need not have actual physical possession of a controlled substance to be guilty of possessing it." *Wolfe, supra* at 519-520. Possession can be either actual or constructive. *Id.* "The essential question is whether the defendant had dominion or control over the controlled substance." *Konrad, supra* at 271. Further, one can possess a controlled substance without actually owning it, and one can possess a controlled substance jointly with one or more others. *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999), citing *Wolfe, supra* at 520. However, "a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." *Wolfe, supra* at 520. "Mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found is insufficient to support a finding of possession." *Griffin, supra* at 35 (citations omitted). Rather, "constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Wolfe, supra* at 521. Lastly, possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence. *Id.* at 526.

We find that the evidence presented at trial was sufficient to support a finding that defendant constructively possessed the cocaine. *Id.* at 520. There was evidence that when the search warrant was executed, defendant and his girlfriend were found in a bedroom with almost nine kilos of cocaine, including more than six kilos and almost \$30,000 in a duffel bag in plain view, and defendant was attempting to keep the officers from entering the bedroom. In addition to the drugs found in plain view, which supports an inference that defendant had knowledge of them, the officers testified that there was a strong odor of cocaine throughout the apartment, and in particular, in the bedroom. Further, connecting defendant to the drugs was the fact that men's clothing was found in the duffel bag with the drugs and money, and defendant's wallet, containing over \$500, was also found in the bedroom. Moreover, a co-defendant testified that he believed defendant and his girlfriend brought the cocaine into the apartment. When viewed in

the light most favorable to the prosecution, we conclude that there was sufficient evidence to find that defendant had constructive possession of the cocaine.

Affirmed.

/s/ Janet T. Neff  
/s/ Michael R. Smolenski  
/s/ Michael J. Talbot