

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAMES LEROY SHAW, JR.,

Defendant-Appellant.

UNPUBLISHED

April 14, 2011

No. 296463

Wayne Circuit Court

LC No. 07-024846-FH

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of felon in possession of a firearm, MCL 750.224f, possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to five months to five years' imprisonment for the felon in possession of a firearm conviction, five months to four years' imprisonment for the possession with intent to deliver marijuana conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Detroit police officers investigated narcotics activity occurring from a vacant home. The officers had investigated prior reports of drug trafficking from that same location. Once inside the home, defendant was observed leaving the kitchen area. On the kitchen table, marijuana, a handgun, and currency were found in plastic bags. Defendant was the only person found in the home, and he testified that he had been in the home for three days. Defendant testified that he was slammed against the wall after he opened the door for police. He was in the living room when he heard activity by police in the kitchen. An officer carried out a plastic bag. Defendant denied having any knowledge of the marijuana, gun, or currency on the kitchen table. Despite defendant's testimony, he was convicted as charged.

First, defendant argues that the trial court erred when it denied his motion to suppress evidence seized at a house in which he was an overnight guest. We disagree. We review de novo a trial court's conclusions of law made in regard to a suppression ruling, *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999), while a trial court's factual findings related to the same motion are reviewed for clear error, *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

The trial court did not err in denying defendant's motion to suppress the evidence seized from the house because defendant did not have a reasonable expectation of privacy in the abandoned property. The government performs a search within the meaning of the Fourth Amendment when it intrudes on an individual's reasonable or justifiable expectation of privacy. *People v Nash*, 418 Mich 196, 204-205; 341 NW2d 439 (1983). "An expectation of privacy is legitimate only if the individual exhibited an actual, subjective expectation of privacy and that actual expectation is one that society recognizes as reasonable." *People v Taylor*, 253 Mich App 399, 404-405; 655 NW2d 291 (2002), citing *Bond v United States*, 529 US 334, 338; 120 S Ct 1462; 146 L Ed 2d 365 (2000). Further, whether the expectation of privacy exists depends on the totality of the circumstances surrounding the intrusion. *Taylor*, 253 Mich App at 405.

An owner has no expectation of privacy in abandoned property, and the search and seizure of abandoned property is presumptively reasonable. *Id.* at 406, citing *People v Rasmussen*, 191 Mich App 721, 725; 478 NW2d 752 (1991). Moreover, "[p]olice officers do not need a warrant before entering structures that, by all objective manifestations, appear abandoned." *Taylor*, 253 Mich App at 409. Courts examine the totality of the circumstances when evaluating whether police officers must secure a warrant before entering what appears to be an abandoned or vacant structure. *Id.* at 407. The objective factors to be considered include:

- (1) the outward appearance,
- (2) the overall condition,
- (3) the state of the vegetation on the premises,
- (4) barriers erected and securely fastened in all openings,
- (5) indications that the home is not being independently serviced with gas or electricity,
- (6) the lack of appliances, furniture, or other furnishings typically found in a dwelling house,
- (7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows,
- (8) the history surrounding the premises and prior use, and
- (9) complaints of illicit activity occurring in the structure. [*Id.*]

Applying the above cited factors to the testimony, the trial court did not clearly err when it found that police officers reasonably determined that the house was abandoned. Officer Renny Shelby and Officer Derrick Carter testified that, prior to the incident on December 3, 2007, they had been to this house on several occasions investigating narcotics complaints. In fact, defendant had previously been ticketed at that home for loitering in a place where drugs were kept or sold. The house appeared abandoned and vacant. It did not have any running water, and the bathrooms were not accessible. The electricity was illegally hooked up to the house, and there was garbage and feces scattered throughout the house. The officers also observed that the refrigerator was filthy and not working. In fact, it appeared that the refrigerator "had [not] been used in years." There was sparse furnishing on the first floor, and there were no furnishings on the second floor. Additionally, there were no dishes in the kitchen cabinets. The house had sustained fire damage, and ashes were scattered throughout the basement on the floor. The officers observed that part of the roof was missing, and the windows were broken. When the officers returned to the house on December 3, 2007, the house appeared to be in the same condition.

On the contrary, defendant's aunt, Misty Taylor, testified that she owned the home and asked defendant to "watch" the home because she was in the process of remodeling the home which had been vandalized. Although Taylor asserted that she owned the home, she

acknowledged that she had not paid taxes for two years and that the home was now owned by the county. She did not pay for water and electricity at the home and denied knowing that there was an illegal electrical connection. Taylor claimed that the home did not have fire damage, but admitted that she had not lived at the home for years.

The trial court held that Taylor was no longer the owner of the home and that she cannot give permission to defendant to “stay in what used to be her house.” The court also held that defendant did not have standing to object to the search of a forfeited, abandoned structure. In light of the evidence and the trial court’s factual findings, we cannot conclude that the trial court erred in denying the motion to suppress. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001) (holding that a trial court’s factual findings in ruling on a motion to suppress are reviewed for clear error). The officers did not need a search warrant before entering the house because, by all objective manifestations, the house was abandoned. *Taylor*, 253 Mich App at 409. Accordingly, defendant did not have an expectation of privacy in the abandoned property, and the warrantless search and seizure was reasonable.

Next, defendant contends that there was insufficient evidence to support his convictions. We disagree. We review de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Possession with intent to deliver marijuana requires knowing possession with intent to deliver. See *People v Gonzalez*, 256 Mich App 212, 225-226; 663 NW2d 499 (2003). “Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence, just as it can be established by direct evidence.” *People v Wolfe*, 440 Mich 508, 526; 489 NW2d 748 (1992). Defendant only challenges the possession element of this offense, and this Court explained in *People v Brown*, 279 Mich App 116, 136-137; 755 NW2d 664 (2008), that:

Actual physical possession is not required to meet the possession element. Instead, possession may be either actual or constructive. Constructive possession of an illegal substance signifies knowledge of its presence, knowledge of its character, and the right to control it. Because it is difficult to prove an actor’s state of mind, only minimal circumstantial evidence is required. Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of possession. Circumstantial evidence that a defendant had the exclusive control or dominion over property on which contraband narcotics are found is sufficient to establish that the defendant constructively possessed the narcotics. [Citations omitted.]

Regarding felon in possession, “[u]nder MCL 750.224f, a person who has been convicted of a felony may not ‘possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm’ unless certain conditions are met.” *People v Dupree*, 284 Mich App 89, 102; 771 NW2d 470 (2009). Therefore, to be guilty of this offense, a defendant must have a previous felony conviction and be in possession of a firearm. Because the parties stipulated that defendant

had committed a prior felony, and was not eligible to possess a firearm, the only element in question is defendant's possession of the gun.

Likewise, to be guilty of felony-firearm, a defendant must possess a firearm during the commission of a felony. "The elements of felony-firearm are that the 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 question of possession dictates defendant's guilt or innocence. Possession of a firearm can be either actual or constructive. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Constructive possession may be established "if the location of the weapon is known and it is reasonably accessible to defendant." *Id.*

There was sufficient evidence for the trial court to conclude that defendant had constructive possession of the marijuana and handgun that were found on the kitchen table. Defendant was the only person found in the house. In fact, defendant testified that he had been watching the home for three days. According to Officer Renny Shelby, marijuana, plastic baggies, money and a handgun were laying on the kitchen table in plain sight. Further, when officers entered the home, defendant was walking away from the kitchen area. Defendant testified that he had previously been inside the kitchen of the house. This circumstantial evidence can lead a rational trier of fact to infer that defendant knew the location of the marijuana and the handgun, and the handgun and marijuana were reasonably accessible to defendant. Viewing the evidence in a light most favorable to the prosecution, defendant's argument, that the evidence was insufficient to support his convictions, fails.

Lastly, defendant contends that his convictions were against the great weight of the evidence. "The test [to determine whether a verdict is against the great weight of the evidence] is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). In order to discount testimony that supports a verdict and grant a new trial, the testimony must either contradict indisputable physical facts, or be so patently incredible or inherently implausible that a reasonable juror could not believe it. *Id.* at 643-644. The evidence in the instant case, as outlined above, did not preponderate so heavily against the verdict that it would be a miscarriage of justice to let it stand.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray