

STATE OF MICHIGAN  
IN THE SUPREME COURT

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THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

Supreme Court  
No.

GEORGE WALTER TENNYSON,  
Defendant-Appellant.

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Third Circuit Court No. 06-010137  
Court of Appeals No. 278826

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137755'

BRIEF OPPOSING LEAVE

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FILED

DEC 26 2008

CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

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## Counterstatement of Questions Presented

**I. Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. A field test on the substance found on a plate under defendant's bed found the presence of heroin. Was there sufficient evidence to support the jury's verdict?**

The People answer: Yes  
The Defendant answers: No  
The Trial Court answered: Yes

**II. To prove possession the People must show that defendant had dominion and control over the narcotics. The heroin was found on a plate under defendant's bed and defendant was sitting on the bed at the time. Are these facts sufficient to show that defendant possessed the narcotics?**

The People answer: Yes  
The Defendant answers: No  
The Trial Court answers: Yes

**III. The delinquency statute is aimed at preventing delinquency and thus, the juvenile does not have to be adjudicated a delinquent before the defendant can be found guilty. Defendant had loaded guns and heroin in a home where there was a ten-year-old child. Was there sufficient evidence to support the conviction for contributing to the delinquency of a minor?**

The People answer: Yes  
The Defendant answers: No  
The Trial Court answered: Yes

**IV. A police officer may provide lay opinion testimony regarding topics within his or her personal knowledge and experience. The officers offered testimony regarding the narcotics after a testifying to their experience with narcotics. Was counsel ineffective for failing to object to the testimony?**

The People answer: No

The Defendant answers: Yes

The Trial Court was not asked.

### **Counterstatement of Facts**

This case does not concern legal principles of major importance to the state's jurisprudence. There was no manifest injustice and the Court of Appeals decision turns on the particular facts in this case. In addition, there is no other case with like facts with which this case conflicts.

## ARGUMENT

### I.

**Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. A field test on the substance found on a plate under defendant's bed found the presence of heroin. There was sufficient evidence to support the jury's verdict.**

#### **Standard of Review**

The standard of review on a challenge to the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the People, there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Hampton*, 407 Mich 354 (1979), cert den sub nom *Michigan v Hampton*, 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980). This court uses a de novo standard of review for arguments challenging the sufficiency of evidence supporting a conviction. *People v Wolfe*, 440 Mich 508, modified on other grounds 441 Mich 1201 (1992).

#### **Discussion**

Defendant complains that there was not enough evidence to show that the substance found was heroin. On the contrary, there was evidence that a preliminary test was done for the presence of heroin and the test came out positive. 3/19, 115-116. In addition, officers familiar with the drug testified that the substance had the color and texture of heroin. 3/19, 97-98. The fact that the powder was found on a plate under a bed with a razor blade and a tiny spoon, in a room containing two loaded handguns, and a scale also support a finding that the substance was heroin. 3/19, 112,116-117, 123-127. Circumstantial evidence and reasonable inferences arising from the evidence may

constitute satisfactory proof of the elements of the offense. *People v Richardson*, 139 Mich App 622 (1984); *People v Frank Johnson*, 146 Mich App 429 (1985), lv den 425 Mich 855 (1986).

Pretrial, the substance had been found to be heroin, and defense counsel stipulated to that finding for purposes of the preliminary examination, but defendant moved the trial court to strike the expert from the witness list because defendant had not been given the expert's name until late. 3/19, 7-8. Defendant made the spurious claim that he was prevented from acquiring the substance for independent testing because he did not know the chemist's name. 3/19, 9. On the witness list the People had merely listed "chemist," not the specific name of the chemist. The chemist had been named in the district court at the exam. 3/19, 8. The trial judge seemed to recognize that a failure to know the exact lab technician's name would not have prevented defendant from moving the court for a sample of the narcotic for independent testing and still this judge erroneously struck the expert from the witness list. 3/19, 9-10. In addition, defendant had moved the court for the information three months prior to trial but then waited until trial date to complain that he had only been given the chemist's name a week before trial.

Defendant cites no case holding that on-the-scene testing is insufficient evidence to support a conviction for possession of heroin. Michigan does recognize that a trained chemist is not the only way to present sufficient evidence of the identity of a drug. *People v Boyd*, 65 Mich App 11 (1975). There was no testimony at trial contradicting the police finding at the scene that the substance found under the bed was heroin, nor did defendant offer evidence of faulty methods used during the on-the-scene test. Since defendant has not been charged with a specific amount of heroin, only that he was in possession of a substance containing heroin weighing under 25 grams, and there was evidence that

the substance in question did contain heroin, defendant was properly convicted. *People v Harrington*, 396 Mich 33(1976); *People v Vaughn*, 200 Mich App 32 (1993).

## II.

**To prove possession the People must show that defendant had dominion and control over the narcotics. The heroin was found on a plate under defendant's bed and defendant was sitting on the bed at the time. These facts were sufficient to show that defendant possessed the narcotics.**

### **Standard of Review**

The standard of review on a challenge to the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the People, there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Hampton*, 407 Mich 354 (1979), cert den sub nom *Michigan v Hampton*, 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980). This court uses a de novo standard of review for arguments challenging the sufficiency of evidence supporting a conviction. *People v Wolfe*, 440 Mich 508, modified on other grounds 441 Mich 1201 (1992).

### **Discussion**

Defendant contends that there was insufficient evidence that he possessed the heroin and guns in question. On the contrary, there was sufficient evidence of constructive possession of the both. Defendant was sitting in the bedroom where the narcotics were present. In fact defendant was sitting on the bed under which the narcotics were found. 3/19, 96. The police found proof of residency in the same room. 3/19, 127. There were two bedrooms in the house, one appeared to be the ten-year-old child's room. The room that defendant and the drugs were in had a queen size bed and men and women's clothing. The only other bedroom in the house held a child's possessions. 3/19, 119-120, 133.

The essential question is whether the defendant had dominion or control over the drugs. Defendant must have had the right, not the legal right, but the recognized authority in the drug house, to possess them. *People v Konrad*, 449 Mich 263 (1995); *People v Fetterley*, 229 Mich App 511 (1998); *People v Mumford*, 60 Mich App 279 (1975).

The only element in contention was whether defendant possessed the heroin and guns that were in the house. Proof of actual physical possession, however, is not necessary, proof of constructive possession will suffice. *People v Wolfe*, 440 Mich 508, 519-520 (1992). Moreover, possession need not be exclusive and may be joint, with more than one person actually or constructively possessing the drug. *People v Konrad*, 449 Mich 263, 271 (1995).

The question is whether the defendant had *dominion* and *control* over the substance. This court noted:

“In the foremost discussion of what is necessary to have dominion or control over drugs, Judge Posner explained that a defendant ‘need not have them literally in his hands or on premises that he occupies but he must have the right (not the legal right, but the recognized authority in his criminal milieu) to possess them, as the owner of a safe deposit box has legal possession of the contents even though the bank has actual custody.’ *United States v Manzella*, 791 F 2d 1263, 1266 (CA 7, 1986).”  
*Konrad*, 449 Mich at 271.

A person’s presence at the place where the drugs are found is not sufficient, by itself to prove constructive possession; some additional link between the defendant and the drugs must be shown. *People v Fetterley*, 229 Mich App 511 (1998). But circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *Fetterley* at 515. Since there was ample evidence that defendant was living in the house, that the drugs were found in his bedroom, and that he was sitting on the bed under which the drugs were found, there was sufficient

evidence from which the trier of fact could infer that defendant had dominion and control over the heroin and guns in the bedroom, this issue is without merit.

### III.

**The delinquency statute is aimed at preventing delinquency and thus, the juvenile does not have to be adjudicated a delinquent before the defendant can be found guilty. Defendant had loaded guns and heroin in a home where there was a ten-year-old child. There was sufficient evidence to support the conviction for contributing to the delinquency of a minor.**

#### **Standard of Review**

The standard of review on a challenge to the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the People, there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Hampton*, 407 Mich 354 (1979), cert den sub nom *Michigan v Hampton*, 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980). This court uses a de novo standard of review for arguments challenging the sufficiency of evidence supporting a conviction. *People v Wolfe*, 440 Mich 508, modified on other grounds 441 Mich 1201 (1992).

#### **Discussion**

Defendant argues that there was no evidence that he contributed to the neglect or delinquency of a minor. On the contrary, defendant had loaded guns and heroin in a home where there was a ten-year-old child. The statute in question, MCL 750.145, is aimed at preventing delinquency and thus, the juvenile does not have to be adjudicated a delinquent before the defendant can be found guilty. *People v Owens*, 13 Mich App 469 (1968). The only other adult in the home was charged with operating a place of illegal occupation. 3/19, 134. The child seemed scared and upset by the police raid, which is a natural consequence of heroin and weapons possession. 3/19, 111. The presence of loaded revolvers and heroin in a home with a small child is neglectful and could have cause the

child to be subject to charges. Similar circumstances were presented in the unpublished case of *People v Owens*, decided 9/11/07, # 271064, attached. In *Owens*, defendant was found guilty of possession with the intent to deliver under fifty grams of cocaine, possession of a firearm, and contributing to the neglect or delinquency of a minor. This Court affirmed his convictions, holding that the intent of the contributing to the delinquency statute is to prevent minors from coming into the jurisdiction of the juvenile court system. Since the minor was in the home when it was raided, the court held that Owens's actions placed his nephew in danger of, at the least, being charged with loitering in a place of illegal business.

Similarly, the presence of the young child in defendant's home with two loaded guns and a quantity of heroin put the child at risk for neglect or delinquency. There was sufficient evidence to convict defendant.

#### IV.

**A police officer may provide lay opinion testimony regarding topics within his or her personal knowledge and experience. The officers offered testimony regarding the narcotics after testifying to their experience with narcotics. Defense counsel was not ineffective for failing to object to the testimony.**

#### **Standard of Review**

Absent a *Ginther* hearing, review is limited to plain error on the existing record affecting defendant's substantial rights. *People v Snider*, 239 Mich App 393, 423 (2000)..

#### **Discussion**

Defendant complains that his trial counsel failed to object to opinion testimony given by nonexperts and failed to call exculpatory witnesses. A defendant claiming ineffective assistance of counsel must show that his trial counsel made errors so serious that counsel was not functioning as the counsel guaranteed an accused by the Sixth Amendment, and that such errors prejudiced the defense so as to deprive the defendant of a fair trial. *People v Pickens*, 446 Mich. 298 (1994). Scrutiny of a claim of ineffective counsel must be highly deferential, and the court must indulge the presumption that trial counsel provided reasonable assistance. *Barnes v Elo*, 231 F3d 1025 (CA 6, 2000). To prove his claim, the defendant must establish the reasonable probability that, but for counsel's claimed unprofessional conduct, the result of the trial would have been different. *People v Hoag*, 460 Mich. 1 (1999).

A police officer may provide lay opinion testimony regarding topics within his or her personal knowledge and experience. *People v Oliver*, 170 Mich App 38, 50 (1988). The prosecutor laid a proper foundation with each officer about his or her prior experience and the officers's answers

were all based on current perceptions and past experience. 3/19, 96-98, 144. Defendant was not denied the effective assistance of counsel in this regard.

Likewise defendant was not denied the effective assistance of counsel regarding the alleged failure to call defense witnesses. In *People v Johnson*, 451 Mich App 115 (1996), cited by defendant, the motion for new trial was supported by six affidavits from people willing to testify that they witnessed the fight in question and could testify that defendant was not the shooter. Defendant on the other hand merely alludes to “witnesses” without naming them or indicating what testimony they could offer. Defendant has failed to even support this allegation.

Defendant has not met his burden to show ineffective assistance of counsel.

**Relief**

ACCORDINGLY, the People respectfully request this Honorable Court to deny defendant's application.

Respectfully submitted,

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