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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYSHON DERRICK THOMAS,

Defendant and Appellant.

F056337

(Super. Ct. No. MCR10473)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. John W. DeGroot, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Rayshon Derrick Thomas of possession of cocaine for sale (Health & Saf. Code, § 11351; count 1) and possession of a firearm by a convicted felon (Pen. Code, § 12021 subd. (a)(1); count 2).¹ With respect to count 1, the jury found that defendant possessed 57 grams or more of cocaine (§ 1203.073, subd. (b)(1)), the weight of the cocaine exceeded one kilogram (Health & Saf. Code, § 11370.4, subd. (a)(1)), and defendant was personally armed with a firearm in the commission of the offense (§ 12022, subd. (c)). The jury further found that defendant suffered two prior convictions within the meaning of section 667, subdivisions (b) through (i). The trial court sentenced defendant to prison for a total of 33 years to life. One of defendant's contentions on appeal is that the trial court erred in denying his pretrial motions to dismiss the action on the ground the Madera County Superior Court lacked territorial jurisdiction over the counts because the cocaine and firearm he was charged with possessing were found in Fresno County, and the People failed to sustain their burden of showing venue was proper in Madera County. We agree and reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The complaint alleged that defendant committed the offenses in Madera County. Before the preliminary hearing, defendant moved to dismiss the action. He argued that Fresno County, not Madera County, was the proper jurisdictional territory for prosecution of the charges because the subject cocaine and firearm were found in a storage locker at a mini-storage facility in Fresno.

In opposing the motion, the prosecutor argued venue was proper in Madera County on the theory that “[defendant] was selling his cocaine in Madera County and simply storing the bulk of it in Fresno County to try and avoid its discovery by law enforcement.” Robert Blehm, a Madera police officer assigned to the Madera County Narcotic Enforcement Team, testified as a narcotics expert for the prosecution. Agent

¹ Further statutory references are to the Penal Code unless otherwise specified.

Blehm opined the cocaine found in the Fresno storage locker was possessed by defendant for the purpose of converting it into cocaine base and selling it in Madera. The agent's opinion was based on facts presented in a "hypothetical question" posed to him by the prosecutor and information Blehm had received from confidential informants to the effect that defendant was "a very large trafficker of cocaine in the City and County of Madera."

The factual scenario the prosecutor posed to Agent Blehm included the following: Defendant was stopped by his parole agent in Madera and was found to be in possession of a plastic bag containing a large amount of cash (\$12,561) and a receipt for a storage locker in Fresno. Defendant also had a number of keys in his possession. One of the keys opened an apartment in Madera that was different than the one he had reported to his parole agent as his residence. Police found a second receipt to the Fresno storage locker in this apartment. A stack of cash (\$741) was found inside a dryer in the kitchen. Also found in the kitchen were items often used in connection with the manufacture and sale of cocaine base, including a face filter mask, a box of plastic sandwich bags, a box of baking soda, and two microwave ovens. Police agents went to the Fresno storage locker listed on the receipts. One of defendant's keys opened the locker. Inside the locker, agents smelled the strong odor of cocaine and found a stainless steel revolver wrapped in a handkerchief, bearing the initials "RT."

On cross-examination, Agent Blehm acknowledged no controlled substances were found on defendant's person at the time of his arrest, and no cocaine residue was found on items in his possession. The items found in the kitchen of the Madera apartment were not necessarily indicative of criminal activity. Although he could not recall precisely where they were found in the kitchen, Officer Blehm acknowledged the possibility one of the microwave ovens was found on top of the kitchen counter, while the other was found inside a kitchen cabinet. He did not check to see if the microwave ovens were functioning.

In denying defendant's motion to dismiss the action, the trial court reasoned venue was proper in Madera County because evidence the prosecution needed to establish the requisite mental state for the crime of possessing cocaine for sale "was seized here in Madera County." When asked if the court's ruling also applied to the firearm possession charge, the court stated it did not think it would be proper "to bifurcate that weapon out" and noted the inefficiency of trying the counts in separate courts.

Before trial, defendant brought a second motion to dismiss the action based on improper venue. The trial court denied the motion, finding the prosecution had sustained its burden of showing venue was proper in Madera County because a reasonable jury could find defendant was "in constructive possession in Madera County of the drugs and the gun."

DISCUSSION

Section 777 states the basic rule of venue: "[E]xcept as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed." "The words 'jurisdictional territory' ... in case of a superior court mean the county in which the court sits." (§ 691, subd. (b).)

Section 781 provides an exception to the rule: "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory."

"Courts have construed the phrase 'requisite to the consummation of the offense' to mean requisite to achieving the offender's unlawful purpose. [Citation.] Pursuant to this interpretation, venue is proper in a county where only preliminary arrangements or acts leading to commission of the crime occur, even though such acts are not essential elements of the charged offense. [Citations.]" (*People v. Bismillah* (1989) 208 Cal.App.3d 80, 85.)

“[V]enue should be considered a question of law for determination by the court prior to trial rather than a question of fact for the jury at the conclusion of trial.” (*People v. Posey* (2004) 32 Cal.4th 193, 210 (*Posey*)). The People must prove the facts underlying venue by a preponderance of the evidence. (*Id.* at p. 211.) “On review, a trial court’s determination of territorial jurisdiction will be upheld as long as there is ‘some evidence’ to support its holding. [Citations.]” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1117.)

The possessory crimes in this case occurred in Fresno and, thus, the appropriate venue was Fresno County under section 777. There is no evidence in the record that defendant ever possessed the subject cocaine and firearm within Madera County. However, in denying defendant’s second motion to dismiss, the trial court found venue was proper in Madera because there was evidence defendant constructively possessed the cocaine and firearm in Madera. We disagree with the trial court’s conclusion.

“Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another.” (*People v. Morante* (1999) 20 Cal.4th 403, 417.) “For purposes of drug transactions, the terms ‘control’ and ‘right to control’ are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance.” (*Armstrong v. Superior Court* (1990) 217 Cal.App.3d 535, 539.)

It is true defendant’s right to control the contraband located inside the Fresno storage locker could be inferred from evidence found in Madera, including the key and receipts for the locker. It does not follow, however, that defendant constructively possessed the cocaine and firearm *in Madera*. Rather, under the principles set forth above, the law could fairly treat defendant as if he were in actual possession of the contraband, which was physically located and thus constructively possessed *in Fresno*.

Invoking section 781, the People insist venue was proper in Madera County because “[o]ther than the cocaine itself, all of the evidence proving [the crime of possessing cocaine for sale] was located in Madera County.” In essence, the People have adopted the trial court’s position in denying defendant’s first motion to dismiss, that Madera County was a proper venue for the action because evidence establishing defendant had the requisite *mental state* (e.g., knowledge of presence, intent to sell) was connected to Madera. We are aware of no cases applying section 781, which support this position.

“[V]enue turns on the presence or absence, in a county, of acts or effects constituting the crime or requisite to the commission of the crime—*not on the defendant’s state of mind* or on the soundness of any beliefs that he or she might hold as to the location of those acts or effects.” (*Posey, supra*, 32 Cal.4th at p. 221, italics added.) While the prosecution’s theory that defendant intended to sell the cocaine in Madera might have been factually true, the record disclose no evidence that any acts or effects “requisite to the consummation” (§ 781) of the crimes of possession of cocaine for sale (Health & Saf. Code, § 11351) or possession of a firearm by a felon (§ 12021) occurred in Madera County. There was no evidence defendant engaged in any preparatory acts in Madera leading to his possession of the cocaine and the firearm in the Fresno storage locker. Nor was there any evidence defendant sold or transacted to sell any of the subject cocaine in Madera.

Because Madera County was not the proper venue for prosecution of defendant’s Fresno crimes of possession of cocaine for sale and possession of a firearm by a felon, the judgment must be reversed. In light of the reversal, we do not address defendant’s other contentions on appeal.

DISPOSITION

The judgment is reversed.

HILL, J.

WE CONCUR:

CORNELL, Acting P.J.

POOCHIGIAN, J.