STATE OF MICHIGAN

COURT OF APPEALS

LESTER BELL,

Petitioner-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

UNPUBLISHED
April 16, 2020

No. 349194
Wayne Circuit Court
LC No. 18-012317-AA

Before: SAWYER, P.J., and FORT HOOD and REDFORD, JJ.

PER CURIAM.

Petitioner appeals by delayed leave granted[1] the circuit court's order affirming the revocation of his parole and remanding for the parole board[2] to reconsider the "penalty/mitigation phase" of the parole revocation proceedings. We affirm.

I. BACKGROUND

Petitioner was serving sentences for third-degree fleeing and eluding, MCL 257.602a(3)(a), conspiring to furnish contraband to a prisoner, MCL 800.281(1), and conspiring to furnish a cell phone to a prisoner, MCL 800.283a, when released on parole in May 2017. The terms of petitioner's one-year parole included a prohibition against owning or possessing a firearm of any type and prohibited him from being in the company of anyone he knew to possess firearms, ammunition, or firearm components. On February 3, 2018, petitioner performed at an event at the Coleman Center in Romulus, Michigan. Two Romulus police officers were called to the Coleman Center regarding altercations. The police officers observed petitioner and a female, Amanda Huff, walk toward a parked Hyundai Santa Fe but move away from it to stand at a distance in freezing temperatures without coats for an extended period. The police officers walked to the Santa Fe and

[1] *Bell v Dep't of Corrections*, unpublished order of the Court of Appeals, entered October 3, 2019 (Docket No. 349194).

[2] The parole board falls within the purview of respondent, Department of Corrections. MCL 791.201; MCL 791.231a(1).

observed what appeared to be a bag of marijuana in open view on the center console. Their suspicions aroused, the police returned to their car which had been parked across the street out of sight and surveilled the Santa Fe until they observed petitioner and Huff walk to the vehicle. Petitioner unlocked the vehicle with a key fob. Huff sat in the front passenger seat while petitioner stood by the open door. When the police officers approached, petitioner tossed the keys to the ground. The police searched the vehicle and found what they believed to be marijuana and also three loaded firearms in the center console. Petitioner denied any connection to the firearms and repeatedly told Huff that she did not know anything and not to talk to the police. Investigation later determined that petitioner's friend, Danielle Gilliam, had rented the Santa Fe and also attended the event at the Coleman Center that night. The firearms recovered from the vehicle were registered to three different people and two had been reported stolen.

Petitioner was charged with three parole violations stemming from this event, but only the second charge, which alleged that petitioner violated the conditions of his parole by possessing firearms, is at issue in this appeal. Following a formal hearing, an administrative law examiner (ALE) found petitioner guilty of this charge under a constructive possession theory. The parole board revoked petitioner's parole and ordered that he serve a 60-month continuance. Petitioner appealed to the circuit court, and the circuit court affirmed the parole board's decision to revoke petitioner's parole, but remanded the matter to the parole board for reconsideration of the "penalty/mitigation phase" of the revocation process. On remand, the parole board again imposed a 60-month continuance. This appeal followed.

II. STANDARDS OF REVIEW

"[T]he Parole Board is an administrative body[.]" *Morales v Mich Parole Bd*, 260 Mich App 29, 34; 676 NW2d 221 (2003). "Parole revocation proceedings are contested cases under the Administrative Procedures Act (APA), MCL 24.201 *et seq*.[.]" *In re Parole of Bivings*, 242 Mich App 363, 369; 619 NW2d 163 (2000). "A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002), citing Const 1963, art 6, § 28, and MCL 24.306.

> When reviewing whether an agency's decision was supported by competent, material, and substantial evidence on the whole record, a court must review the entire record and not just the portions supporting an agency's findings. Substantial evidence is what "a reasoning mind would accept as sufficient to support a conclusion." Substantial evidence is "more than a mere scintilla" but less than "a preponderance" of evidence. A reviewing court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result. Deference must be given to an agency's findings of fact, especially with respect to conflicts in the evidence, and the credibility of witnesses. [*Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497; 813 NW2d 763 (2011) (citations omitted).]

"This Court has limited review of a trial court's review of an agency determination." *Dana v American Youth Foundation*, 257 Mich App 208, 211; 668 NW2d 174 (2003). "This Court reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clearly erroneous standard of review." *Vanzandt v State Employees Retirement Sys*, 266 Mich App 579, 585; 701 NW2d 214 (2005). "A finding is clearly erroneous where, after reviewing the record, this Court is left with the definite and firm conviction that a mistake has been made." *Id*. This Court reviews the circuit court's legal conclusions de novo. *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 152; 725 NW2d 56 (2006). "Great deference is accorded to the circuit court's review of the [administrative] agency's factual findings; however, substantially less deference, if any, is accorded to the circuit court's determinations on matters of law." *Mericka v Dep't of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009) (quotation marks and citation omitted, alteration in original).

To the extent that this appeal involves questions of constitutional law, this Court's review is de novo. *In re Parole of Hill*, 298 Mich App 404, 410; 827 NW2d 407 (2012). Evidentiary decisions are reviewed for an abuse of discretion. *Nat'l Wildlife Federation v Dep't of Environmental Quality (No. 2)*, 306 Mich App 369, 373; 856 NW2d 394 (2014). "An abuse of discretion occurs when the . . . decision falls outside the range of reasonable and principled outcomes." *In re Elias*, 294 Mich App 507, 538; 811 NW2d 541 (2011).

III. ANALYSIS

Petitioner first argues on appeal that the ALE violated his Fifth Amendment right against self-incrimination by drawing an inference from his conduct and statements after the guns were found and the fact that he encouraged Huff to remain silent. We disagree.

The right to be free from compelled self-incrimination in criminal trials is guaranteed by the federal and state constitutions. *People v Clary*, 494 Mich 260, 264-265; 833 NW2d 308 (2013), citing US Const, Am V, and Const 1963, art 1, § 17. To protect that right, statements a criminal defendant makes during custodial interrogation are generally inadmissible unless the defendant voluntarily, knowingly, and intentionally waived his or her right to remain silent. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). As a corollary rule, when a defendant has been advised of his or her rights concerning self-incrimination, the defendant's exercise of that right by remaining silent cannot be used as evidence of guilt in a criminal trial. *People v Shafier*, 483 Mich 205, 212-214; 768 NW2d 305 (2009). "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *People v White*, 493 Mich 187, 194; 828 NW2d 329 (2013).

Petitioner's claim of error rests on the questionable assumption that the same rules governing self-incriminating statements in criminal prosecutions apply to parole revocation hearings. "[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Morrissey v Brewer*, 408 US 471, 480; 92 S Ct 2593; 33 L Ed 2d 484 (1972); see also *Jones v Dep't of Corrections*, 468 Mich 646, 651-652; 664 NW2d 717 (2003). Other jurisdictions have held that self-incriminating statements are admissible in comparable proceedings that fall outside the scope

of a criminal prosecution. See, e.g., *United States v Riley*, 920 F3d 200 (CA 4, 2019) (finding statements made to a probation officer admissible in proceedings to revoke supervised release); *United States v Hulen*, 879 F3d 1015 (CA 9, 2018).[3]

It is unnecessary for us to determine to what extent the right against compelled self-incrimination applies to parole revocation hearings in this case. Assuming, without deciding, that the ALE could not consider silence that would be inadmissible in the context of a criminal prosecution, petitioner's argument lacks merit as a matter of law under the facts of this case. The ALE cited several reasons for finding petitioner's testimony unbelievable. In pertinent part, the ALE noted that petitioner "repeatedly told Ms. Huff, 'you don't know anything' and encouraged her not to speak to the police" after the guns were discovered inside the vehicle to which he held the keys and used to unlock the vehicle. The ALE concluded that petitioner would have no reason to make such statements, or engage in other suspicious behavior, if petitioner lacked awareness that the firearms were in the vehicle. The record reflects that petitioner voluntarily and spontaneously shouted statements to Huff. He did not exercise his right to remain silent, nor did the police compel him to speak against his interest. Petitioner's remarks were not the product of a custodial interrogation. The ALE could draw the negative inference of guilt from the evidence presented of petitioner's conduct and unsolicited speech. Petitioner admits that his advice to Huff did not arise in response to police interrogation. Although petitioner misconstrues the significance of that fact, it demonstrates that his statements were voluntary, rather than the product of interrogation or police coercion. Because the constitutional protection against self-incrimination is not implicated by voluntary statements, the ALE did not violate petitioner's rights in any manner by considering petitioner's statements to Huff and drawing reasonable inferences from his conduct and statements.

Petitioner next argues that the ALE erred by considering statements attributed to him by parole officers who did not testify at the hearing as part of the ALE's determination regarding petitioner's credibility. Petitioner, however, did not raise this issue in his appeal before the circuit court. Generally, "[f]or an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Because petitioner did not raise this issue before the circuit court he failed to preserve and waive it for our review. *People v Carter*, 462 Mich 206, 216-217; 612 NW2d 144 (2000). Waiver involves the "intentional relinquishment or abandonment of a known right." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (quotation marks and citation omitted). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id*. (quotation marks and citation omitted). This claim of error is not properly before this Court because petitioner did not first appeal the issue to the circuit court which has jurisdiction under MCR 7.103(A)(2) over an appeal of right from a final order of an agency governed by the APA. Because petitioner failed to raise the issue on his appeal to the circuit court, we do not have jurisdiction over this issue under MCR 7.203(B)(1).

[3] Opinions issued by federal courts of appeals are not binding, but may be considered for their persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

As a reviewing court, we generally defer to the fact-finder's decisions regarding credibility and the weight of conflicting evidence. *Huron Behavioral Health v Dept of Community Health*, 293 Mich App 491, 497; 813 NW2d 763 (2011). A reviewing court may only set aside an administrative agency's decision or order if substantial rights of the petitioner have been prejudiced by specific types of error. MCL 24.306(1); *Ranta v Eaton Rapids Pub Sch Bd of Ed*, 271 Mich App 261, 265; 721 NW2d 806 (2006). The record in this case indicates that the parole board's ultimate decision to revoke petitioner's parole was not entered "[i]n violation of the constitution or a statute." MCL 24.306(1)(a). In this case, the record reflects that the ALE considered the evidence presented and predominantly relied upon petitioner's suspicious behavior before the guns were discovered, his statements to Huff after the police discovered the guns, and the inconsistencies between petitioner's version of the events and the credible testimony offered by the police officers regarding the sequence of events and petitioner's conduct. The record in this case does not support petitioner's contention that the ALE erred by concluding that he lacked credibility.

Petitioner argues at length that the ALE's stated reasons for finding his testimony incredible were based on illogical inferences. To the extent that petitioner asks this Court to reject inferences that are supported by adequate evidence but deemed illogical by petitioner, petitioner misconstrues the nature of this Court's review. See *Huron Behavioral Health*, 293 Mich App at 497 ("Deference must be given to an agency's findings of fact, especially with respect to conflicts in the evidence, and the credibility of witnesses.") (citations omitted).[4]

Petitioner next argues that the ALE's determination that petitioner violated parole by constructively possessing firearms must be set aside because that determination rested upon legal error. We disagree.

Constructive possession is a legal concept defined under criminal law. In Michigan, when a person's alleged possession of a firearm does not involve actual, physical possession, there must be a sufficient nexus between the accused and the firearm to support a finding of constructive possession. *People v Minch*, 493 Mich 87, 91-92; 825 NW2d 560 (2012). Constructive possession of a firearm occurs when the accused knows the location of the firearm and has reasonable access to it. See, e.g., *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011); see also *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989). Like other possessory offenses in Michigan, constructive possession of a firearm occurs when the accused " 'knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons . . . .' " *Minch*, 493 Mich at 92, quoting *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010). In determining whether a person is in constructive possession of a firearm, courts must look to the totality of the circumstances. *Id*. Possession can be proved by circumstantial or direct evidence and is a factual question for the trier of fact. *Johnson*, 293

[4] Petitioner attempts to rely on a supplemental police report that was never made part of the agency record and, thus, cannot be considered by this Court. See MCR 7.210(A)(2) (defining record on appeal from administrative agency); *Killmer v Sabourin*, 499 Mich 852 (2016) (vacating peremptory reversal premised on evidence outside the record on appeal where the defendant did not move to expand the record).

Mich App at 83. A person's mere presence near contraband does not prove knowing possession or an ability to control it. See *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (reiterating the "well established" principle "that a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession.") Nevertheless, a rational trier of fact may infer from the evidence that the accused "knowingly had the power and the intention to exercise dominion or control over the firearms" which suffices to establish constructive possession. *People v LaFountain*, 495 Mich 968, 969; 844 NW2d 5 (2014).

In *People v Flick*, 487 Mich 1, 18-19; 790 NW2d 295 (2010) our Supreme Court explained that actual or constructive possession does not involve incidental conduct:

> Rather, it is the many intentional affirmative steps taken by the defendant to gain actual physical control, or to knowingly have the power and the intention at a given time to exercise dominion or control over the contraband either directly or through another person or persons, that distinguishes mere viewing from knowing possession. In either case, the prosecution must establish that the defendant had either actual or constructive possession . . . .

In this case, after recounting the evidence from the hearing, the ALE concluded:

> [I]t is the finding of the ALE that Parolee Bell was aware of the three firearms found in the Hyundai Santa Fe on 2/3/18. As he was in possession of the keys and unlocked the vehicle as he approached it; he had access to it and the ability to exercise control over the three firearms found in its center console. He is guilty of Count 2.

The record in this case support's the ALE's determination, the parole board's decision, and the circuit court's affirmance of it. The evidence established that petitioner had the keys to the Santa Fe and exercised dominion and control over the vehicle by controlling access to its interior with the keys. He used the keys to intentionally access the vehicle. Petitioner did not just happen to be in the vicinity of the vehicle while someone else controlled it. Having control over the vehicle and unlocking the doors to access it and its contents constituted constructive possession of the firearms within the vehicle. The ALE could infer from petitioner's conduct before and after unlocking the vehicle, including his statements to Huff, that he had the requisite intent at that given time to exercise dominion and control over the firearms. The record does not support the contention that petitioner acted lawfully and only inadvertently came into close proximity to contraband.

Based on the record, the parole board could properly rely upon the ALE's factual determinations which were based on competent, material, and substantial evidence on the whole record, as required under MCL 24.306(1)(d). The ALE did not commit a material legal error by applying the law concerning the constructive possession of firearms in this case. The ALE reasonably could infer from the evidence that petitioner had knowledge of the presence of the firearms in the vehicle and his control over the vehicle established that he intended to exercise dominion and control over them sufficient to establish that he had constructive possession of them.

Considering the entire record, the circuit court did not err by affirming the parole board's decision to revoke petitioner's parole on the basis of constructive possession of firearms.[5]

Affirmed.

/s/ David H. Sawyer
/s/ Karen M. Fort Hood
/s/ James Robert Redford

[5] Because our decision in this regard is dispositive of petitioner's appeal, we decline to consider his claim of error regarding the parole board's failure to reconsider its decision to impose a 60-month continuance. Further, this claim of error is not properly before this Court because petitioner did not first appeal the issue to the circuit court which has jurisdiction under MCR 7.103(A)(2) over an appeal of right from a final order of an agency governed by the APA. Because petitioner has not appealed the parole board's decision on remand, we do not have jurisdiction over this issue under MCR 7.203(B)(1).