

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESUS GARCIA,

Defendant-Appellant.

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UNPUBLISHED

June 9, 1998

No. 200484

Oakland Circuit Court

LC No. 95-143333 FH

Before: Wahls, P.J., and Jansen and Gage, JJ.

MEMORANDUM.

Defendant appeals as of right from his jury conviction of operating a motor vehicle while under the influence of intoxicating liquor causing death, MCL 257.625(4); MSA 9.2325(4), and his accompanying sentence of 7-1/2 to 15 years' imprisonment. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he was deprived of the effective assistance of counsel by trial counsel's failure to file a pretrial motion to suppress the results of a blood-alcohol test performed at the hospital on blood drawn from defendant on the order of the treating emergency room physician while defendant was being treated for injuries sustained in the accident. The record lacks any evidence from which it could be inferred that the physician ordered the blood sample withdrawn and tested to aid in defendant's prosecution. Instead, the record contains evidence supporting the conclusion that the blood was drawn for medical treatment purposes. Accordingly, on the record before us, the evidence was admissible pursuant to MCL 257.625a(6)(e); MSA 9.2325(1)(6)(e), and defendant has failed to establish that counsel's performance was constitutionally deficient, counsel not being required to make a frivolous motion. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Defendant next argues that he was deprived of the effective assistance of counsel when trial counsel failed to file a pretrial motion to suppress blood evidence seized pursuant to a search warrant. Defendant asserts that he was entitled to the suppression of this blood evidence because the search

warrant was issued after the blood sample was withdrawn. To support this argument, defendant appends to his brief a copy of the search warrant that was faxed to the hospital and a copy of an “alcohol or drug determination” form. These documents are not in the record and, therefore, may not be relied upon by this Court in evaluating the merits of defendant’s claim. *Hedelsky, supra* at 387. A review of the record reveals no evidence from which we can conclude that the blood sample in question was withdrawn before the warrant was issued. In fact, defense counsel indicated on the record that he had no legal grounds to challenge the admission of this evidence because it was gathered pursuant to a valid warrant. On this record, defendant has failed to establish that counsel’s performance was constitutionally-deficient. *Mitchell, supra* at 156; *Gist, supra* at 613.

Finally, defendant argues that he was deprived of the effective assistance of counsel by counsel’s failure to file a pretrial motion to suppress defendant’s statement to a paramedic and for an evidentiary hearing pursuant to *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965). Because there is no indication in the record that the paramedic initiated her questioning of defendant at the request of the sheriff’s deputy, that she was acting in concert with the deputy when she questioned defendant or that she was a police officer herself, the paramedic was not required to advise defendant of his *Miranda*<sup>1</sup> rights before she asked him the questions at issue. *People v Anderson*, 209 Mich App 527, 533; 531 NW2d 788 (1995). Accordingly, defense counsel did not deprive defendant of the effective assistance of counsel by failing to move for suppression. *Mitchell, supra* at 156; *Gist, supra* at 613.

Affirmed.

/s/ Myron H. Wahls

/s/ Kathleen Jansen

/s/ Hilda R. Gage

<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), reh den 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966).