

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS D. JOHNSON,

Defendant-Appellant.

UNPUBLISHED

September 19, 2000

No. 212879

Recorder's Court

LC No. 97-005235

Before: Gribbs, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to 160 to 240 months' imprisonment. We affirm.

Defendant first argues that the trial court abused its discretion in failing to order an examination to determine defendant's competency to stand trial. We disagree. Defendant failed to preserve the issue for appeal because he did not move for a new trial, seeking an evidentiary hearing in the trial court. *People v Lucas*, 393 Mich 522, 529; 227 NW2d 763 (1975). We find no circumstances warranting review of this forfeited claim. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). Our review of the record reveals no evidence of incompetence compelling an examination, given defendant's informed participation in his criminal proceedings. MCL 330.2020(1), 330.2026(1); MSA 14.800(1020)(1), 14.800(1026)(1), *People v Newton (After Remand)*, 179 Mich App 484, 487-488; 446 NW2d 487 (1989); *People v Garfield*, 166 Mich App 66, 74; 420 NW2d 124 (1988).

Defendant next argues that he was denied the effective assistance of counsel at trial. We disagree. Because defendant failed to move for a new trial or an evidentiary hearing in the trial court, this Court's review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604-605; 585 NW2d 27 (1998).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced

such that he was denied a fair trial, i.e., there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). Defendant must overcome the presumption that the challenged conduct was sound trial strategy. *Id.*

Defendant was not denied the effective assistance of counsel at trial when counsel conceded to the jury that defendant was guilty of possession, but not possession with intent to deliver. It is not ineffective assistance for a defense attorney to admit a defendant's guilt of a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). "[T]hrowing oneself upon the mercy of the jury" is considered legitimate trial strategy in that "[a]n attorney may well admit guilt of a lesser included offense in hopes that due to his candor the jury will convict of the lesser offense instead of the greater." *People v Schultz*, 85 Mich App 527, 532; 271 NW2d 305 (1978).

Defendant makes much of the fact that counsel was ineffective for conceding possession when defendant had previously rejected a plea offer in which he would have pleaded guilty to possession and would have received two to four years' imprisonment. However, defendant does not set forth what a more effective defense would have been, given the evidence presented at trial. Three police officers testified that they saw defendant with a package of suspected narcotics, a white lumpy substance. It was stipulated that the substance was cocaine. The packaging of the cocaine indicated that the cocaine was meant for sale and not personal use. Counsel may have concluded, as a matter of trial strategy, that defendant's only hope was a conviction on the lesser charge of possession.

Affirmed.

/s/ Roman S. Gibbs

/s/ Janet T. Neff

/s/ Peter D. O'Connell