

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON SHAWN HICKS,

Defendant-Appellant.

UNPUBLISHED

March 30, 2001

No. 215248

Oakland Circuit Court

LC No. 98-157675-FH

Before: Smolenski, P.J., and Holbrook, Jr., and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and escape from lawful custody, MCL 750.197a; MSA 28.394(1). He previously pleaded guilty to one count of operating a motor vehicle with a suspended or revoked license, second or subsequent offense, MCL 257.904; MSA 9.2604. Defendant was sentenced to one to eight years' imprisonment for the possession conviction, to be served consecutive to two concurrent one-year jail terms for the other two convictions. We affirm.

Defendant first argues that there was insufficient evidence that he possessed the cocaine in question. We disagree. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999). The evidence adduced at trial showed that the cocaine was found on the driver's seat of the car that defendant was driving, that defendant was the only occupant of the car, that defendant had exclusive control of the vehicle for several hours preceding his arrest, that defendant quickly exited the car after he was pulled over for a traffic stop, and that defendant subsequently tried to flee after he was arrested. Viewed in a light most favorable to the prosecution, this evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant knowingly possessed the cocaine. *Id.*

Next, defendant argues that he was denied the effective assistance of counsel. Again, we disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456

Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994)

Defendant asserts that defense counsel's ineffectiveness was evidenced in two ways. First, defendant claims that counsel was ineffective for advising a potential witness to invoke her Fifth Amendment privilege at trial. Following a *Ginther*¹ hearing, however, the trial court found that counsel did not give such advice. After reviewing the *Ginther* hearing record, we conclude that this factual determination is not clearly erroneous. *People v Goforth*, 222 Mich App 306, 310 n 4; 564 NW2d 526 (1997).²

Second, defendant claims that counsel was ineffective for allegedly failing to inquire about the possibility of immunity for this same witness. Because this issue was not raised in the motion to remand filed in this Court or at the *Ginther* hearing, our review is limited to errors apparent in the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). We find nothing in that record to support defendant's allegation.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² Defendant's reliance on *Eldridge v Atkins*, 665 F2d 228 (CA 8, 1981), is misplaced because *Eldridge* is readily distinguishable. Here, unlike the situation in *Eldridge*, counsel in the present case exercised reasonable diligence by personally interviewing the witness, subpoenaing her, and calling her to testify.