

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY JERMAINE BURT,

Defendant-Appellant.

UNPUBLISHED

January 25, 2002

No. 226076

Saginaw Circuit Court

LC No. 98-015729-FH

Before: Bandstra, C.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of between 50 and 224 grams of cocaine, MCL 333.7403(2)(a)(iii), and possession of marijuana, second offense, MCL 333.7403(2)(d); MCL 333.7413(2). The trial court sentenced defendant to consecutive prison terms of ten to forty years for the possession of cocaine conviction and thirty days to two years for the possession of marijuana conviction. Defendant appeals by leave granted. We affirm.

Defendant first argues that the lower court violated his Fourth Amendment rights by admitting evidence against him that was obtained through an illegal search and seizure. We review de novo a trial court's ultimate decision on a motion to suppress. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). The trial court's underlying findings of fact, however, are reviewed for clear error. *Id.*

The lower court found that there was probable cause to issue a search warrant for defendant's mother's house and that the evidence obtained from that search was admissible against defendant. We agree. A search warrant may not issue unless probable cause exists to justify the search. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). A proper finding of probable cause does not require that it is overwhelmingly likely that a search will uncover contraband or other evidence, or even that it is more likely than not that the search will turn up the evidence. *People v Garvin*, 235 Mich App 90, 104-105; 597 NW2d 194 (1999). Appellate courts will find probable cause to exist if "there is a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992), quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

Here, the police obtained information from a confidential informant indicating that an illegal numbers operation was being run at various houses, including that of defendant's mother.

The police corroborated this information by conducting surveillance of the house and subsequently obtained a warrant to search defendant's mother's home. We find that these facts established a fair probability that evidence of criminal activity would be found at defendant's mother's residence, and that, therefore, probable cause to issue the warrant existed. *Russo, supra*; see also *People v Levine*, 461 Mich 172, 182-184; 600 NW2d 622 (1999). We further conclude that despite conflicting testimony regarding whether, at the time the search was conducted, defendant continued to occupy the bedroom where the cocaine and marijuana were found, these items were properly admissible against defendant at trial. During the suppression hearing below, counsel for defendant acknowledged defendant's continued connection to the bedroom when he asserted that defendant had standing to challenge the search of his mother's house. Defendant's mother also testified at that time that defendant had a key to the house, could come and go as he pleased, and was in and out of the house regularly. These facts were sufficient to support admission of the disputed evidence against defendant at trial.

Defendant next argues that he was denied the effective assistance of counsel because his trial counsel failed to file a written motion to quash the search warrant. Because defendant did not move for a new trial or evidentiary hearing, this Court's review is limited to the existing record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

A defendant's counsel's performance is presumed to be effective and a defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that it was so prejudicial that it denied him a fair trial. *Id.* With respect to the element of prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 302-303.

It is clear from the record that defense counsel vigorously argued the motion to quash through oral argument. Nothing required defense counsel to file a written motion and the fact that the trial court denied the motion does not show defense counsel's actions were deficient. See *People v Weatherford*, 193 Mich App 115, 122; 483 NW2d 924 (1992). In any event, defendant has failed to show that he was prejudiced by defense counsel's failure to place his arguments in writing. As discussed above, given the facts supporting issuance of the warrant the trial court did not err in denying defendant's motion. A written brief would not have changed this outcome. Accordingly, we find no deficiency in counsel's performance in this regard, nor any prejudice to defendant.

In his final argument on appeal, defendant asserts that the prosecution failed to present evidence sufficient to support his convictions. Specifically, defendant argues that given defendant's attenuated connection to the bedroom and acknowledged absence from the home at the time of the search, the prosecution failed to proffer evidence sufficient to allow a rational trier of fact to conclude beyond a reasonable doubt that he knowingly and intentionally possessed the drugs found in the bedroom. In reviewing challenges to the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution to determine whether the evidence was sufficient to show that the essential elements of the crime were proved beyond a reasonable doubt. *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000). Circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130

(1999). Moreover, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

A defendant possesses drugs if he knowingly has the power and intention to exercise dominion or control over the drugs either directly or through another person. See *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991). Here, testimony offered at trial indicated that during the search police found several pieces of evidence within the bedroom where the drugs were found that contained defendant's name. Additional testimony showed that defendant had unlimited access to the home, stayed at the home at times, and kept personal belongings in the room where the drugs were found. Although there was conflicting testimony regarding whether defendant continued to reside in the home at the time of the search, the credibility of such testimony was properly within the province of the jury, and we will not interfere its determination. See *Terry, supra*; *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Accordingly, viewing the evidence in a light most favorable to the prosecution, we find that the jury could have reasonably inferred that defendant knowingly and intentionally possessed the drugs.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage