

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY EDWARD WRIGHT,

Defendant-Appellant.

UNPUBLISHED

April 23, 2002

No. 228939

Oakland Circuit Court

LC No. 1999-169837-FH

Before: Gage, P.J., and Griffin and Buth*, JJ.

PER CURIAM.

Defendant appeals as of right from convictions of possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v), possession of a firearm during the commission of a felony, MCL 750.227b, and contributing to the delinquency of a minor, MCL 750.145. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to the mandatory two-year term for the felony-firearm conviction. The court imposed suspended sentences of six months' and ninety days' for the narcotics and delinquency convictions, respectively. We affirm.

Defendant first contends that he is entitled to a new trial due to ineffective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001) (citations omitted).]

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant first contends that counsel was ineffective because he failed to file a motion to suppress the evidence relating to the controlled substance conviction. The officers testified at trial that defendant gave them permission to enter his house and to retrieve a shotgun from beneath the bed. If a defendant consents to a search of himself or his premises, a warrant and probable cause are not required. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999); *People v Goforth*, 222 Mich App 306, 309; 564 NW2d 526 (1997). While retrieving the shotgun, the officer found the narcotics evidence and could seize it under the plain view exception. *People v Jordan*, 187 Mich App 582, 588; 468 NW2d 294 (1991). Based on the record presented, we are unable to conclude that the evidence would have been suppressed and thus defendant has not shown that the outcome of the proceedings likely would have been different had counsel brought such a motion.

Defendant also contends that counsel was ineffective for failing to file a motion to dismiss, or move for a directed verdict as to, the felony-firearm charge, arguing that possession of a controlled substance is not a felony to which the felony-firearm statute applies. The statute applies to all felonies save the four expressly exempted by the statute, *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998), none of which is possession of a controlled substance. Moreover, the fact that defendant did not have actual possession at the time the police discovered that he committed a felony or arrested him does not preclude a felony-firearm charge because the relevant inquiry is whether defendant possessed the weapon at the time he committed the felony. *People v Burgenmeyer*, 461 Mich 431, 438-439; 606 NW2d 645 (2000). Dismissal of the felony-firearm charge was not warranted and counsel is not required to bring a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant next contends that the verdicts on the controlled substance and delinquency charges were against the great weight of the evidence. This issue has not been preserved for appeal because defendant did not include it in his statement of questions presented for review. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Moreover, defendant's sole argument is that the prosecution witnesses were not credible. The resolution of credibility questions is within the exclusive province of the jury, *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993), and this Court may not resolve them anew. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Therefore, defendant has not shown that the trial court abused its discretion when it denied his motion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

Lastly, defendant contends that the prosecutor abused its discretion in charging him with possession of a controlled substance and felony-firearm. The issue has not been preserved for appeal because defendant did not include it in his statement of questions presented. *Brown, supra* at 748. In addition, defendant has waived the issue by failing to brief the merits of the claim. *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994). In any event, in the absence of any evidence that the prosecutor acted in contravention of the constitution or the law

in determining what charges to file, the courts cannot intervene. *People v Barksdale*, 219 Mich App 484, 488-489; 556 NW2d 521 (1996).

Affirmed.

/s/ Hilda R. Gage
/s/ Richard Allen Griffin
/s/ George S. Buth