

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

WILLY FRANCIS GARCIA,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 235099

Oakland Circuit Court

LC No. 00-175835-FH

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of less than fifty grams of cocaine, MCL 333.7403(2)(a)(iv),¹ possession of marijuana, MCL 333.7403(2)(d), and operating a motor vehicle while under the influence of intoxicating liquor, MCL 257.625(1)(a). He was sentenced as a fourth habitual offender, MCL 769.12, to two to fifteen years' imprisonment for the possession of cocaine conviction, 194 days time served for the possession of marijuana conviction, and ninety days in jail for the OUIL conviction. Defendant appeals as of right and we affirm.

Defendant's sole argument on appeal is that he was denied the effective assistance of counsel when his trial counsel conceded guilt to possession and use of cocaine and possession and use of marijuana. Because defendant's request for a *Ginther*² hearing was denied, our review of this issue is limited to errors apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *People v Torres*, 452 Mich 43, 50; 549 NW2d 540 (1996). In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that,

¹ It should be noted that defendant was originally charged with possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445.

In the present case, defendant has failed to overcome the presumption that his counsel's actions were sound trial strategy. Contrary to defendant's claim, defense counsel does not render ineffective assistance of counsel by conceding certain points at trial, including guilt of a lesser offense. Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994); *People v Kryzstopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). It appears that trial counsel's strategy was to get defendant acquitted of the most serious charge, possession with intent to deliver cocaine, while conceding guilt to the lesser charges. At trial, defense counsel vigorously contested the intent element of the possession with intent to deliver charge. In light of the prosecution's evidence, this was proper trial strategy, which we will not second-guess with the benefit of hindsight. See *Rice, supra*; *Emerson, supra*.³ Moreover, defendant's claim that he disagreed with this strategy is unsupported by the record. Regardless, the final decision as to defense strategy rests with counsel. *People v Thompson*, 69 Mich App 465, 467-468; 245 NW2d 93 (1976).

Further, defendant has also failed to establish that he was prejudiced by counsel's conduct. The prosecution presented overwhelming evidence to prove defendant's guilt of the cocaine possession charges. Thus, there is no reasonable probability that the result of the proceedings would have been different absent trial counsel's errors. *Noble, supra*. Accordingly, defendant was not denied the effective assistance of counsel, and the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Christopher M. Murray

³ Significantly, trial counsel's strategy was not unsuccessful, as defendant was acquitted on the charged offense of possession with intent to deliver cocaine, in favor of a conviction of a lesser offense.