

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN EUGENE MARTIN,

Defendant-Appellant.

UNPUBLISHED
February 17, 2004

No. 244073
Kent Circuit Court
LC No. 01-011234-FH

Before: Schuette, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), entered after a bench trial, and his sentencing as a fourth habitual offender, MCL 769.12. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's vehicle was stopped as it drove through an area in which narcotics transactions were known to take place. Two officers observed defendant reach to the area in back of the front passenger seat. A search of the vehicle revealed a pill bottle containing white powder in the map pocket on the back of the front passenger seat. The parties stipulated that the pill bottle contained cocaine. The trial court found defendant guilty of possession of less than twenty-five grams of cocaine, and sentenced him to nine months in jail, with credit for one day. The trial court did not make a finding regarding defendant's status as a fourth habitual offender.

When reviewing a challenge to the sufficiency of the evidence in a bench trial, we view the evidence presented in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. The trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Petrella*, 424 Mich 221, 268-270, 275; 380 NW2d 11 (1985); *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

Possession of a controlled substance may be actual or constructive. Mere presence is insufficient. An additional link between the defendant and the controlled substance must be shown. Circumstantial evidence and reasonable inferences based on the evidence are sufficient to prove possession. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Drug profile evidence may be admitted if: (1) it is offered as background or modus operandi evidence, and not as substantive evidence of guilt; (2) other evidence is admitted to establish the defendant's guilt; (3) the appropriate use of the profile evidence is made clear to the jury; and (4) no expert witness is permitted to opine that, based on the profile, the defendant is guilty, or to compare the defendant's characteristics with the profile in a way which suggests guilt. The admission of drug profile evidence is subject to a harmless error analysis. *People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000).

First, defendant argues that he was denied a fair trial by the admission of drug profile evidence. We disagree. Defendant failed to object to the admission of this evidence; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A police officer offered drug profile evidence as background evidence, but also was permitted to opine that based on the profile, defendant was conducting narcotics transactions from his vehicle. This opinion evidence was improperly admitted; however, we conclude that because the case was tried to the court rather than a jury and because other evidence was introduced to establish defendant's guilt, the error was not plain but rather was harmless. A judge sitting as the factfinder is presumed to understand the law and to be able to ignore evidentiary errors and decide a case based solely on properly admitted evidence. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). The trial court referred to the drug profile evidence when it found that defendant knowingly possessed cocaine, but also relied on the evidence that just before his vehicle was stopped, defendant reached his arm to the back of the front passenger seat. The bottle containing cocaine was found in the map pocket on the back of the front passenger seat. This evidence supported an inference that defendant was attempting to conceal the bottle because he knew it contained cocaine. *Fetterley, supra*. Reversal is not warranted under the circumstances. *Carines, supra; Williams, supra*.

Next, defendant argues that his conviction must be reversed, or that he is entitled to resentencing, because he was not arraigned on the information charging him as a fourth habitual offender, and because the trial court did not determine his status as a habitual offender prior to imposing sentence. We disagree. A notice of intent to seek sentence enhancement based on habitual offender status must be filed with the court and served on the defendant within twenty-one days after the arraignment or the filing of the information. MCL 769.13(1). Defendant was not entitled to be arraigned on the supplemental information charging him as a habitual offender. The existence of a defendant's prior convictions is determined by the court either at sentencing or at a pre-sentencing hearing. MCL 769.13(5). The prior convictions may be established by any relevant evidence, including information contained in the presentence report. MCL 769.13(5)(c); *People v Green*, 228 Mich App 684, 700; 580 NW2d 444 (1998). Due process is satisfied if the sentence is based on accurate information regarding the existence of prior convictions and if the defendant had the opportunity at sentencing to challenge the information. *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996). The presentence report listed defendant's prior convictions. The trial court acknowledged defense counsel's statement that the guidelines took into consideration defendant's status as a habitual offender. The trial court was aware of defendant's prior convictions. Defendant had the opportunity to challenge the information upon which his status as a habitual offender was based, and did not do so. His sentence did not violate due process. MCL 769.13(5)(c); *Green, supra; Williams, supra*.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600.

Defendant argues that trial counsel's failure to object to the admission of drug profile evidence and to his sentencing as a habitual offender deprived him of the effective assistance of counsel. We disagree. Defendant has not shown prejudice in that he has not established that had counsel objected to the introduction of the drug profile evidence, the result of the proceedings would have been different. *Carbin, supra*. Defendant's sentence as a fourth habitual offender was proper. Counsel was not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Bill Schuette
/s/ Patrick M. Meter
/s/ Donald S. Owens