

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY EARL BUTLER,

Defendant-Appellant.

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UNPUBLISHED

March 30, 2004

No. 244234

Wayne Circuit Court

LC No. 01-011267

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant was charged with possession of less than fifty grams of cocaine with intent to deliver, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b. Following a bench trial, he was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and felony-firearm. He was given a suspended sentence of nine months to four years on the controlled substance conviction and sentenced to the mandatory two-year term for felony-firearm. Defendant appeals as of right. We affirm.

**I. FACTS**

This case arose from the discovery, by police, of firearms and cocaine in defendant's home. On September 18, 2001, Detroit police officers executed a search warrant<sup>1</sup> at a house located at 2914 Pingree. The officers knocked and announced. When they got no response, entry was forced.

Upon entry, the officers found defendant sitting at table in the dining room with a ceramic plate containing loose cocaine in front of him. Although the officers ordered defendant to "freeze," he jumped up and ran into the kitchen. Following, an officer saw defendant throw a plastic bag behind the refrigerator. The bag appeared to contain cocaine. Defendant was taken into custody.

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<sup>1</sup> The warrant was issued after police conducted a "controlled buy" involving the residence.

During the subsequent search, officers found a shotgun and a loaded handgun, with serial numbers filed off. Elsewhere, the officers found a pill bottle containing ninety-eight Tylenol #4 tablets, items verifying that defendant resided in the house, a digital scale, plastic baggies, and a large amount of cash. In the defendant's bedroom, officers also found a shoe box containing "chunk cocaine."

## II. STANDARD OF REVIEW

Defendant's sole claim on appeal is that he was denied effective 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), *aff'd* 468 Mich 233 (2003) (citations omitted).]

## III. ANALYSIS

The felony-firearm charge was predicated on a handgun that officers testified was found on the floor of the dining room within arm's reach of defendant. While defendant was testifying, he admitted that he had the handgun, but said it was simply collateral for a loan to a friend and it was upstairs in his bedroom, not downstairs in the dining room. Defendant contends that counsel was ineffective for eliciting testimony from him that he was in possession of the handgun. Absent such testimony, an argument could have been made that it belonged to someone else in the house.

Even if we assume that counsel erred by eliciting testimony for the purpose of showing that there was not a nexus between the weapon and the controlled substance offense, we nonetheless find no merit in defendant's claim of ineffective assistance of counsel because defendant has not shown that the verdict likely would have been different had he not admitted to having the weapon. Whether defendant or someone else owned the gun was irrelevant because the felony-firearm statute does not proscribe ownership of a weapon, only carrying or possessing the weapon. *People v Burgenmeyer*, 461 Mich 431, 436-438; 606 NW2d 645 (2000). The officers' testimony, which the trial court expressly accepted as true, was sufficient to prove that defendant was in constructive possession of the weapon. *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989).

Affirmed.

/s/ Brian K. Zahra  
/s/ Henry William Saad  
/s/ Bill Schuette