STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 6, 2004
v	No. 247946 Calhoun Circuit Court
GAILAN ORLANDO SMITH, Defendant-Appellant.	LC No. 02-003275-FH

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of possession of less than twenty-five grams of cocaine in violation of MCL 333.7401(2)(a)(iii). The trial court sentenced him as an habitual offender, third offense, to a term of 2 to 12 years in prison. We affirm.

I. FACTS

On July 21, 2003, at 2:30 a.m., defendant was seen riding a bike on a sidewalk without the required headlight in violation of two city ordinances. Therefore, police stopped defendant and his companion. Once stopped, defendant put his hands in the front pockets of his shorts. An officer ordered defendant to remove his hands from his pockets. According to the officer, defendant failed to comply and the officer motioned to his partner. According to defendant, defendant pulled out his keys and wallet to show the officer, but when he went to replace the items, the officer motioned for his gun. In response, defendant ran.

The officers gave chase and witnessed defendant make a throwing motion with his left arm. After defendant was apprehended, police retraced defendant's path and discovered a baggy containing individually wrapped pieces of crack cocaine totaling approximately 1.77 grams. Defendant denied that the cocaine was his or ever in his possession.

Based on this evidence, defendant was convicted, by jury, of possession of less than twenty-five grams of cocaine. MCL 333.7401(2)(a)(iii).

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

Defendant first contends that the prosecution presented insufficient evidence to sustain his conviction. This Court reviews challenges to the sufficiency of the evidence de novo. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748, amended 441 Mich 1201 (1992). The prosecution need not negate every reasonable theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), citing *People v Konrad*, 449 Mich 263, 273, n 6; 536 NW2d 517 (1995). Rather, it must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing its sufficiency, the court must examine the evidence in the light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This includes all determinations concerning the credibility of witnesses. *Wolfe*, *supra*, 514-515. The scope of review remains the same whether the evidence presented is direct or circumstantial. *Nowack*, *supra*, 400. Circumstantial evidence and the reasonable inferences arising from it may constitute sufficient evidence of the elements of a crime. *People v Bulmer*, 256 Mich App 33, 37; 662 NW2d 117 (2003), citing *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

B. Analysis

To establish the elements of unlawful possession of less than twenty-five grams of cocaine, the prosecution must show that (1) the defendant possessed a controlled substance, (2) the substance possessed was cocaine, (3) the defendant knew he was possessing cocaine, and (4) the substance was in a mixture that weighed less than twenty-five grams. MCL 333.7403(2)(a)(v); *Wolfe*, *supra*, 516-517.

"A person need not have actual physical possession of a controlled substance to be found guilty of possessing it." *Wolfe*, *supra*, 519-520. Rather, possession may be actual or constructive. *Id.*, citing *People v Harper*, 365 Mich 494, 506-507; 113 NW2d 808 (1962). Whether the defendant had dominion or control over the substance constitutes the essential question. *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998), citing *Konrad*, *supra*, 271. The defendant's mere presence at the place where the drugs are found does not provide sufficient evidence to prove constructive possession. *Id.*, citing *Wolfe*, *supra*, 520. Although "some additional link between the defendant and the contraband must be shown," this may be established with circumstantial evidence. *Id.*, citations omitted.

In the instant case, defendant contends that the prosecution failed to present any evidence concerning the actual weight of the cocaine or prove the element of possession. But he stipulated to a laboratory report finding that the bag found near the scene of his arrest contained crack cocaine. Additionally, Officer Penning estimated that the total weight of the crack cocaine in the package was approximately one-sixteenth of an ounce or 1.77 grams. Although the prosecution did not present evidence concerning the exact amount of cocaine present, conviction under MCL 333.7403(2)(a)(v) only requires proof of some amount less than twenty-five grams. Because defendant agreed that the bag contained cocaine and the prosecution does not contend that it weighed more than twenty-five grams, sufficient evidence existed on the element of weight.

Furthermore, Officer Case testified that while pursuing defendant, he observed him make a throwing motion to his left. And the tracking dog used by the police discovered the bag of crack near the route along which defendant had fled. The bag was sitting on top of the dirt and

looked clean, as if it had not been there for very long. This provided circumstantial evidence that defendant discarded the package containing crack cocaine from his person. From this the jury could have reasonably inferred that defendant exercised dominion and control over the cocaine and thus had at least constructive possession of the controlled substance. Similarly, the testimony that defendant discarded the package when pursued by Officer Case supported an inference that he knew that the package contained cocaine.

The prosecution presented evidence tending to establish each element of the crime of possession of less than twenty-five grams of cocaine. Viewed in the light most favorable to the prosecution, this evidence provided a sufficient basis for a rational jury to have found defendant guilty beyond a reasonable doubt.

III. EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Effective assistance of counsel is presumed and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001), citing *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). In order to establish ineffective assistance of counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms" and "but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon***,** 248 Mich App 522, 531; 640 NW2d 314 (2001), citing *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

B. Analysis

1. Trial Counsel

Defendant contends that his trial counsel provided ineffective assistance in that he failed to move to suppress the evidence against him. Defendant contends that his stop and subsequent arrest by police violated his Fourth Amendment rights in that they exceeded the permissible scope of a stop-and-frisk search. He further argues that if his attorney had filed a motion, the evidence discovered as a result of this stop would have been suppressed. But defendant has failed to articulate how the officer's actions violated his rights. A party may not make a bald assertion and "leave it to this Court to search for authority to sustain or reject its position." *People v Mackle*, 241 Mich App 583, 604; 617 NW2d 339 (2000), quoting *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987). Where a defendant fails to argue the merits of an allegation of error, the issue is not properly presented for review. *People v Jones (On Reh)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Because we have no basis for reviewing defendant's conclusory assertion that he was seized in violation of his constitutional rights, the issue is not subject to review.

2. Appellate Counsel

Defendant also asserts that he was denied effective assistance of counsel on appeal because a portion of the trial transcript is missing. He asserts that a newly appointed appellate counsel cannot determine whether error requiring reversal occurred at trial unless he has access

to the entire transcript of the earlier proceedings. At oral argument, the parties stipulated that the missing transcript was found. As a result, this issue is moot and will not be addressed.

IV. JURY INSTRUCTIONS

Defendant next argues that the trial court erred by instructing the jury on the lesser included offense of possession of cocaine and that his attorney erred in failing to object to the instruction. But defendant's attorney affirmatively expressed satisfaction with the proposed instructions at trial, thus waiving the issue. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Waiver "*extinguishes* any error" and precludes appellate review. *Id.*, 216, emphasis in original. Although the trial transcript is missing a portion of the jury instructions, defendant concedes that his attorney failed to object to the instructions concerning the lesser-included offense. Unlike the situation in *Scott*, *supra*, 931, the record contains sufficient information for this Court to resolve this issue on the merits even before the record has been settled. Thus, there is no error for this Court to review, and we affirm defendant's conviction.

Furthermore, even if defendant had not waived the issue, the trial court's instruction concerning the lesser-included offense of possession of less than twenty-five grams of cocaine did not constitute error. Thus, defense counsel was not ineffective for failing to object to the instruction.

Under MCL 768.32(1), a trial court may instruct a jury concerning necessarily included lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002), citing *People v Cornell*, 466 Mich 335, 357-358; 646 NW2d 127 (2002). "A necessarily included offense is one that must be committed as part of the greater offense; it would be 'impossible to commit the greater offense without first having committed the lesser.'" *People v Alter*, 255 Mich App 194, 199; 659 NW2d 667 (2003), quoting *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). "Such an instruction is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser offense and it is supported by a rational view of the evidence." *Reese*, *supra*, 446.

This Court has held that possession of more than 650 grams of cocaine constitutes "a necessarily included lesser offense of possession with intent to deliver that amount of cocaine, because the only distinguishing characteristic is the additional element of the intent to deliver." *People v Torres (On Remand)*, 222 Mich App 411, 416-417; 564 NW2d 149 (1997), citing *People v Gridiron (On Reh)*, 190 Mich App 366, 369; 475 NW2d 879 (1991), amended 439 Mich 880 (1991). Similarly, in the instant case, possession of less than twenty-five grams of cocaine constitutes a lesser-included offense to possession of less than fifty grams with intent to deliver. If a person possesses less than twenty-five grams of cocaine, that person necessarily also possesses less than fifty grams of cocaine. And the greater offense requires jury to find the element of intent to deliver that is not included in the lesser offense. As noted above, the prosecution presented sufficient evidence for a rational jury to find defendant guilty of possession beyond a reasonable doubt. Thus, the instruction on the lesser offense was supported by a rational view of the evidence. Based on *Reese*, *supra*, 446, the instruction on the lesser offense was proper. Because the instruction contained no error, defendant's trial counsel was not ineffective for failing to raise an objection. *Goodin*, *supra*, 433.

V. IN PROPRIA PERSONA

In addition to the issues raised by appellate counsel, defendant himself raises three issues in propria persona. He first contends that the trial court erred by instructing the jury that it could find him not guilty, guilty of possession with intent to deliver, or guilty of simple possession and that it was error for the court not to have included an additional instruction stating that the jury could find him not guilty of simple possession. As with the previous issue, defendant concedes that his attorney failed to object to this instruction. And his trial counsel affirmatively expressed satisfaction with the trial court's proposed jury instructions. Therefore, the issue is waived and there is no error for this Court to review. *Carter*, *supra*, 219.

Defendant next asserts that he received ineffective assistance from both his trial and appellate counsel. He contends that his trial counsel was ineffective in that he failed to conduct a proper investigation and obtain the videotape from the mobile video recording unit in the patrol car driven by the arresting officers. Defendant asserts that the videotape would have supported his contention that he was illegally stopped. However, "the burden of establishing the factual predicate" for a claim of ineffective assistance of counsel falls on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Where the record does not contain sufficient detail to support an ineffective assistance claim, the defendant waives the issue. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94, citing *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Because defendant failed to move for an evidentiary hearing or a new trial in the trial court, review of this issue is limited to the record. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). The only evidence in the record concerning this tape is the testimony of the arresting officer, who stated that he could not recall checking to determine whether the camera had recorded the incident with defendant. Because nothing in the record indicates that the videotape contained any information that would establish that defendant was illegally stopped, defendant has failed to establish a factual predicate for his claim and has thus waived the issue.

Additionally, defendant asserts that his appellate counsel was ineffective for failing to raise this issue on appeal. The standards that apply to claims of ineffective assistance of trial counsel also apply to claims of ineffective assistance of appellate counsel. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994), citing *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993), aff'd 449 Mich 375 (1995). This Court has stated as follows:

> An appellate attorney's failure to raise an issue may result in counsel's performance falling below an objective standard of reasonableness if that error is sufficiently egregious and prejudicial. However, appellate counsel's failure to raise every conceivable issue does not constitute ineffective assistance of counsel. [*Reed*, *supra*, 646.]

Furthermore, it is presumed that counsel's decisions regarding which claims to pursue on appeal constitute sound appellate strategy. *Id.*, 647. In the instant case, defendant merely asserts that appellate counsel is ineffective for failing to raise the issue of the video evidence on appeal. He presents no argument as to why this constitutes an error rendering counsel's performance seriously deficient. Thus, defendant has not overcome the presumption that his attorney's decision not to pursue this issue on appeal constitutes sound appellate strategy.

Finally, defendant argues that he was erroneously convicted under the wrong statute. Because the issue was not preserved for appeal, we review the matter for plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750, 764-765; 597 NW2d 130 (1999).

In the instant case, defendant was initially charged with possession with intent to deliver less than fifty grams of cocaine under MCL 333.7401(2)(A)(iv) and was convicted of possession of less than twenty-five grams of cocaine under MCL 333.7403(2)(a)(v). He contends that, because the prosecution failed to present any evidence regarding the weight of the drugs, he should have been charged under MCL 333.7403(2)(b)(ii).

As noted above, the prosecution presented testimony from a police officer who estimated that the drugs weighed approximately one-sixteenth of an ounce or 1.77 grams. And neither MCL 333.7401(2)(a)(iv) nor MCL 333.7403(2)(a)(v) requires proof of a specific amount of a controlled substance. Rather, they apply where the accused possesses any amount less than the specified amount. Other statutes providing harsher penalties apply if the accused possessed more than the specified amount. See MCL 333.7403(2)(a)(i). Defendant stipulated to the lab report finding that the bag in question contained cocaine. Because the prosecution did not contend that it contained more than twenty-five grams of the drug, proof of its specific weight was not required. Furthermore, MCL 333.7403(2)(b)(ii) does not apply in the instant case; the plain language of this subdivision states that it only applies to the following: "a controlled substance classified in schedule 1, 2, 3, or 4, except a controlled substance for which a penalty is prescribed in subdivision (a), (b)(*i*), (c), or (d)."

MCL 333.7403(2)(a) states that it applies to the possession of the drugs listed in MCL 333.7214(a)(iv), which describes cocaine and cocaine derivatives. Based on the unambiguous language of the statutes, defendant was properly charged under MCL 333.7401(2)(a)(iv) and convicted under MCL 333.7403(2)(a)(v). Thus, no plain error affecting defendant's substantial rights occurred and we deny further review of the issue.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette