

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY J. WILSON,

Defendant-Appellant.

UNPUBLISHED

December 21, 2004

No. 250141

Wayne Circuit Court

LC No. 03-004755-01

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

PER CURIAM.

Defendant was charged with possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than fifty grams of methadone, MCL 333.7401(2)(a)(iv), felony-firearm, MCL 750.227b, habitual offender second offense notice, MCL 769.10, and habitual offender third offense notice, MCL 769.11. The habitual offender notices were never considered in sentencing because defendant was found to not have a previous criminal record. Defendant was convicted of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), possession of less than twenty-five grams of methadone, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to five days in jail, with credit for time served, for the possession of controlled substance convictions, and two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

On April 3, 2003, the police sent a raid team, with a valid search warrant, to 5858 Rohns in Detroit, Michigan, in response to a complaint of drugs being sold in front of and inside the premises. Officer Robert Gerak, who was the shotgun man,¹ was the first to go inside. When Gerak entered the house he saw Zora Reeves, who is defendant's sister, and another black male standing in the downstairs area. Gerak then went upstairs with Officer Debinski; they entered the southeast bedroom and saw defendant on a bed with his right hand under a pillow.

¹ The duty of the shotgun man is to enter the premises with a shotgun and go from room to room securing the premises.

Defendant's son was also in the room. Gerak ordered defendant to put his hands on his head and defendant complied. Debinski handcuffed defendant and his son and sent them downstairs to the other officers. Debinski looked under the pillow that defendant's hand had been under, and found a .357 revolver, which was loaded. Gerak finished securing the house and then came back to the southeast bedroom where defendant was originally found. Gerak looked underneath the covers and recovered two more pistols, which were not loaded. Gerak ceased his search, took the weapons downstairs, and later placed them in evidence. Gerak did not find any narcotics, nor did he confiscate anything else in the house.

Officer Delshawn King placed defendant under arrest and said that defendant was very cooperative. King read defendant his rights and said that it was defendant's desire not to make a statement. Defendant said that he was a drug user, but never said that he was a cocaine or methadone user. After Gerak searched the house and secured the premises, King went up to the southeast bedroom to search for weapons and suspected narcotics. King found drug paraphernalia and seized it, but did not seize any narcotics.

Officer Tracy Bradford, who was outside security,² entered the premises after the house was secured. She began to take down information from defendant. Defendant was cooperative and started to blurt out that narcotics were located in "one of the upper bedrooms." Before defendant completed his admission, Bradford advised him of his rights. Defendant then led Bradford upstairs to the southeast bedroom to retrieve the narcotics. The narcotics were visible; they were located between the mattress and the headboard and concealed in a brown paper bag. Bradford confiscated the bag and put it in lock seal folder number 521564. Bradford did not have to search for the narcotics because defendant showed her exactly where they were. The bag in lock seal folder number 521564 was stipulated by the parties to contain a tablet of methadone and .37 grams of cocaine.

II. STANDARD OF REVIEW

When reviewing unpreserved constitutional claims, this Court reviews for plain error affecting the defendant's substantial rights. Reversal is warranted only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999); *People v Newton*, 257 Mich App 61, 65; 665 NW2d 504 (2003). This Court's review is limited to the record presented at trial. *People v Robinson*, 390 Mich 629, 632; 213 NW2d 106 (1973).

III. ANALYSIS

On appeal, despite failing to object to the use of his statements at trial, defendant claims that his constitutional right against self-incrimination was violated when his statements were used to find physical evidence that would not have been inevitably discovered without his statements. We disagree.

² The duty of the outside security officer is to maintain the perimeter until the premises is secured, and then later enter the premises to assist in investigating and searching.

Both the United States and Michigan Constitutions guarantee the right against self-incrimination. *People v Watkins*, 247 Mich App 14, 19; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003). This right protects an accused from being compelled to testify against himself or provide incriminating evidence of a testimonial nature. *People v Geno*, 261 Mich App 624, 628; 683 NW2d 687 (2004). To be testimonial, the communication must relate a factual assertion or disclose information. *Hiibel v Sixth Judicial Distr Ct of Nevada*, ___ US ___; 124 S Ct 2451, 2460; 159 L Ed 2d 292, 305 (2004). To be incriminating, the communication must present a reasonable basis to apprehend a real and appreciable danger to the accused from the disclosure, such that the disclosure could be used in a criminal prosecution or lead to other evidence that might be so used. *Id.*

Defendant's statements regarding the location of the narcotics disclosed information, and thus, were testimonial. Furthermore, defendant's statements regarding the location of the narcotics led to evidence, and thus, were incriminating. The only question that remains is whether defendant's statements were compelled. Defendant asks that this Court remand this case to the lower court so that it can determine whether defendant's statements were compelled.

Generally, voluntariness of a confession should be determined by the trial judge, completely apart and independent from the jury who is limited to finding the truthfulness and weight of the confession if the judge allows it in as being voluntary. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965); *People v Manning*, 243 Mich App 615, 624-625; 624 NW2d 746 (2000). This is referred to as a *Walker* hearing. The rationale behind a *Walker* hearing is that voluntariness should not be found by the body that is finding guilt or innocence because even if it finds the confession to be involuntary, it has heard it, and thus, will not be able to completely strike it from its mind when finding guilt or innocence. *Walker, supra*.

However, since defendant failed to object to the evidence that resulted from defendant's statements and failed to request a *Walker* hearing, he failed to properly preserve this issue for appeal, and thus, this Court is limited to reviewing the trial courts failure to exclude the contested evidence for plain error. *Carines, supra*.

The trial judges's failure to sua sponte suppress the physical narcotic evidence or to hold a *Walker* hearing was not a clear or obvious error. Defendant now claims that his constitutional right against self-incrimination was violated, and that the evidence, which was discovered because of his confession, should be suppressed. As discussed previously, defendant's confession was testimonial and incriminating, but from the evidence presented at trial it was not plain error for the trial judge to fail to conclude, sua sponte, that there might be an issue regarding whether the confession was also compelled. Officer King read defendant his rights and defendant initialed the rights notification form, which certified that he had been read his rights. Although defendant chose not to make a statement at this time, he later voluntarily admitted that there were narcotics upstairs. Before defendant could complete his admission, Officer Bradford interrupted him and read him his rights again. Defendant chose to finish the statement, and furthermore, led Bradford upstairs to the narcotics and pointed them out to her. Nothing on the record supports the conclusion that the confession was involuntary; therefore, the trial judge did not commit plain error when he failed to inquire further into the confession.

Defendant's contention that the narcotics would not have been inevitably discovered without the confession need not be examined. Even if defendant's contention in that regard is

true, the evidence presented at trial showed that defendant's confession was not compelled. Thus, the trial judge did not commit plain error when he failed to sua sponte suppress the evidence that was discovered because of the confession or to hold a *Walker* hearing to determine whether the confession was compelled.

Affirmed.

/s/ Patrick M. Meter

/s/ Kurtis T. Wilder

/s/ Bill Schuette