

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN MCGEE,

Defendant-Appellant.

UNPUBLISHED

December 11, 2001

No. 224818

Wayne Circuit Court

Criminal Division

LC No. 99-004508

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of less than twenty-five grams of methadone, MCL 333.7403(2)(a)(v), and possession of less than fifty grams of cocaine, MCL 333.7403(2)(a)(iv). He was sentenced to concurrent terms of nine to forty-eight months' imprisonment for the possession of methadone conviction, and one to twenty years' imprisonment for the possession of cocaine conviction. He appeals as of right. We affirm.

Defendant raises one issue on appeal, claiming that defense counsel was ineffective. Because defendant did not request a *Ginther*¹ hearing below, our review is limited to mistakes apparent on the record. *People v Randolph*, 242 Mich App 417, 422; 619 NW2d 168 (2000). For defendant to establish a claim that he was denied his right to the effective assistance of counsel, he must show that counsel's representation fell below an objective standard of reasonableness and that this was so prejudicial that it denied him a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant first argues that counsel was ineffective for failing to make sufficient efforts to locate a defense witness. Defendant was arrested and a prescription vial of methadone with the name "Beverly Major" was found in his jacket pocket. Defendant told the police that the methadone belonged to his girlfriend. In defendant's unsigned affidavit, attached to his brief on appeal, defendant asserts that he did not know that the methadone was in his pocket, that he could not contact his girlfriend, Beverly Major, unless he was released on bond, that he told counsel that he needed Major as a defense witness, and that counsel said "he could not get in touch with her." This information does not overcome the presumption that counsel's conduct

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

was reasonable. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Further, Major could not have testified that defendant did not know that the methadone was in his jacket since only defendant could have testified to his knowledge. Further, her testimony that the methadone was hers and that she left it in the jacket would have been cumulative to other evidence. We are not convinced that counsel's failure to locate Major was a serious mistake that prejudiced the defense and deprived defendant of a fair trial. *Id.*

Defendant also argues that counsel was ineffective for acknowledging in closing argument that defendant was in possession of methadone and that he should not have been, regardless to whom it belonged. The only evidence presented at trial established that methadone was found in defendant's pocket, that the methadone container had the name "Beverly Major" on it, and that defendant said that the methadone belonged to his girlfriend. It is unlawful for anyone to possess methadone outside a clinic. Counsel's candid remarks were supported by the record and appear to have been counsel's attempt to minimize the damaging effects of the evidence to his client. *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). Moreover, counsel asserted defendant's innocence, did not misstate the evidence, and attempted to avoid defendant's conviction for the more serious offense of possession of cocaine. Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Kryztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Even assuming that the remarks were ill chosen, we do not agree that they prejudiced the defense or deprived defendant of a fair trial. *Mitchell, supra.*

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen