

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUPREE LERON RICH,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 263442

Macomb Circuit Court

LC No. 2005-000693-FH

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession of marijuana, MCL 333.7403(2)(d), and operating a motor vehicle with a suspended or revoked license, MCL 257.904(1). Pursuant to MCL 333.7413(2), defendant was sentenced as a second controlled-substance offender to 16 months to two years' imprisonment for his possession of marijuana conviction. Defendant was sentenced to 93 days' imprisonment for his conviction of operating a motor vehicle with a suspended or revoked license. We affirm defendant's convictions, but remand for correction of the presentence investigation report (PSIR) and resentencing consistent with this opinion.

Defendant first argues that he was denied the effective assistance of counsel because his defense counsel failed to request an instruction for the lesser offense of use of marijuana. We disagree. Defendant did not preserve this issue by raising it below in a request for an evidentiary hearing or a motion for new trial. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Therefore, review of this claim is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). If a claim of ineffective assistance of counsel involves question of laws, those questions are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of trial counsel, a defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Defendant argues that defense counsel was ineffective because he failed to request an instruction for the lesser included misdemeanor offense of use of marijuana. Defendant would have been entitled to a use-of-marijuana instruction only if that misdemeanor had been a necessarily included lesser offense of possession of marijuana, and only if a rational view of the evidence had supported giving the instruction. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); *People v Wilson*, 265 Mich App 386, 395; 695 NW2d 351 (2005). Because the lesser offense of use of marijuana contains an element not found in the greater offense of possession of marijuana, use of marijuana is not a necessarily included lesser offense of the possession charge. *Cornell*, *supra* at 357.

Moreover, despite testimony from defendant's mother that defendant had a drug problem and had been in drug rehabilitation several times, and in spite of defendant's post-arrest statement that he intended to smoke the marijuana, the evidence consistently showed that the marijuana taken from defendant was packaged to be sold, and not to be personally consumed. Testimony was presented which showed that it is common in drug cases for packaging to be broken down into individual "baggies" when the drugs are intended for sale. This was compared to the packaging common in cases of personal use, which typically consists of one large bag. Because the marijuana was individually packaged in small bags, which was consistent with the sale of drugs, the evidence did not support a use-of-marijuana instruction. Defendant has failed to show defense counsel was ineffective for failing to request the instruction.

Defendant next argues that he is entitled to resentencing because of two inaccuracies in his PSIR. We review de novo a defendant's claims of legal error concerning the trial court's sentencing determination. See *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004); *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003).

Defendant asserts that the trial court erred when it determined, in reliance on the PSIR, that the sentencing guidelines were inapplicable to his case. We agree. Defendant was convicted of possession of marijuana, a misdemeanor offense punishable by imprisonment for no more than one year, a fine of no more than \$2,000, or both. MCL 333.7403(2)(d). However, defendant's sentence was enhanced due to a prior controlled-substance conviction, and he was sentenced as a felon to a term of 16 months to two years in prison. MCL 333.7413(2).

The statutory sentencing guidelines generally apply to all enumerated felonies committed on or after January 1, 1999. *People v Hendrick*, 472 Mich 555, 560; 697 NW2d 511 (2005). Conviction of a subsequent controlled-substance offense is specifically listed as one of the enumerated felonies to which the sentencing guidelines apply. MCL 777.18; *People v Williams*, 268 Mich App 416, 429-430; 707 NW2d 624 (2005).

Based on MCL 777.18 and *Williams*, *supra*, we conclude the PSIR inaccurately stated that the sentencing guidelines were inapplicable to defendant's case. Therefore, we remand for correction of the PSIR to accurately reflect the applicability of the sentencing guidelines to defendant's controlled-substance conviction. See *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). "[A] sentence is invalid if it is based on inaccurate information." *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Because the sentencing guidelines apply to defendant's controlled-substance conviction, defendant's sentence is invalid. He is entitled to resentencing in accordance with the sentencing guidelines. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006); *Miles*, *supra* at 101.

Defendant also asserts that he is entitled to resentencing because the PSIR inaccurately stated that he was “jury-convicted” of a “double-penalty.” We disagree. As noted, a sentence is invalid if it is based on inaccurate information. However, defendant has failed to show that the PSIR inaccurately stated that he was jury convicted, under double penalty, for possessing marijuana. The initial information filed in this case notified defendant that the possession of marijuana charge, if proven, would constitute his second controlled-substance offense. The information also stated that, if convicted, defendant would be subjected to an enhanced sentence pursuant to MCL 333.7413(2). Following a jury trial, defendant was convicted of possession of marijuana. Accordingly, the PSIR accurately stated that defendant was convicted by a jury of possession of marijuana, and that the conviction represented his second controlled-substance offense—subjecting him to “double penalty.” The information was accurate, and defendant’s is entitled to no relief on this issue.

Affirmed but remanded for correction of the PSIR and resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen