

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY GOREE,

Defendant-Appellant.

UNPUBLISHED

July 12, 1996

No. 180253

LC No. 92-004927

Before: Wahls, P.J., and Young and H.A. Beach,* JJ.

PER CURIAM.

Defendant was convicted after a bench trial of possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b(a); MSA 28.424(2)(a). He appeals as of right. We affirm.

Defendant argues that there was not sufficient evidence presented at trial for the trial court to find that he was in possession of heroin. We disagree. In an appeal challenging the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

For a conviction of possession of a controlled substance, possession may be found even when the defendant is not the owner of the recovered narcotics. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992). In addition, the possession may be joint, with more than one person actually or constructively possessing a controlled substance. *Id.* Constructive possession may be found where a defendant knowingly has the power and intention to exercise dominion or control over a substance or where there is proximity to the substance together with indicia of control. *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991).

Defendant was more than merely present at the premises where the contraband was found. Defendant lived at the home and admitted that the two other persons whom he claimed lived there had

* Circuit judge, sitting on the Court of Appeals by assignment.

been gone from the house for several days. Moreover, the heroin was found sitting out in the open on the kitchen table during the period of time when defendant was the only person staying in the home. A reasonable trier of fact could find beyond a reasonable doubt that defendant had possession and control over the drugs. *Wolfe, supra*, p 521. Therefore, there was sufficient evidence to convict defendant of possession of less than twenty-five grams of heroin.

Next, defendant argues that he was denied the effective assistance of counsel when defense counsel failed to present relevant evidence at trial. To sustain a claim of ineffective assistance of counsel, defendant must show: 1) that counsel's performance was deficient under an objective standard of reasonableness, i.e. that counsel made an error so serious that he was not functioning as an attorney; and 2) that the representation so prejudiced him as to deprive him of a fair trial. *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The failure to present evidence can constitute ineffective assistance of counsel only when it deprives a defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995).

Here, defendant argues that counsel should have presented utility bills showing that some of the utilities for the home were in other persons' names as this would have defeated the proof of possession. First, it is not clear that this evidence was presented by defendant to his counsel. In addition, this evidence did not deprive defendant of a substantial defense as the evidence only showed that other persons recently lived in the home whereas testimony at trial revealed that the persons allegedly living in the home had been gone from the home for several days. Finally, the determination of whether to present evidence is a determination of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Id.* Accordingly, we conclude that defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ Harry A. Beach