

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVE O'BRIEN MARSHALL,

Defendant-Appellant.

UNPUBLISHED
November 5, 1996

No. 187054
LC No. 94-000186

Before: McDonald, P.J., and Bandstra and C. L. Bosman*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant was sentenced to five to fifteen years in prison, the sentence being enhanced as defendant is a fourth habitual offender, MCL 769.12; MSA 28.1084. We affirm.

Defendant's first claims on appeal the prosecution did not present sufficient evidence of possession to support his conviction. We disagree. The offense of possession of a controlled substance requires proof the defendant had actual or constructive possession of the substance. *People v Hellenthal*, 186 Mich App 484; 465 NW2d 329 (1990). Possession may be established by evidence that the defendant exercised control or had the right to exercise control of the substance and knew it was present. *Id.* Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992).

Viewing the evidence presented by the prosecution up to the time defendant made his motion for a directed verdict in a light most favorable to the prosecution, *People v McKenzie*, 206 Mich App 425; 522 NW2d 661 (1994), we find the prosecution presented sufficient evidence of knowledge and control by defendant to establish possession. Defendant and his companion behaved nervously when first sighted by police. Police officers called the area in which defendant and his companion were seen "a suspected drug area." A detective watched defendant reach under the front seat and dashboard of

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

the car defendant had driven from Battle Creek to Hastings. A drug-sniffing dog found two rocks of crack cocaine in this area of the car. Defendant told police he had come to town to “party,” and he had not delivered drugs because drugs were already at his destination. A rational trier of fact could find beyond a reasonable doubt, based on these facts, defendant knowingly possessed the cocaine found in the car.

Defendant’s next claims his trial attorney did not provide effective assistance of counsel. Defendant has failed to properly preserve this issue for review as he did not move for a new trial or an evidentiary hearing in the trial court. *People v Juarez*, 158 Mich App 66; 404 NW2d 222 (1987). Our review is limited to the existing record. *Id.*

Defendant’s trial attorney provided effective assistance of counsel. To establish a denial of effective assistance of counsel, a defendant must demonstrate counsel’s performance was deficient and the deficiency was prejudicial to the defendant. *People v Daniel*, 207 Mich App 47; 523 NW2d 830 (1994). Furthermore, the defendant must overcome the presumption the challenged action is sound trial strategy. *Id.*

Looking at the list of alleged errors committed by defendant’s trial attorney, we believe all “errors” are in fact sound trial strategy. Action appearing erroneous from hindsight does not constitute ineffective assistance if the action was taken for reasons that would have appeared at the time to be sound trial strategy to a competent criminal attorney. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Defense counsel may have failed to object to the police officer’s testimony defendant acted suspiciously on being seen by police and the area where defendant was seen was “a suspected drug area” to avoid more firmly fixing such statements in the minds of the jurors. Defense counsel’s questioning about the search of defendant’s companion and the search of the car may have helped defendant by showing that defendant and his companion had no drugs on them and had no knowledge drugs were inside the car. In any event, no prejudice to defendant from any of the errors defendant claims were committed by his trial attorney. *Juarez, supra.*

Affirmed.

/s/ Gary R. McDonald
/s/ Richard A. Bandstra
/s/ Calvin L. Bosman