STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST EUGENE BUIS,

Defendant-Appellant.

UNPUBLISHED
December 10, 1996

No. 184396
LC No. 94-066894

Before: Saad, P.J., and Griffin and M. H. Cherry,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Subsequently, defendant pleaded guilty as a third habitual offender, MCL 769.11; MSA 28.1083. Defendant appeals as of right, and we affirm.

I

Defendant first contends that the police lacked probable cause to seize the cocaine evidence which defendant dropped on the ground. We disagree. In this case, there is no dispute that the police officers were lawfully in a place to observe defendant drop the folded paper containing cocaine. Rather, the issue in this case is whether the police officers had probable cause to believe that the wrapped paper object was the evidence or the implement of a crime.

This Court has held that standing alone, the presence of an object such as the folded paper does not give rise to an inference that criminal activity is afoot. See *People v Young*, 89 Mich App 753, 757-758; 282 NW2d 211 (1979). However, this case involves much more than the mere observation of the folded paper. Both police officers testified defendant was found in a car where the driver had been pulled over for driving without a license -- a violation under the motor vehicle code. MCL 257.301; MSA 9.2001. Moreover, both officers testified that that the area where defendant was found was an area known for drug trafficking. Additionally, both officers indicated that based on their

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

experience, folded pieces of paper, like the one defendant dropped, usually contained drugs. Indeed, this Court has recognized that a police officer's experience in detecting drug containers in a high crime area can give that officer probable cause to seize evidence in a case such as this one. See *People v Russell*, 152 Mich App 537, 542-543; 394 NW2d 9 (1986); *Wayne County Prosecutor v Recorder's Court Judge*, 101 Mich App 772, 777-778; 300 NW2d 516 (1980); *People v Ridgeway*, 74 Mich App 306, 314; 253 NW2d 743 (1977). In sum, we believe that based upon the police officers' experience, the area where defendant was found, and the officers' observations of defendant, the officers had probable cause to believe that the folded paper was evidence or an implement of crime.

II

Defendant next argues that the trial court erred in failing to instruct the jury on the offenses of use of cocaine and attempted possession of cocaine. We disagree. With regard to the use of cocaine instruction, proof of use of cocaine is never necessarily presented as part of the proofs for possession of cocaine. Therefore, the misdemeanor offense of unlawful use fails to bear an appropriate relationship to the greater offense of possession. *People v Lucas*, 188 Mich App 554, 582; 470 NW2d 460 (1991). Accordingly, no error exists as to the trial court's denial of the use of cocaine instruction. See also *People v Leighty*, 161 Mich App 565; 411 NW2d 778 (1987).

Additionally, we find that the trial court did not err in denying defendant's request for an instruction as to the lesser included offense of attempted possession. The evidence adduced at trial did not show that defendant attempted to possess cocaine. Rather, the police officers testified that they saw the packet of cocaine in defendant's right hand and that he dropped the packet. Because the evidence showed that the crime was complete, the trial court did not err by refusing to instruct the jury regarding attempted possession of cocaine. See *People v Adams*, 416 Mich 53, 59-60; 330 NW2d 634 (1982).

III

Defendant next argues that he received the ineffective assistance of counsel because trial counsel failed to move to suppress the cocaine evidence prior to trial. We disagree. To establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel was not functioning as an attorney guaranteed by the Sixth Amendment to the United States Constitution. Further, defendant must show that any deficiency was prejudicial to his case. *People v Pickens*, 446 Mich 298, 302-303, 312, 314; 521 NW2d 797 (1994). We note that claims of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal are without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). With regard to the claim that trial counsel failed to move to suppress the cocaine evidence, we held above that the suppression of the cocaine evidence was not warranted in this case. Since the police seizure of the cocaine was constitutional, defendant was not prejudiced by counsel's failure to move to suppress

the evidence. *Pickens*, 446 Mich at 302-303, 312, 314. Accordingly, counsel's inaction did not constitute ineffective assistance of counsel.

IV

Defendant next argues that the quantity of cocaine seized was insufficient to support his conviction for possession of less than twenty-five grams of cocaine. Specifically, defendant argues that because he was found with a minuscule amount of cocaine, he did not have the guilty knowledge required for a possession conviction. We disagree.

In support of his argument, defendant relies upon this Court's decision in *People v Hunten*, 115 Mich App 167; 320 NW2d 68 (1982). In *Hunten*, this Court held that the mere presence of a quantity of a controlled substance that is invisible to the naked eye, without more, is insufficient to support an inference of knowing possession of that substance. *Id.*, 171. However, here, the amount of cocaine seized was not invisible to the naked eye, but rather, was visible and found to weigh fifty milligrams. Thus, we believe that the amount of cocaine seized by the police was sufficient to support defendant's possession conviction. Accordingly, no reversal is necessary as to this allegation of error. See also *People v Vaughn*, 200 Mich App 32, 35-38; 504 NW2d 2 (1993).

V

Lastly, defendant argues that his sentence for the habitual offender conviction violates the principle of proportionality under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). After a thorough review of the record, we find that the sentence imposed on defendant is proportionate to the offense and the offender. Notably, defendant's criminal record reflects seven prior felony convictions and four prior misdemeanor convictions. Defendant has been found guilty in the past of larceny, burglary, use of heroin, possession of stolen property, felonious assault with intent to rob while armed, uttering and publishing, retail fraud and overcharging using a financial device. Moreover, as of the date of sentencing, defendant had charges pending for felonious illegal use of credit cards and the illegal use of a financial transaction device. Accordingly, we find no abuse of the sentencing court's discretion. See *People v White*, 208 Mich App 126, 135; 527 NW2d 34 (1994).

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry