S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 30, 1996
v	No. 168556 LC No. 93-003058
RICHARD R. SMITH, Defendant-Appellant.	

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

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and was sentenced to a term of ten to twenty years of imprisonment. He appeals as of right. We affirm.

Defendant argues that the trial court erred in refusing to suppress the cocaine because the search warrant was issued without probable cause. Defendant contends that because the affidavit in support of the search warrant did not address the unnamed police informant's credibility, it failed to meet the statutory requirements for probable cause. We disagree.

According to statute, an affidavit based upon information from an unnamed person must include "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." MCL 780.653(b); MSA 28.1259(3)(b). Defendant argues that the affidavit in question was deficient because it lacked allegations from which the magistrate could conclude that the informant was reliable. We disagree. In the affidavit, Officer Foley attested that he searched the informant for drugs and money before he entered the scene of the buy, provided the informant with prerecorded funds, observed the informant enter the premises where he remained for eight minutes, searched the informant

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

immediately after he left the scene of the buy, and found a baggy containing a white substance, later identified as cocaine, and no money. Immediately after this, Officer Foley presented this information to a magistrate through the prosecutor's office in order to obtain a search warrant. From these facts, a magistrate could conclude that the informant spoke with personal knowledge and that the information provided was reliable. *People v Head*, 211 Mich App 205, 208-209, 535 NW2d 563 (1995); *People v Stumpf*, 196 Mich App 218, 222-224; 492 NW2d 795 (1992). Moreover, Officer Foley and three other officers executed the search warrant the very next day. Therefore, the trial court did not err in denying defendant's motion to suppress the cocaine.

Defendant also claims that his right against compelled self-incrimination was violated when the police questioned him about his place of residence without *Miranda*[1] warnings, and subsequently used his response as substantive evidence against him at trial. We review a *Miranda* challenge by examining the entire record and making an independent determination; however, we give deference to the trial court's findings unless they are clearly erroneous. *People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994).

After defendant had been detained, Officer Foley asked defendant for his name and address. Defendant responded with his name and his address. The address stated by defendant coincided with the address which was the subject of the search warrant and where the contraband was found. When defense counsel moved to suppress defendant's response to this question, the trial court denied this request, reasoning that Officer's Foley's question was merely a request for booking information and not interrogation warranting *Miranda* warnings. We concur. See *United States v Clark*, 982 F2d 965, 967 (CA 6, 1993) (routine gathering of biographical data for booking purposes requires no *Miranda* warnings).

Defendant next claims that he was denied his right to due process and a fair trial when the trial court erroneously instructed the jury regarding constructive possession and the presumption of innocence. We disagree.

Defendant failed to preserve this issue for appellate review because he did not object below and therefore we will not reverse the lower court's decision absent manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 731 (1993). We find no manifest injustice as both instructions were legally sound. Regarding constructive possession, the court defined constructive possession as "when a person has the power and intent to exercise dominion and control over such an item" and stated that "the prosecutor must prove . . . that the defendant knew that he was possessing cocaine." This instruction mirrors this Court's holding in *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 901 (1991). The trial court also provided the standard jury instruction on the presumption of innocence, CJI 2d 1.9, which mirrors long-standing precedent. See, e.g., *People v Goss*, 446 Mich 587, 618; 521 NW2d 312 (1994) ("It is axiomatic that in any criminal case a defendant is presumed innocent until proven guilty."); *People v Kayne*, 286 Mich 571, 576; 282 NW 248 (1938).

Defendant next claims that he was denied his due process and confrontation rights when the police allegedly lost documents and proof of residence that indicated that defendant lived at the house where the cocaine was found. We disagree. Because defendant through his counsel conceded at trial that there was no bad faith on the part of the police in failing to preserve this evidence, we conclude that defendant was not denied his right to due process. See *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988). In addition, we conclude that defendant's confrontation rights were not infringed by the absence of this evidence. Both the United States and Michigan Constitution provide that, in a criminal case, a defendant has the right to confront the "*witnesses* against him." US Const, Amend VI; Const 1963, art I, § 20.(Emphasis supplied.) The record indicates that defendant was allowed full cross-examination of the officer who testified regarding the evidence in question.

Defendant next claims that there was insufficient evidence that he knowingly possessed the cocaine. We disagree. To support a conviction for possession with intent to deliver a controlled substance, it is necessary for the prosecution to prove four elements beyond a reasonable doubt: (1) that the recovered substance was controlled, (2) the weight of the substance, (3) that defendant was not authorized to possess the substance, and (4) the defendant knowingly possessed the substance with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, amended 441 Mich 1201 (1992).

The evidence indicates that defendant admitted to living in the house where the cocaine was found, that men's clothing was found in the closet of the bedroom where the cocaine was recovered, photographs of defendant were found on the dresser in the same bedroom, defendant's vehicle was registered to defendant at that address, the other two people present in the house stated that they slept in other bedrooms, and defendant's parole card was found in the dresser in the bedroom. This evidence, viewed in the light most favorable to the prosecution, was sufficient to allow a reasonable juror to infer that defendant had constructive possession of the drugs. *Wolfe*, *supra*, 440 Mich 513; see also *Head, supra*, 211 Mich App 209-210.

Defendant next claims that he was denied the effective assistance of counsel when his trial attorney failed to move to suppress testimony regarding identification evidence found in the same room as the cocaine and in admitting during opening argument that such evidence belonged to defendant. We disagree.

In the absence of an evidentiary hearing, our review is limited to errors apparent on the current record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992). To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303, 312, 314; 521 NW2d 797 (1994).

Because it is clear from the record that the evidence belonged to defendant, defense counsel was merely acknowledging the obvious. Any motion to suppress would have been meritless. *People v*

Gist, 188 Mich App 610; 470 NW2d 475, (1991) (defense counsel is not required to bring a frivolous or meritless motion). Also, although acknowledging that the evidence belonged to defendant, defense counsel proposed that the presence of these items only supported a finding that defendant may have, *at one time*, resided at the location where the cocaine was found, but that he did not live there at the time that the cocaine was found. Since this course of action was a matter of trial strategy, we find defendant received effective assistance of counsel. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant next claims that he was denied his right a fair trial due to three instances of prosecutorial misconduct. We disagree. Defendant preserved only one of the three alleged errors.

Defendant alleges that the prosecutor improperly commented on the credibility of defense witnesses by stating that their testimony was "all over the map," and, therefore, should not be believed. We find no error. Prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecution's theory of the case. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).

Lastly, as to defendant's two unpreserved claims of prosecutorial misconduct, we conclude no manifest injustice will result from our refusal to review these claims, because a cautionary instruction was given advising the jury that counsels' statements were not evidence. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Finally, defendant argues that he is entitled to resentencing because the sentencing court failed to articulate the reasons supporting the nature and length of defendant's sentence. We disagree. The sentencing court stated that defendant's sentence was mandated by statute, and that it was sentencing defendant according to that mandate. This satisfied the articulation requirement. *People v Broden*, 428 Mich 343, 354; 408 NW2d 789 (1987).

Affirmed.

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

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).