

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY MASS,

Defendant-Appellant.

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UNPUBLISHED

June 11, 1999

No. 204951

Monroe Circuit Court

LC No. 96-027631 FH

Before: MacKenzie, P.J., and Gribbs and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). The trial court, applying a second offense habitual offender enhancement under MCL 333.7413(2); MSA 14.15(7413)(2), sentenced him to five to eight years' imprisonment. We affirm, but remand for resentencing.

Defendant first argues that the admission at trial of his statements that he used cocaine, owned the cocaine in question, and lived in the apartment where the cocaine was found violated his constitutional right against self-incrimination. See US Const, Am V, and Const 1963, art 1, § 17. This Court reviews issues of constitutional law de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

Under *Miranda v Arizona*, 384 US 436, 478; 86 S Ct 1602; 16 L Ed 2d 694 (1966), superceded by statute as applied to federal cases as stated in *United States v Dickerson*, 166 F3d 667, 691-692 (CA 4, 1999), a statement made to police during a custodial interrogation is admissible in our state courts only if the defendant was first advised of his constitutional right against self-incrimination. Here, it is undisputed that defendant was in custody and that he had not been advised of his *Miranda* rights at the time he made the challenged statements. The next inquiry, then, is whether he made the statements in response to police interrogation. *Rhode Island v Innis*, 446 US 291, 298; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

In *Innis*, *supra* at 301, the United States Supreme Court defined "interrogation" under *Miranda* as "any words or actions on the part of the police . . . that the police should know are

reasonably likely to elicit an incriminating response from the suspect” (footnotes omitted). In the instant case, one of the arresting officers, before advising defendant of his *Miranda* rights, asked defendant if he owned the cocaine that they found in his apartment, and defendant responded that he did. Defendant's statement regarding his ownership of the cocaine was in direct response to a question by the police – a question that the officer should have known was likely to elicit an incriminating response. Therefore, defendant made the challenged statement while subject to police interrogation, *id.*, and the statement should not have been admitted at trial. Defendant's statement that he used cocaine, however, was not responsive to any police questioning and was therefore admissible as a volunteered statement. See *Miranda, supra* at 478. Also admissible was defendant's statement that he lived in the apartment where the cocaine was found, since defendant made the statement at police headquarters in response to “routine booking questions,” which are not covered by *Miranda*. *Pennsylvania v Muniz*, 496 US 582, 601; 110 S Ct 2638; 110 L Ed 2d 528 (1990).

Since we have determined that defendant's cocaine ownership statement was erroneously admitted, we must next determine whether the error was harmless beyond a reasonable doubt. See *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998). If there is a reasonable possibility that the statement influenced the jury's decision to convict, the error cannot be deemed harmless. *People v Anderson (After Remand)*, 446 Mich 392, 404-407; 521 NW2d 538 (1994). We conclude that there is no reasonable possibility that the erroneously-admitted statement affected the outcome of the case. Disregarding the statement, the following evidence of defendant's guilt properly came out at trial: (1) defendant resided in the apartment where the cocaine was found; (2) the cocaine was found underneath defendant's shirt and next to defendant's wallet on a chair in the apartment; (3) defendant's wallet contained a razor blade with off-white residue on it; and (4) defendant admitted that he was a cocaine user. In light of this strong evidence of guilt, defendant's statement that he owned the cocaine could not reasonably have affected the jury's verdict, and we therefore decline to reverse defendant's conviction despite the error in admitting the statement. See *Anderson, supra* at 406.

Next, defendant argues that he did not receive effective assistance of counsel because (1) his trial attorney did not move to suppress defendant's statements that he owned the cocaine in question and that he used cocaine, and (2) the attorney introduced evidence of defendant's prior drug-related convictions at trial and emphasized this criminal history in closing arguments. Because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to mistakes that are apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of the prevailing professional norms, and (2) that but for the attorney's error or errors, a different outcome could reasonably have resulted. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Moreover, there is a presumption that the attorney's actions constituted sound trial strategy. *Id.*

We disagree that defendant's trial attorney acted unreasonably in failing to move to suppress defendant's statement that he used cocaine, since, as discussed *supra*, this statement was properly admitted at trial. We agree, however, that the attorney acted unreasonably in failing to move to suppress defendant's statement that he owned the cocaine in question. The attorney should have

realized that defendant made the statement in response to police interrogation while in police custody and that the statement was therefore inadmissible. However, because the admission of the statement did not affect the outcome of the trial, as explained *supra*, the attorney's error did not deprive defendant of the effective assistance of counsel and does not require reversal of his conviction. See *Stanaway, supra* at 687-688.

With regard to the trial attorney's elicitation of defendant's history of drug-related crime, we conclude, contrary to the prosecution's argument, that it cannot be justified as sound trial strategy. The attorney's closing argument made clear that his purpose in eliciting this information was to try to impeach the investigating officers' testimony regarding defendant's alleged confession by suggesting to the jury that an "experienced, cocaine-using criminal" such as his client would not have told the police that he owned the cocaine in question. However, if the attorney had moved to suppress the cocaine-ownership statement prior to trial and if the trial court had properly granted the motion, the attorney would not have had to portray defendant as an experienced criminal in order to counteract the believability of the statement, since the statement would not have been admitted. Conversely, if the attorney had moved to suppress the statement and if the trial court had erroneously denied the motion, the elicitation of defendant's prior drug-use history would have been justified as sound trial strategy, i.e., as a way to counteract the trial court's erroneous ruling. We decline, however, to view the elicitation as sound trial strategy when the attorney did not first move to suppress the cocaine-ownership statement. Nevertheless, we conclude that the attorney's objectively unreasonable behavior did not affect the outcome of the trial, given the strong, untainted evidence of defendant's guilt, as discussed *supra*. Accordingly, reversal is not warranted. See *Stanaway, supra* at 687-688.

Next, defendant argues that he must be resentenced because (1) after originally ordering that defendant's sentence be served concurrently with a sentence defendant was serving in an unrelated case, the trial court sua sponte and erroneously changed the sentence to run consecutively to the unrelated sentence, without conducting a resentencing hearing; (2) the trial court did not resolve a dispute regarding a statement in the presentence investigation report; (3) the trial court based defendant's sentence solely on its potential to deter other offenders; and (4) the trial court denied defendant his right of allocution at the sentencing hearing. Whether the trial court followed the proper procedure in sentencing defendant is a question of law. This Court reviews questions of law de novo. *People v Conner*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

We disagree that the trial court denied defendant his right of allocution at sentencing as guaranteed under MCR 6.425(D)(2)(c), since the court, before imposing the sentence, specifically asked if defendant had anything to say. Although defendant apparently did not verbally respond to this inquiry, the question itself satisfied the requirement of MCR 6.425(D)(2)(c). *People v Lugo*, 214 Mich App 699, 711-712; 542 NW2d 921 (1995). We also disagree that the court based defendant's sentence solely on its potential value as a deterrent to others. The record reveals that the court considered additional factors, such as defendant's status as a repeat offender, in imposing the sentence. Accordingly, the court did not act unlawfully, even though it may have heavily relied on the deterrence factor. See *People v Van Epps*, 59 Mich App 277, 286; 229 NW2d 414 (1975) (a court may base a sentence primarily on its deterrence value, as long as other factors are also considered).

The trial court did err, however, in failing to resolve the dispute regarding a statement contained in defendant's presentence investigation report. After defendant challenged the statement, the trial judge indicated that he found the dispute irrelevant because defendant's sentence – whether he factored in the challenged statement or not – would be subsumed by a longer, concurrent sentence for an unrelated offense. However, MCR 6.425 specifically states that upon a challenge to information in a presentence investigation report, a court ‘*must* make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing’ (emphasis added). Here, the court did neither of these things. Accordingly, a remand for resentencing is necessary. *People v Hoyt*, 185 Mich App 531, 536; 462 NW2d 793 (1990). On remand, if the court accepts defendant's challenge to the information or deems it irrelevant by concluding that the information will not be considered, the information shall be stricken from the presentence investigation report. See MCL 771.14(5); MSA 28.1144(5) and *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993).

The trial court committed an additional error by changing defendant's sentence to run consecutively with another, unrelated sentence without first conducting a resentencing hearing. As this Court held in *People v Thomas*, 223 Mich App 9, 11-12, 17-18; 566 NW2d 13 (1997), a conversion from concurrent to consecutive sentences requires a resentencing hearing. Because the prosecution admits that the trial court erred in ordering defendant's sentence to run consecutively with the unrelated sentence and agrees that the sentences should instead run concurrently, we are authorized under *People v Alexander*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 207444, issued 4/2/99), slip op, p 6, to simply order that the judgment of sentence be amended to reflect concurrent sentences. We decline to do so, however, given that the dispute surrounding the presentence investigation report requires a full resentencing hearing nonetheless and given the prosecution's intimation that defendant's sentence should run consecutively to two additional unrelated sentences. On resentencing, the trial court shall determine whether defendant's sentence should run concurrently with or consecutively to defendant's three unrelated sentences and shall change the judgment of sentence accordingly.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie

/s/ Roman S. Gribbs

/s/ Kurtis T. Wilder