STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2013
v	No. 309724 Saginaw Circuit Court
JESSE JAMES WALKER, Defendant-Appellant.	LC No. 10-035185-FH

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant and two female friends were drinking alcohol in a stationary vehicle with the motor running. Michigan State Police troopers stopped beside the car and spoke to the occupants. During the encounter, a .22 caliber revolver was discovered under defendant's seat. Without being questioned, defendant blurted out "don't arrest my sister; that's mine, not hers." Defendant was placed into the police car, and after an officer indicated that he did not know what charge defendant would face because he did not even know the caliber of the gun, defendant said "man, it's a .22. I only got it because I got shot." Defendant's third statement occurred at the police station after he had signed a form indicating he had been read his *Miranda*[1] rights. The interview was calm and very peaceful, with no raised voices. Defendant explained that he had purchased the gun for protection. Defendant refused to sign a waiver of his *Miranda* rights; however, he never asserted the right to be silent or to have an attorney present. At trial defendant testified that he lied about owning the gun because he wanted to protect the other occupants of the vehicle.

Defendant argues that trial counsel rendered ineffective assistance by failing to move to suppress the statements. We disagree.

The right to counsel guaranteed by the United States and Michigan Constitutions, US

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).

Const, Am VI; Const 1963, art 1, § 20, is the right to the effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that defense counsel was deficient and that the deficiency affected the outcome of the proceedings. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008).

Here, it is apparent that the statements at the scene and in the police car could not have been suppressed. Neither the statement at the scene nor the statement in the police car was made in response to police interrogation. *Miranda* warnings are only required when a person is subjected to a custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Moreover, the statements at the police station were made after defendant waived his *Miranda* rights by failing to assert them. Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *People v Gipson*, 287 Mich App 261, 264; 787 NW2d 126 (2010). The record shows that defendant understood his rights, but that he chose to speak to the police. Defendant argues that he was in pain and taking 15 or 16 pills. However, the police did not find any pills on defendant, and defendant only testified about taking water pills. On appeal, defendant was unable to point to anything other than the alleged pain medications to show his waiver was invalid.[2]

Defense counsel is not required to advocate a meritless position. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). On these facts there is no indication that defense counsel would have been successful in suppressing the statements. Defense counsel did not render ineffective assistance by failing to move to suppress the statements.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Michael J. Kelly

[2] Moreover, defendant's statements were voluntary. In determining voluntariness, the court should consider all the circumstances, including: the duration of the defendant's detention and questioning; the age, education, intelligence and experience of the defendant; whether there was unnecessary delay of arraignment; the defendant's mental and physical state; whether the defendant was threatened or abused; and any promises of leniency. *Gipson*, 287 Mich App at 265. No single factor is determinative. *People v Sexton (After Remand)*, 461 Mich 746, 753; 609 NW2d 822 (2000). Here, the interview was calm and very peaceful with no raised voices. Defendant did not appear fatigued, hungry, or thirsty. He was read his *Miranda* rights. Admittedly, the interview took place in a small room with three chairs, but that fact, by itself, does not make a statement involuntary.