STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN CAREY BLEVINS, III,

Defendant-Appellant.

UNPUBLISHED
May 21, 1996

No. 171902
LC No. 93-049073-FH

Before: Jansen, P.J., and Hoekstra and D. Langford-Morris,* JJ.

PER CURIAM.

Following a jury trial in the Genesee Circuit Court, defendant was convicted of receiving and concealing stolen property in excess of $100 (RCSP), MCL 750.535a; MSA 28.803(1), receiving and concealing a stolen firearm, MCL 750.535b; MSA 28.803(2), and possession of a short-barreled shotgun, MCL 750.224b; MSA 28.421(2). The trial court subsequently found him guilty of fourth habitual offense, MCL 769.12; MSA 28.1084. Defendant was thereafter sentenced, as a fourth habitual offender, to concurrent terms of life imprisonment (RCSP), twenty to forty years' imprisonment (receiving and concealing a stolen firearm), and 7-1/2 to 15 years' imprisonment (possession of a short-barreled shotgun). Defendant appeals as of right. We affirm his convictions, but remand for resentencing.

Defendant raises three issues on appeal. He first argues that the search of his home was improper and that the evidence seized pursuant to that search should have been suppressed. He also argues that a police officer improperly commented on his post-arrest verbal conduct which violated his Fifth Amendment right to not incriminate himself. Last, defendant contends that he is entitled to be resentenced because the trial court failed to prepare the sentencing guidelines for the underlying convictions and that his sentence of life violates the principle of proportionality.

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

Defendant first argues that the trial court clearly erred in denying his motion to suppress evidence seized during an allegedly unlawful search of his house. The trial court ruled that the search was lawful because defendant consented to it.

A trial court's ruling at a suppression hearing is reviewed under the clearly erroneous standard of review. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). A ruling is clearly erroneous if, upon review of the record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*, p 449. Resolution of facts about which there is conflicting testimony is a decision to be made initially by the trial court. *Id.*, p 448. The trial court's resolution of a factual issue is entitled to deference, especially where a factual dispute involves the credibility of the witnesses. *Id.* However, if the claimed error involves the deprivation of a constitutional right, resolution of the issue is not controlled by the trial court's factual determinations. *Id.*, p 449.

An established exception to the warrant requirement includes consent. *In re Forfeiture of $176,598*, 443 Mich 261, 266; 505 NW2d 201 (1993). Although this exception does not require a warrant, it still requires reasonableness and probable cause. *Id.* The consent exception permits a search and seizure when the consent is unequivocal and specific. *People v Jordan*, 187 Mich App 582, 587; 468 NW2d 294 (1991). The validity of a consent depends on the totality of the circumstances and the prosecutor has the burden of proving that the person consenting was authorized to do so and did so freely. *Id.*

In this case, three police officers testified at the suppression hearing that defendant consented to the search of his house. The prosecutor also introduced an exhibit which was a consent to search form signed by defendant. Defendant, on the other hand, testified that he did not consent to the search of his home and that he did not understand the consent to search form that he signed. This case clearly involved a credibility determination for the trial court. The trial court's resolution of the factual determination is entitled to deference and, on review of the record, we are not left with a definite and firm conviction that a mistake has been made.

Accordingly, the trial court's decision at the suppression hearing was not clearly erroneous.

Defendant next argues that he is entitled to a new trial because the police improperly commented on his post-arrest statements and conduct where he had not been advised of his rights pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Defendant did not object to the testimony below, therefore, we will consider the issue only to determine whether it could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

On redirect examination, the prosecutor asked a police officer about defendant's behavior during the search of defendant's house. The police officer testified that they were looking at the marijuana and the officers commented that some of the items in the house could be stolen. At that point, defendant allegedly became uncooperative with the police. Defendant now contends that the police

officer's testimony in this regard was improper because defendant had not been given his *Miranda* warnings and the officer's testimony violated his right against self-incrimination.

There is no error here. The police officers were not required to give defendant his *Miranda* rights at that time because defendant was not subjected to a custodial interrogation. See *People v Anderson,* 209 Mich App 527, 532; 531 NW2d 780 (1995). Because there was no custodial interrogation, *Miranda* warnings did not have to be given. Since *Miranda* did not apply, the police officer's testimony concerning defendant's conduct during the search was not impermissible. Accordingly, defendant was not denied a fair trial on this basis.

Finally, defendant argues that he is entitled to resentencing because the trial court failed to prepare sentencing guidelines for the underlying convictions. We agree.

Defendant was sentenced as a fourth habitual offender. Although the sentencing guidelines do not apply to habitual offender sentences, the trial court must compute the guidelines for the underlying offense. *People v Kerperien,* ___ Mich App ___; ___ NW2d ___ (Docket no. 148785, issued 3/8/96); *People v Elliott,* 215 Mich App 259, 261; 544 NW2d 748 (1996); *People v Cutchall,* 200 Mich App 396, 409; 504 NW2d 666 (1993); *People v Finstrom,* 186 Mich App 342, 345; 463 NW2d 272 (1990); see also Michigan Sentencing Guidelines (2d ed), p 1, B, 3. Accordingly, we vacate defendant's sentences and remand for the trial court to compute the sentencing guidelines for the underlying conviction of receiving and concealing stolen property in excess of $100 and for resentencing. We offer no opinion on the proportionality of defendant's sentences and we deny defendant's request to be resentenced before a different sentencing judge.

Defendant's convictions are affirmed. We remand for resentencing in accordance with this opinion. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Denise Langford-Morris