

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON GREGORY JOHNSON, a/k/a
BRANDON GREGORY ROBINSON,

Defendant-Appellant.

UNPUBLISHED

May 10, 2007

No. 268413

Wayne Circuit Court

LC No. 04-011400-01

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, resisting or obstructing a police officer, MCL 750.81d(1), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court orally announced concurrent sentences of five months to five years for the felon-in-possession conviction and five months to two years for the resisting or obstructing conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. However, the written judgment of sentence reflects sentences of five months to two years for the felon-in-possession conviction and five months to five years for the resisting or obstructing conviction, together with the two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence.

Defendant first argues that his right against unconstitutional searches and seizures was violated when the police ordered him into his vehicle, arrested him, and searched his vehicle based on an unsubstantiated and uncorroborated anonymous tip. Defendant concedes that he did not challenge the validity of the police stop, the seizure of the gun, or his arrest in the trial court. Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The United States and Michigan Constitutions, US Const, Am IV; Const 1963, art 1, §11, guarantee the right of persons to be secure against unreasonable searches and seizures. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). Under certain circumstances, however, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even though there is no probable cause to support an arrest. *Id.* A brief detention does not violate the Fourth Amendment if the officer has a reasonable articulable

suspicion that criminal activity is afoot. *Id.* Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, looking at the totality of the facts and circumstances. *Id.*

In this case, the police received a dispatch to a specific area due to information that shots had been fired from a yellow vehicle. Upon arriving at the reported location, the police observed a yellow vehicle matching the reported description sitting across from the reported location, in front of an abandoned house. As an officer approached defendant's vehicle, defendant exited the vehicle and repeatedly screamed, "I've done nothing wrong." Defendant's conduct properly could be considered along with the other facts available to the police in evaluating the justification for defendant's detention. *People v Lewis*, 251 Mich App 58, 74-75; 649 NW2d 792 (2002). The totality of the circumstances were sufficient to support a reasonable suspicion that defendant may have been involved in the reported shooting to permit the police to briefly detain defendant to investigate the situation.

The constitutional validity of defendant's arrest depends on whether probable cause to arrest existed at the moment the arrest was made. *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed. *People v MacLeod*, 254 Mich App 222, 228; 656 NW2d 844 (2002).

Here, the record discloses that upon arriving at defendant's vehicle, the police officer observed a firearm lying on the car seat, in plain view. Because the officer was lawfully in the position to have that view as part of an investigatory stop, the gun properly could be seized under the plain view exception to the warrant requirement. *People v Galloway*, 259 Mich App 634, 639; 675 NW2d 883 (2003). Defendant was not arrested until after the police discovered the gun in his vehicle. The discovery of the gun, combined with defendant's presence in a vehicle that matched the description of a vehicle from which shots reportedly were fired, at the location of the reported shooting, provided probable cause for defendant's arrest.

Defendant nonetheless maintains that his detention was unlawful because it was based on an unsubstantiated and unreliable anonymous report of a shooting. See e.g., *Illinois v Gates*, 462 US 213, 242; 103 S Ct 2317; 76 L Ed 2d 527 (1983), and *People v Walker*, 385 Mich 565; 189 NW2d 234 (1971), overruled on other grounds in *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990). However, because defendant did not raise this issue below, there was no need to develop the record regarding the circumstances of the police call, and that information is not disclosed in the record. Thus, there is no indication whether the call came from an anonymous caller or an identified citizen. Absent such information, defendant has not established a plain error affecting his substantial rights.

Having found no basis for concluding that defendant's Fourth Amendment rights were violated, we also reject defendant's argument that defense counsel was ineffective for failing to pursue this issue in the trial court. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel is not required to advocate a meritless position. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant also argues that his sentence of five months to five years for resisting or obstructing a police officer is invalid, because it exceeds statutory limits. MCL 750.81d(1). It is apparent that there is a clerical error in the judgment of sentence, and that the sentences that were announced for the resisting or obstructing conviction and the felon-in-possession conviction were transposed on the judgment of sentence. We therefore remand this case for correction of the judgment of sentence to reflect sentences of five months to five years for the felon-in-possession conviction and five months to two years for the resisting or obstructing conviction, consistent with the sentences announced by the trial court at sentencing. MCR 7.216(A)(4). Resentencing is not required.

Defendant raises several issues in a supplemental pro se brief, none of which were preserved below. Accordingly, we review the issues for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

We have already addressed and rejected defendant's arguments regarding the constitutional validity of the police stop and defendant's arrest.

Defendant's arguments concerning the confrontation clause, and the evidentiary issue concerning the 911 tape, are deemed waived due to inadequate briefing. "A party may not announce a position on appeal and leave it to this Court to unravel or elaborate his claims." *People v Hicks*, 259 Mich App 518, 532; 675 NW2d 599 (2003). In any event, defendant's arguments are directed at whether the initial report of shots fired was accurate. Because defendant was not charged with any offense involving the discharge of a firearm, but rather was only charged with offenses committed in the presence of the police officers that arrived later, he has not shown a plain error affecting his substantial rights.

Defendant also argues that the prosecutor had an impermissible conflict of interest because he previously represented defendant in another criminal matter. Contrary to what defendant argues, there was no apparent violation of Rule 1.9 of the Rules of Professional Conduct, because there is no indication that (1) the prior representation involved the instant matter; (2) the prosecutor used information relating to that prior representation to defendant's disadvantage; or (3) the prosecutor revealed information relating to her prior representation of defendant. Because a violation of Rule 1.9 is not apparent, defense counsel was not ineffective for failing to move to disqualify the prosecutor under this rule. *Torres (On Remand), supra* at 425.

Finally, defendant contends that the charge of felon in possession cannot serve as the basis for a felony firearm charge. This issue was squarely addressed in *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2003), where our Supreme Court noted that "because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b." *Id.* at 452. The Court thus concluded that dual convictions for both felony-firearm and felon in possession of a firearm do not violate double jeopardy protections. *Id.* See also, *People v Dillard*, 246 Mich App 163; 631 NW2d 755 (2001). Based on *Calloway, supra*, defendant's argument on this issue is without merit.

Affirmed and remanded for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto