

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RASHEEN KEYON BROWN,

Defendant-Appellant.

UNPUBLISHED

June 3, 2008

No. 270877

Oakland Circuit Court

LC No. 2004-199771-FH

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of 50 or more but less than 450 grams of cocaine, MCL 333.7403(2)(a)(iii), and resisting or obstructing a police officer, MCL 750.81d(1). He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 10 to 40 years for the cocaine conviction and two to four years for the resisting or obstructing conviction. We affirm.

I. Appellate Counsel's Issues

A. Effective Assistance of Counsel

Although trial counsel filed a motion to suppress the evidence, which the trial court denied, defendant argues that counsel failed to effectively present and argue the motion in three different respects.

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To justify reversal under either the federal or state constitution, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, the defendant must show that counsel's performance was deficient, which requires a showing that counsel made an error so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 600. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Defendant first argues that counsel was ineffective for failing to argue that the pat-down search was not based on an articulated fear that defendant was armed with a weapon. We disagree.

A police officer may perform a limited pat-down search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons. *Terry v Ohio*, 392 US 1, 27; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001). “The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety . . . was in danger.” *Terry, supra* at 27. In order to demonstrate reasonable suspicion, an officer must have “specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.” *Id.* at 21. A court must consider the totality of the circumstances in determining whether a pat-down search is constitutional. *People v Champion*, 452 Mich 92, 111-112; 549 NW2d 849 (1996).

Contrary to what defendant asserts, the record discloses that defense counsel challenged the validity of the pat-down search by attacking the officer’s testimony that defendant’s furtive gestures and nervous demeanor caused him to become concerned that defendant might be armed with a weapon. Counsel argued that a videotape of the traffic stop contradicted the officer’s claim that defendant was making furtive movements, and counsel also raised other points that defendant now argues should have been made, such as the fact that the officer did not radio for assistance. Further, even if counsel had focused more on this issue, there is no reasonable probability of a different result.

The officer testified that as he approached defendant’s vehicle, he observed defendant make several furtive gestures on the right side of his body, toward the center console area of his vehicle. When the officer asked defendant for his driver’s license, defendant appeared unusually nervous and shaken, stumbled his words, and was sweating from his head. Based on defendant’s conduct and demeanor, the officer became concerned that defendant might be armed with a weapon, so he asked him to exit the vehicle so the officer could conduct a pat-down search for any weapons.

A defendant’s furtive gestures, or unusual or extreme nervousness lasting throughout a traffic stop, may justify a pat-down search for an officer’s safety under the totality of the circumstances. See *People v Lewis*, 251 Mich App 58, 72; 649 NW2d 792 (2002); *People v Balog*, 56 Mich App 624, 627; 224 NW2d 725 (1974). The trial court determined that there was no reason to doubt the credibility of the officer’s testimony regarding defendant’s conduct. Because the officer provided specific and articulable facts for his suspicion that defendant might be armed, and because the totality of the circumstances regarding defendant’s unusually nervous demeanor and repeated movements toward the center console area provided a reasonable basis for the officer’s suspicion, a pat-down search to confirm or dispel that suspicion was permitted. Accordingly, even if defense counsel had argued this issue with more force, there is no reasonable probability of a different result.

Second, defendant asserts that defense counsel ineffectively argued the suppression issue by arguing that defendant was being arrested, “rather than arguing that this could not have been a search incident to an arrest.” Contrary to what defendant asserts, counsel never suggested that the pat-down search could be justified as a search incident to an arrest. Although counsel

asserted that the facts supported a conclusion that defendant was “under arrest already” when the officer conducted the pat-down search, counsel never argued that any arrest was legal, thereby permitting a search incident to an arrest. On the contrary, counsel argued that the pat-down search, although effectively amounting to an arrest, was illegal because it was not based on “any true reasonable suspicion.” There was no basis for concluding from counsel’s argument that the pat-down search was a permissible search incident to an arrest. Further, any concern that counsel’s argument may have misled the trial court into believing that the pat-down search could be justified as a search incident to an arrest is unfounded, because the trial court did not find that the pat-down search was permissible on this basis, or that defendant was under arrest when the pat-down search was conducted.

Third, defendant asserts that counsel was ineffective for failing to challenge the validity of the pat-down search at the preliminary examination. However, the purpose of the preliminary examination was to determine if there was probable cause to believe that defendant committed a crime. Further, defendant was not prejudiced, because counsel’s failure to raise the suppression issue at the preliminary examination did not preclude the issue from being raised later in an appropriate motion to suppress, and counsel later filed a motion to suppress, an evidentiary hearing was conducted, and the issue was decided by the trial court.

For these reasons, defendant has not established that counsel was ineffective in his presentation and argument of the suppression motion.

B. Pretext Stop

Defendant argues that the evidence of the cocaine should have been suppressed because the officer’s purported reason for stopping his vehicle, i.e., that defendant ran a stop sign, was merely a pretext to search for evidence of another crime. Because defendant did not move to suppress the evidence on this ground below, the issue is not preserved. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A traffic stop may not be used as a pretext to search for evidence of a crime. *People v Haney*, 192 Mich App 207, 209; 480 NW2d 322 (1991). When the police lack the reasonable suspicion necessary to support a stop and use a minor violation to stop and search a person for evidence of an unrelated serious crime, the stop is a mere pretext. *Id.* However, so long as the officer has probable cause to believe that a traffic violation occurred, the resulting traffic stop is not unlawful and does not violate the Fourth Amendment. *People v Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002).

Here, there is no indication that the police stopped defendant because they suspected his involvement in another crime. At the suppression hearing, the officer testified that he stopped defendant’s vehicle because he observed defendant run a stop sign, and the trial court determined that the officer’s testimony was credible. Contrary to what defendant asserts, the police videotape does not establish that defendant did not run a stop sign. For these reasons, there is no basis for concluding that this was a pretext stop and, therefore, no plain error.

C. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his resisting or obstructing conviction, because there was no evidence that he was in the process of being arrested when he resisted and fled.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Defendant was convicted of violating MCL 750.81d(1), which provides:

Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.

Contrary to what defendant argues, the statute does not require an arrest. Rather, the statute is violated if an individual resists or obstructs a person who the individual knows or has reason to know is performing his duties.

In this case, the officer testified that, while conducting a pat-down search, defendant grabbed the officer's hand, turned around and fought with the officer, and then got up and ran off. This evidence was sufficient to support defendant's conviction for resisting or obstructing a police officer.

II. Defendant's Standard 4 Brief.

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, none of which have merit.

A. Effective Assistance of Counsel

In *People v Ventura*, 262 Mich App 370, 375-376; 686 NW2d 748 (2004), this Court determined that resisting unlawful police conduct is not a defense to a prosecution under MCL 750.81d. Defendant argues that *Ventura* was wrongly decided. Additionally, he argues that defense counsel was ineffective for failing to challenge the constitutionality of the statute, as interpreted in *Ventura*. We disagree.

After examining the statutory language, this Court in *Ventura, supra* at 377, concluded:

When prosecuting a charge drawn upon MCL 750.81d, we adopt the modern rule that a person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal under the circumstances of the occasion.

Assaulting, resisting, or obstructing an officer while he is performing his duty must be avoided for the safety of all society, regardless of the legality of the arrest. It is the immediate harm that can be attendant to an arrest when a subject engages in assaultive, resistant, or obstructive behavior that the Legislature seeks to eradicate. Solid mechanisms are in place to guarantee the safety of those arrested, and, to correct any injustices that may result from an illegal arrest. The statute at issue, MCL 750.81d, now serves as another mechanism to reduce the likelihood and magnitude of the potential dangers inherent in an arrest situation, thereby dually protecting both the general public and its police officers.

Under MCR 7.215(J)(1), we are required to follow this Court's decision in *Ventura*. In any event, we are not convinced that *Ventura* was wrongly decided. Further, given this Court's decision in *Ventura*, defense counsel was not ineffective for failing to defend the resisting or obstructing charge at trial on the ground that either the initial traffic stop or the subsequent search of defendant was unlawful.

Defendant further argues, however, that as interpreted in *Ventura*, the statute is unconstitutional because it violates his constitutional rights against unreasonable searches and seizures, and against self-incrimination. We disagree.

As our Supreme Court explained in *Phillips v Mirac, Inc*, 470 Mich 415, 422-423; 685 NW2d 174 (2004):

Statutes are presumed constitutional. We exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict. Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity. [Citations and internal quotations omitted.]

Further, a statute is not unconstitutional merely because it is undesirable, unfair, or unjust, *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000), or because it might be improperly administered, *People v Kirby*, 440 Mich 485, 493; 487 NW2d 404 (1992). Such arguments should be addressed to the Legislature. *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 462; 639 NW2d 332 (2001).

Although defendant contends that MCL 750.81d(1) violates his protections under the Fourth Amendment, the statute does not authorize conduct prohibited by the Fourth Amendment. It merely prohibits an individual from resisting or obstructing a police officer in the performance of his duties. Further, contrary to what defendant argues, the statute does not foreclose challenges to the legality of a police officer's conduct in an appropriate forum. As this Court observed in *Ventura, supra* at 377, “[s]olid mechanisms are in place to guarantee the safety of those arrested, and, to correct any injustices that may result from an illegal arrest.” Indeed,

defendant was permitted to challenge the legality of his traffic stop and subsequent search in this case. We therefore reject defendant's constitutional challenge.¹

Because defense counsel is not required to make futile motions or advance novel legal arguments, counsel was not ineffective for failing to challenge the constitutionality of MCL 750.81d(1). *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997); *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996).

We also reject defendant's remaining claims of ineffective assistance of counsel. We find no merit to defendant's claim that defense counsel was ineffective for failing to object to the police officer's testimony that defendant ran a stop sign and made furtive gestures on the ground that it was perjured. There is no basis in the record for concluding that the officer committed perjury with regard to these matters. Further, contrary to what defendant argues, the record discloses that defense counsel used the police videotape to attempt to discredit portions of the witnesses' testimony. Lastly, defense counsel was not ineffective for failing to bring a pretrial motion in limine. Although the trial court mentioned that defendant had not challenged the admissibility of hearsay evidence in a motion in limine, the court did not prohibit defendant from raising an appropriate hearsay objection at trial. Therefore, defendant was not prejudiced by counsel's failure to file a motion in limine.

B. Prosecutorial Misconduct

Defendant argues that the prosecutor engaged in misconduct by knowingly presenting false testimony. Although a prosecutor may not knowingly use false testimony to obtain a conviction, *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001), there is no basis for concluding that the prosecutor knowingly used false testimony in this case. Contrary to what defendant argues, the videotape does not establish that the officer who stopped defendant committed perjury. Further, the prosecutor did not improperly mischaracterize the videotape evidence, but rather properly argued reasonable inferences from that evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

C. Judicial Bias

Defendant lastly argues that the trial court was biased against him. Because defendant never raised this issue below, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

A party claiming bias bears a heavy burden of overcoming the presumption of judicial impartiality. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992). Defendant argues that the trial court was biased because it permitted the prosecutor to knowingly use perjured testimony to obtain a conviction. As previously indicated, however, the record does

¹ Although defendant also asserts that the statute violates his constitutional right against self-incrimination, US Const, Am V, he does not develop this argument and, therefore, has waived that claim of error. *People v Hicks*, 259 Mich App 518, 532; 675 NW2d 599 (2003).

not support defendant's claim that the prosecutor knowingly used perjured testimony. Defendant also contends that the trial court was biased because it refused to disclose why it removed defendant's appointed attorney. However, the record discloses that the court explained to defendant that it granted counsel's motion to withdraw due to a breakdown in the attorney-client relationship. As further support for his argument, defendant points out that the trial court denied his posttrial motion. However, judicial rulings do not constitute a valid basis for a claim of bias, unless the decision displays a deep-seated favoritism or antagonism that would make fair judgment impossible. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). There has been no showing of deep-seated favoritism here.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly