

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

TORINO DATRELL ATKINSON,

Defendant-Appellant.

UNPUBLISHED

March 19, 2009

No. 280885

Kalamazoo Circuit Court

LC No. 06-001784-FH

Before: Cavanagh, P.J., and Fort Hood and Davis JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving or concealing a stolen firearm, MCL 750.535b, carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 2 to 20 years and 2 to 10 years for the receiving or concealing a stolen firearm and felon in possession of a firearm convictions, respectively, to be served consecutive to concurrent prison terms of 2 to 10 years and 2 years for the CCW and felony-firearm convictions, respectively. Defendant appeals as of right. We affirm.

In July 2006, a plain-clothes police officer heard loud music coming from a parked vehicle in violation of the City of Kalamazoo noise ordinance, which is a misdemeanor. Defendant was in the driver's seat and another man was in the passenger's seat. The plain-clothes officer summoned some uniformed officers who then investigated the incident. When an officer asked for the vehicle's registration, defendant admitted he was driving on a suspended license. Also, the odor of marijuana was detected coming from inside the car and marijuana was discovered during a subsequent consensual search of the passenger. After placing both defendant and the passenger under arrest, the police performed a search of the vehicle and discovered a .45 caliber Glock handgun in a pocket behind the passenger seat. It was determined, based on the serial number of the gun, that it had been stolen during a robbery approximately one month earlier.

Defendant first argues on appeal that his trial counsel was ineffective for failing to file a motion to suppress the evidence obtained by the police officers pursuant to their stop and search of his vehicle. Defendant claims the stop and search of the vehicle was illegal.

Defendant did not move for an evidentiary hearing or a new trial based on ineffective assistance of counsel in the trial court. Therefore, this Court's review is limited to errors

apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The determination as to whether a defendant 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). Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo. *Id.*

“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). “[T]o overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.* at 663-664. Here, defendant did not show that trial counsel was ineffective for failing to file a motion to suppress properly obtained evidence.

To effectuate a valid traffic stop, a police officer must have an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law. *People v Williams*, 236 Mich App 610, 612; 601 NW2d 138 (1999). Accordingly, a police officer may effectuate a vehicle stop if probable cause exists to believe a crime has been committed or criminal activity is taking place. *People v Estabrooks*, 175 Mich App 532, 438 NW2d 327 (1989). “[A]s long as the police are doing no more than they are legally permitted and objectively authorized to do, a stop or arrest is constitutional. *People v Haney*, 192 Mich App 207, 210; 480 NW2d 322 (1991).

In this case, defendant was stopped for a proper purpose. The officers had, at minimum, reasonable suspicion to believe defendant was violating the City of Kalamazoo misdemeanor noise ordinance. The plain-clothes officer was sitting in an unmarked vehicle across a four-lane road from defendant’s vehicle and could hear loud, booming bass coming from the vehicle. She observed defendant inside the car for several minutes. Accordingly, there was probable cause to believe defendant was committing a noise violation, which was a legitimate reason for the stop.

When police officers approached the vehicle, defendant informed them that his license was suspended. A police officer also detected the odor of marijuana emanating from the vehicle. During a consensual search of the passenger, the police discovered marijuana on his person. Both defendant and the passenger were placed under arrest. Having determined defendant violated the noise ordinance, and upon discovering the marijuana and that defendant was driving with a suspended license, any further search of the vehicle was proper as being incident to the lawful arrests and therefore consistent with the Fourth Amendment. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

For the above reasons, defendant’s trial counsel was not ineffective for failing to move to suppress the evidence seized during the search because any such motion would have been fruitless, and counsel cannot be faulted for not asserting a meritless position. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant next argues there was insufficient evidence to convict him of the conviction offenses. This Court reviews sufficiency of the evidence challenges in a criminal trial de novo.

People v Cox, 268 Mich App 440, 443; 709 NW2d 152 (2005). In reviewing the sufficiency of the evidence, this Court determines whether the evidence, when viewed in the light most favorable to the prosecution, would warrant a trier of fact in finding that all the elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). “Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime.” *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). In determining whether sufficient evidence had been presented to support a conviction, “this Court must not interfere with the jury’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000).

The elements of felon in possession of a firearm are: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a felony, and (3) the defendant’s right to possess a firearm has not yet been restored. MCL 750.224f; *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004).

In this case, the parties stipulated that defendant had been previously convicted of a felony and that less than five years had passed. The only element in dispute was whether defendant possessed a firearm. A defendant “possesses” a gun for purposes of the felon-in-possession statute when that gun is readily accessible and available to him. *People v Burgenmeyer*, 461 Mich 431, 436-440; 606 NW2d 645 (2000).

Here, the gun was located in defendant’s vehicle and he admitted knowing the gun was in the car. Defendant was also aware of allegations that the gun had been previously stolen from a man during a robbery. Accordingly, the jury was warranted in finding that all the elements of the crime were proven beyond a reasonable doubt.

The elements of carrying a concealed weapon are: (1) the weapon was present in a vehicle operated or occupied by the defendant; (2) the defendant was aware that the weapon was present in the vehicle; and (3) the defendant was carrying the weapon. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). The element of “carrying” can be satisfied if the defendant was aware of the weapon’s location and was in control of the vehicle. *Id.* As with the felon in possession of a firearm charge, the evidence established that a gun was located in defendant’s vehicle. Also, defendant’s statements to the detective revealed that he knew the gun was in the vehicle. Defendant’s statement that he “sneaked” the gun from the person who allegedly took it from the true owner supports the jury’s conclusion that defendant obtained the gun, put it in the vehicle he was driving and, therefore, took part in carrying the gun in the vehicle. Viewed in the light most favorable to the prosecution, the reasonable inferences from the evidence warranted the jury’s finding of guilt beyond a reasonable doubt.

The elements of receiving or concealing a stolen firearm are: (1) the defendant concealed a stolen firearm, and (2) the defendant knew the firearm was stolen at the time he concealed it. MCL 750.535b. Here, the evidence established that the gun had been stolen and that defendant was aware the gun had been stolen. Defendant’s comment that “I had to sneak it from the guy who actually stole the gun” proved his knowledge that the gun was stolen. As noted, evidence also showed that defendant possessed the gun. Viewed in the light most favorable to the prosecution, the reasonable inferences from the evidence warranted the jury’s finding of guilt beyond a reasonable doubt.

To support a felony-firearm conviction, the prosecution was required to prove that defendant carried or possessed a firearm while he was committing or attempting to commit a felony. MCL 750.227b; *Burgenmeyer, supra* at 438. Possession may be actual or constructive, and it may be proved by circumstantial evidence. *Burgenmeyer, supra* at 437. Constructive possession exists if there is proximity to the weapon together with indicia of control. *Id.* at 438. “[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant.” *Id.*, quoting *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989).

The felony-firearm charge in this case is related to the other crimes of felon in possession of a firearm, and receiving or concealing a stolen firearm.¹ The evidence established that defendant possessed a gun and that he was guilty of the crimes of felon in possession of a firearm and receiving or concealing a stolen firearm. Viewed in the light most favorable to the prosecution, the reasonable inferences from the evidence warranted the jury’s finding of guilt beyond a reasonable doubt.

Defendant further argues that the trial court improperly scored Offense Variable 16 (“OV 16”) and, thus, that he should be resentenced. Because defendant failed to preserve his challenge to the scoring of the sentencing guidelines, this Court’s review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The prosecutor does not dispute that the trial court erred in scoring OV 16; however, as the prosecutor noted, the error had no effect on defendant’s guideline score. Defendant was scored 1 point for OV 16, although his score should have been zero points. Because defendant was convicted of all class E offenses, he fell within OV level 1 (0-9 points) with a minimum sentence range of 9-46 months. MCL 777.66. Even with the correct OV score of zero points, defendant still fell within the same level. Accordingly, defendant’s guideline range remains the same, 9-46 months. Resentencing is not required where the guidelines are incorrectly scored, but the guideline range does not change with the correct scoring. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Defendant has also failed to demonstrate ineffective assistance of counsel because he has not shown that but for the scoring error the result of the proceeding would have been different. *Id.* at 83. Defendant was sentenced within the correct sentencing guideline range and is not entitled to relief.

Last, defendant argues that his sentences violate the federal and state constitutions for various reasons. This Court reviews an unpreserved sentencing challenge and constitutional claim for plain error that affects the defendant’s substantial rights. *Carines, supra* at 774.

¹ Convictions are permissible both for receiving or concealing a stolen firearm and felony-firearm, the receiving or concealing offense not being excluded from felony-firearm by the statute. When the felony-firearm statute does not exclude an offense from its operation, it is thus included. *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998).

Defendant argues that his sentences constitute cruel and unusual punishment because they are excessive. However, a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel and unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Here, the sentences were within the guidelines range and therefore are not cruel and unusual.

Defendant further asserts that the trial court failed to articulate the reasons why the maximum terms of the sentences for receiving or concealing a stolen firearm, CCW, and felon in possession of a firearm were set at 20, 10, and 10 years, respectively. However, defendant could have been sentenced to a maximum of life or a lesser term of years. MCL 769.12(1)(a). Defendant also argues that the trial court failed to state why the sentences were proportionate or assess his rehabilitative potential; therefore, he claims the trial court did not have accurate information that would have caused it to depart downward from the guidelines range. A court's articulation of reasons for a sentence is sufficient if the court relies on the sentencing guidelines. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). Hence, this claim is without merit.

Here, the trial court referenced the presentence investigation report and recited the guidelines range before sentencing defendant. The court commented on defendant's criminal history and the letters of support from defendant's family, friends and coworkers. Nothing more was necessary. Moreover, that an assessment of defendant's rehabilitative potential might have provided more complete information does not render the information relied upon inaccurate. Since there was no scoring error or inaccurate information, this Court must affirm defendant's sentences.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis