

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERT TERRENCE BURNS,

Defendant-Appellant.

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UNPUBLISHED

February 6, 2007

No. 263393

Kent Circuit Court

LC No. 04-008220-FH

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v). The trial court sentenced defendant, as an habitual offender, fourth offense, MCL 769.12, to 3-1/2 to 50 years' imprisonment for his possession with intent to deliver cocaine conviction, and 2-1/2 to 15 years' imprisonment for his possession of heroin conviction. We affirm.

I

According to trial testimony, on May 26, 2004, police officers Gregory Bauer and Aaron Rossin were on patrol in a high crime area when they observed a car, driven by defendant, directly ahead of them. It appeared, through the car's tinted rear window, that defendant's passenger was not wearing a safety belt. Accordingly, the officers activated their vehicle's overhead lights, initiating a traffic stop for the possible safety belt violation. Defendant continued to drive an additional .25 miles before stopping his car. During the time defendant continued to drive, he appeared to unbuckle his seat belt and lean over for several seconds before sitting upright and refastening his seatbelt.

When the officers approached defendant's car after stopping, they observed that defendant's passenger was, in fact, wearing his safety belt, but that the shoulder strap was improperly tucked under his arm. In response to Bauer's questions, defendant denied removing his own safety belt, and said that he did not use drugs and was not a drug dealer. Upon Bauer's request, defendant exited his car and consented to be searched. Bauer recovered a plastic bag containing a white chunky substance, which he believed to be crack cocaine, from defendant's pocket. Bauer subsequently arrested defendant. Rossin then searched defendant's car and found

heroin inside the car's center console. Defendant denied having any knowledge of the cocaine or heroin. Later, during an interview with Detective Cathleen Postmus, however, defendant admitted to possessing the 2.76 grams of cocaine found in his pocket, but he maintained that he had no knowledge of the heroin in his car.

## II

Before trial, defendant moved to suppress the evidence that officers found on his person and in his vehicle, arguing that the evidence was obtained after he was unlawfully detained and searched. Following a hearing on the matter, the trial court denied defendant's motion to suppress.

On appeal, defendant argues that the trial court erred in denying the motion to suppress. Specifically, he claims that the trial court erred in denying his motion to suppress because the drug evidence was obtained in violation of constitutional prohibitions against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Defendant claims that the initial stop of his car was unreasonable because the circumstances surrounding the stop were insufficient to support a reasonable suspicion of criminal activity and, therefore, any evidence obtained as a result of the stop should have been suppressed. We review a trial court's factual findings on a motion to suppress for clear error, but, to the extent that the trial court's ruling involves an interpretation of the law, or the application of a constitutional standard to essentially uncontested facts, our review is de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005); *People v Harrington*, 258 Mich App 703; 672 NW2d 344 (2003).

“[T]he reasonableness of a search and seizure depends on ‘whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.’” *Williams, supra* at 314, quoting *Terry v Ohio*, 392 US 1, 20; 88 S Ct 1868; 20 L Ed 2d 889 (1968). An officer may stop a vehicle if he has probable cause to believe a traffic violation has occurred or is occurring. *People v Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002). An actual violation need not be proved; all that is required is that the officer had a reasonable suspicion that a violation may have occurred. *People v Fisher*, 463 Mich 881, 881-882; 617 NW2d 37 (2000) (Corrigan, J., concurring); *People v Chambers*, 195 Mich App 118, 121-122; 489 NW2d 168 (1992).

In this case, the officers initiated the stop because they perceived a safety belt violation. Failure to wear a properly adjusted and fastened safety belt in a moving vehicle constitutes a civil infraction. MCL 257.710e(3), (7). Although the officers discovered, after effectuating the stop, that defendant's passenger was actually wearing his safety belt, the belt appeared unfastened because the strap was improperly tucked under the passenger's arm. Further, according to the officers, defendant removed his own safety belt while continuing to drive after they initiated the stop.

We conclude that the officers had probable cause to believe a safety belt violation occurred and, therefore, the initial stop of defendant's car was valid. In reaching our conclusion, we note that defendant argues that the tinting on his car's rear windows made it impossible for the officers to see inside the vehicle. But, to the extent that defendant challenges the officers' veracity, the trial court ultimately concluded that the officers provided credible testimony

concerning the civil infraction and found that the initial stop was valid, and we defer to a trial court's credibility determination. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

In regard to the initial stop of his car, defendant also alleges that, because the incident occurred in a high crime area, the officers used the safety belt violation as a mere pretext to search for drugs. In *People v Haney*, 192 Mich App 207; 480 NW2d 322 (1991), we held that, regardless of an officer's subjective intent in making a stop, the stop will be deemed constitutionally valid where the officer's actions do not exceed what he is legally permitted and objectively authorized to do. Therefore, because the officers in this case stopped defendant's car pursuant to an observed civil infraction, the stop itself was valid, despite any subjective motivations the officers may have harbored at the time of the stop.

In affirming the trial court's denial of the motion to suppress, we additionally find that the officers were justified in detaining and questioning defendant after the initial stop. When a traffic stop is premised on a reasonable suspicion of criminal activity, the officer may briefly detain the driver and inquire into matters related to the stop. *Williams, supra* at 315. The determination whether a traffic stop is reasonable includes consideration of the evolving circumstances, and if new circumstances are revealed, an officer may extend the detention long enough to resolve his suspicions, including through further questioning of the driver or passengers. *Id.* at 315-316. In determining whether there is a reasonable and articulable suspicion of criminal activity, "[c]ommon sense and everyday life experiences predominate over uncompromising standards," and therefore, we defer to experienced officers who state that certain behavior by particular individuals fits a certain crime. *People v Nelson*, 443 Mich 626, 635-636; 505 NW2d 266 (1993).

At the suppression hearing, the officers testified that after initiating the traffic stop, defendant's behavior led them to believe that criminal activity was afoot. According to the officers, after they activated their overhead lights, defendant drove an additional .25 miles at approximately 25 mph. He turned on his left turn signal, removed his safety belt, leaned to the right for five to ten seconds, returned to an upright position, reclapsed his safety belt, and turned onto a side street. After the officers approached the car, and questioned defendant about the safety belt violations, defendant appeared to be excessively nervous and denied removing his safety belt. The officers testified that defendant's behavior, coupled with their law enforcement experience in high crime areas, led them to believe that defendant was attempting to conceal contraband or weapons in his vehicle. On the basis of this testimony, we agree with the trial court's determination that the officers were justified in asking defendant questions regarding drugs and weapons, and we find that the officers were justified in detaining and questioning defendant even after the reason for the initial stop was resolved. See *Williams, supra* at 315; *Nelson, supra* at 636.

With regard to the search of defendant's person, the trial court found that defendant consented to be searched. A warrantless search may be reasonable when based upon voluntary consent. *Williams, supra* at 318; *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). Bauer testified that he "consent searched" defendant. While defendant denied that he consented to the search, the trial court determined that Bauer provided credible testimony concerning defendant's consent. Accordingly, because we defer to a trial court's credibility determination, *Farrow, supra* at 209, and because we determined that defendant was not being

unlawfully detained when asked to consent to the search, we find that the search was reasonable. Furthermore, we find that the subsequent search of defendant's car was valid because the officers conducted the search pursuant to a lawful arrest. *People v Bullock*, 440 Mich 15, 26; 485 NW2d 866 (1992). The trial court did not err in denying defendant's motion to suppress.

### III

Defendant next argues that the evidence presented at trial was insufficient to find him guilty of possession with intent to deliver less than 50 grams of cocaine. In reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the charged crime have been proved beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). We will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses, *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004), because it is for the trier of fact, rather than this Court, to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences, *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

To support a conviction of possession with intent to deliver less than 50 grams of cocaine, the prosecution must prove that 1) the recovered substance is cocaine, 2) the cocaine is in a mixture weighing less than fifty grams, 3) the defendant was not authorized to possess the substance, and (4) the defendant knowingly possessed the cocaine with the intent to deliver. *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Gonzalez*, 256 Mich App 212, 225-226; 663 NW2d 499 (2003).

Defendant admits to unlawful possession of 2.76 grams of cocaine, but he claims there was insufficient evidence to find that he intended to deliver the cocaine. We disagree. Intent to deliver may be inferred from circumstantial evidence, such as the quantity of cocaine in a defendant's possession. *Wolfe, supra* at 524; *Gonzalez, supra* at 226. Furthermore, because of the difficulty of proving a defendant's state of mind, minimal circumstantial evidence is sufficient to establish intent to deliver. *Id.*

Here, according to Postmus' testimony, the amount of cocaine in defendant's possession was consistent with the amount that drug dealers carry. Postmus explained that one "rock" of cocaine is equivalent to one-tenth of a gram of cocaine, and that users typically carry one or two "rocks" on their person because that is an immediately usable, and less costly, amount of cocaine. In comparison, defendant admitted to carrying 2.76 grams, or approximately 27 "rocks," of cocaine. Postmus stated that, in 19 years investigating drug related crimes, she has never encountered a person who carried as many as 27 "rocks" of cocaine for personal use. Bauer offered similar testimony, stating that, in his experience, drug users carry substantially less than 2.76 grams of cocaine for their own consumption. Further, testimony provided by defendant's parole supervisor, that defendant repeatedly tested negative for cocaine in May 2004 and that there was no cocaine detectable in his system on the day of the arrest, undermined defendant's claim that the cocaine was for personal use.

Reviewing the evidence in the light most favorable to the prosecution, *Tombs, supra* at 459, a rational juror could find, beyond a reasonable doubt, that defendant possessed less than 50 grams of cocaine with intent to deliver. Reversal of defendant's conviction is unwarranted on the ground of insufficient evidence.

#### IV

Defendant finally argues on appeal that he is entitled to resentencing. Because defendant did not raise his sentencing issues at sentencing, or in a motion for resentencing, they are not properly preserved. *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003). We review for plain error affecting his substantial rights. *Id.* at 670; *Carines, supra* at 764. Reversal is warranted only if defendant is actually innocent or an "error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763 (citation omitted).

Defendant admits that the sentences imposed by the trial court fall within the appropriate sentencing guidelines range, with habitual offender enhancement, but he argues, nonetheless, that he is entitled to resentencing. He claims that the trial court imposed cruel and unusual punishment, US Const, Am VIII and Const 1963, art 1, § 16, and violated his Sixth Amendment right to trial by jury, US Const, Am VI, in fashioning his sentences. Generally, when a sentence falls within the appropriate guidelines range, we must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). However, we have held that this limitation on review of sentences imposed within the guidelines range is "inapplicable to claims of constitutional error." *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). Thus, we will review defendant's claim of error.

Defendant argues that, in failing to consider his strong family support, remorseful attitude, mental health, and history of substance abuse, the trial court imposed disproportional sentences and violated constitutional prohibitions against cruel and unusual punishment. We disagree. In determining whether a sentence is "cruel and unusual," we consider whether the harshness of the penalty is proportional to gravity of the offense, given the goal of rehabilitation. *People v Poole*, 218 Mich App 702, 715; 555 NW2d 485 (1996).

Here, contrary to defendant's assertion, the record supports that the trial court considered information regarding defendant's family, mental health, and history of substance abuse, and recommended that defendant participate in a rehabilitation program. Moreover, because defendant's sentences are within the appropriate guidelines range, they are presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Proportionate sentences do not constitute cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004), *aff'd* 475 Mich 140; 715 NW2d 778 (2006). And, habitual offender enhancements do not violate constitutional prohibitions against cruel and unusual punishment. *People v Curry*, 142 Mich App 724, 732; 371 NW2d 854 (1985); see also *People v Potts*, 55 Mich App 622, 639; 223 NW2d 96 (1974). For these reasons, we find no merit in defendant's argument that his sentences constitute cruel and unusual punishment.

Defendant also asserts that he was sentenced in violation of the Sixth Amendment, US Const, Am VI, and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Contrary to defendant's argument, the trial court's reliance on facts at sentencing, which were not found by a jury, does not violate either the Sixth Amendment or the United States Supreme Court's rulings in *Blakely*. In *Drohan*, *supra*, 475 Mich 159-161, the Court definitively ruled that Michigan's indeterminate sentencing scheme is not affected by the rulings in *Blakely*, *supra*, that were designed to protect defendants from higher sentences based on facts not found by a jury in violation of the Sixth Amendment. See also *People v McCuller*, 475 Mich 176; 715 NW2d 798 (2006).

Defendant also argues he is entitled to resentencing because the trial court based defendant's sentences on inaccurate information. Generally, a sentence is invalid when it is based on inaccurate information. MCL 769.34(10); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). However, defendant provides no basis for his claim that the trial court considered inaccurate information in imposing his sentences. Defendant has not specified the particular facts relied on by the trial court, if any, that were incorrect. Therefore, defendant's claim is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant further argues he is entitled to resentencing because the trial court failed to articulate its reasons for the sentences imposed. Although a trial court is generally required to articulate its reasoning, on the record, at the time of sentencing, "[t]he articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *Conley*, *supra* at 312-313. Here, the trial court acknowledged that defendant should "be sentenced consistent with the verdict of the jury," and that he was a fourth felony offender under the habitual offender laws. The trial court also noted the specific sentencing guidelines range in issuing the sentence for defendant's possession with intent to deliver cocaine conviction. Because it is clear from the trial court's remarks that it relied on the sentencing guidelines in imposing defendant's sentences, the articulation requirement is satisfied and resentencing is unwarranted. *Id.*

In a supplemental brief, defendant seeks a remand to the trial court with regard to sentencing for a possible credit for the time served in jail while awaiting trial in this case. Defendant contends that a remand is necessary to determine the status of his parole sentence, to then determine whether he is entitled to a credit against the sentence imposed in this case pursuant to MCL 769.11b.<sup>1</sup> Defendant has failed to establish any factual or legal basis for his argument, and we find it without merit. Because this issue was not raised before the trial court, our review is for plain error affecting defendant's substantial rights. *McLaughlin*, *supra* at 670.

Defendant acknowledges that credit for jail time served by a defendant on parole, while awaiting trial on a new offense, must generally be applied against the sentence for the paroled

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<sup>1</sup> MCL 769.11b provides that if the court is sentencing a defendant who has served time in jail before sentencing because he or she could not afford or was denied bond, the court must credit the defendant with time served. *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006).

offense, not the sentence for the new offense. *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004); *People v Watts*, 186 Mich App 686, 687-690; 464 NW2d 715 (1991). “A parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense.” *Seiders, supra* at 705, citing MCL 768.7a(2); see also *People v Stead*, 270 Mich App 550, 552; 716 NW2d 324 (2006). Time spent in jail is normally credited against the unexpired portion of the defendant’s paroled sentence. *Seiders, supra* at 706.

Defendant nevertheless asserts that it is unclear whether he, in fact, received jail credit against his paroled sentences or whether a parole violation hearing was even held. He argues that if no hearing was held, or if a hearing was held, but he was not required to serve any additional time on his paroled sentence(s), there would be no earlier sentence against which to credit his jail time and, thus, he would be entitled to a credit against the sentence in this case pursuant to MCL 769.11b. We disagree.

Defendant relies on authority and reasoning that is no longer valid. In *Seiders*, this Court determined that MCL 769.11b does not apply if a defendant was held on a parole detainer, thereby overruling earlier case law to the contrary. *Seiders, supra* at 703, 707. A parole detainee convicted of a new offense is entitled to have jail credit applied exclusively to the sentence from which parole was granted. *Stead, supra* at 552. “Credit is not available to a parole detainee for time spent in jail attendant to a new offense, because ‘bond is neither set nor denied when a defendant is held in jail on a parole detainer.’” *Id.*, quoting *Seiders, supra* at 707. If a defendant is held on a parole detainer, the question of bond is not an issue, and MCL 769.11b does not apply. *Seiders, supra* at 707.

The presentence investigation report in this case stated that defendant was on parole at the time of the instant offense and was ineligible for any jail credit with regard to sentencing for the instant offense. Defendant does not dispute that he was on parole, and therefore held on a parole detainer while awaiting trial in this case. Under *Seiders*, defendant would not be entitled to credit for time served with regard to the sentence in this case regardless of the status of his parole sentence.

Affirmed.

/s/ David H. Sawyer

/s/ Janet T. Neff

/s/ Helene N. White