

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL DALE,

Defendant-Appellant.

UNPUBLISHED

October 16, 2007

No. 269464

Berrien Circuit Court

LC No. 2005-405856-FH

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced to 23 to 480 months' imprisonment for possession with intent to deliver and to 16 to 24 months' imprisonment for possession of marijuana, with no credit for time served because he was on parole when the current offenses occurred. Both sentences were enhanced under MCL 333.7413(2).

Defendant first asserts that the cocaine seized after his arrest was the fruit of an illegal search and should have been suppressed. Having failed to challenge the introduction of the evidence below, defendant argues this unpreserved claim should be reviewed for plain error and that his trial counsel was ineffective in failing to challenge the admission of the cocaine.

Defendant argues that because the officer found the crack cocaine in the overhang of the front porch of the house he was visiting, it was a search of the home and presumptively unreasonable without a warrant or the consent of the resident. We conclude that the cocaine was not illegally seized, and therefore the court did not commit plain error in allowing its admission, and counsel was not ineffective in failure to seek its suppression.

Constitutional rights are personal. *Rakas v Illinois*, 439 US 128, 133-134; 99 S Ct 421; 58 L Ed 2d 387 (1978); *People v Smith*, 420 Mich 1, 17; 360 NW2d 841 (1984). The person asserting the right to be free from an unreasonable search must prove that the constitutional protection applies. *People v Nash*, 418 Mich 196, 204; 341 NW2d 439 (1983) (Brickley, J.). The protection applies and the defendant has standing to challenge a search when he has a reasonable expectation of privacy in the place searched. *Rakas, supra* at 143; *People v Perlos*, 436 Mich 305, 317-318; 462 NW2d 310 (1990). An expectation of privacy is reasonable or

legitimate if the defendant has an actual, subjective expectation of privacy, and that expectation is one that society is prepared to recognize as reasonable.

Defendant did not have a reasonable expectation of privacy in the overhang above the front door of his friend's home. An overnight guest in a home may have a reasonable expectation of privacy in the home, *Minnesota v Olson*, 495 US 91, 98-100; 110 S Ct 1684; 109 L Ed 2d 85 (1990), but a temporary visitor to a home does not, particularly where the visit is for conducting business. *Minnesota v Carter*, 525 US 83, 91; 119 S Ct 469; 142 L Ed 2d 373 (1998). In *People v Parker*, 230 Mich App 337, 341; 584 NW2d 336 (1998), this Court held that the defendant did not have a reasonable expectation of privacy in the premises searched because he was not an overnight guest in his friend's home, did not plan to spend the night there and did not plan to fall asleep in the apartment. *Id.* at 340-341. Because the defendant established, at best, that he was a "mere visitor," he lacked standing to challenge the search of the apartment. *Id.* at 341.

Here, defendant did not live at the home in question, and was not an overnight guest. Defendant arrived that morning to visit his friend, the lessee, was there for only a few hours, and was at the home to conduct business, specifically selling cocaine. As in *Parker*, defendant was there for a relatively brief period of time, and at best, was a mere visitor. He did not have a reasonable expectation of privacy in the home or the porch area outside of the home. *Id.* Because defendant lacked a reasonable expectation of privacy in the overhang or porch area, the officer's search did not violate defendant's Fourth Amendment rights. A motion to suppress would have been denied, and an objection at trial would have been overruled. Thus, his counsel was not ineffective. *Mack, supra* at 130.

Given our disposition, we need not address defendant's argument that the search was not valid under the search incident to an arrest exception or the prosecution's argument that the seizure was valid under the plain view exception.

Defendant next makes numerous claims that the trial court erred when it sentenced him. We find those claims to be without merit. A trial court must impose a sentence within the recommended minimum sentence range under the legislative guidelines unless it finds a substantial and compelling reason to depart from that range. *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). Defendant does not dispute that his sentence for possession of cocaine with intent to deliver is within the statutory guidelines range as properly enhanced by MCL 333.7413(2). That statute allows the trial court to impose a term not more than twice the term authorized, and applies to both the minimum and maximum sentences. *People v Williams*, 268 Mich App 416, 430; 707 NW2d 624 (2005). The trial court was authorized to sentence defendant to any minimum term within 10 to 46 months and a maximum of 480 months' or 40 years. His sentence of 23 to 480 months' imprisonment is within the guidelines' range as enhanced.

Defendant nevertheless argues that the trial court did not sufficiently articulate the reason for its sentence, because it did not say why a maximum of forty years was proportionate to defendant's offense. The trial court was not required to articulate a reason for the imposition of a forty-year maximum because the articulation requirement for imposing sentence was met when the court relied upon the sentencing guidelines, *People v Conley*, 270 Mich App 301, 313; 715

NW2d 377 (2006), and, because an enhanced sentence is not a departure from the guidelines, it needs no additional articulation, *Williams, supra* at 430.

Defendant also claims that his sentence was invalid because it was based on inaccurate and incomplete information, was inadequately personalized, was disproportionate, and was based on facts not admitted by defendant or found by the jury, in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree.

Defendant argues that the presentence investigation report (PSIR) provides insufficient information for a trial court to properly sentence a defendant, and that the trial court should have conducted a more thorough investigation, including whether intensive alcohol and drug abuse counseling would increase his rehabilitative potential. Defendant is correct that he is entitled to be sentenced based on accurate information and that, if he is sentenced upon inaccurate information, his sentence is invalid and he is entitled to resentencing. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006); *People v Miles*, 454 Mich 90, 96-98; 559 NW2d 299 (1997). Defendant, however, has not shown that the PSIR was incomplete or inaccurate. Rather, he complains that the report and the court gave inadequate attention to his mental impairments¹ and rehabilitative potential. “A presentence report is presumed to be accurate and *may be relied on* by the trial court unless effectively challenged by the defendant.” *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003) (emphasis added). Defendant did not challenge the accuracy of the PSIR below, did not move for resentencing, and does not, on appeal, articulate any specific inaccuracies relied upon the trial court. The trial court’s reliance on the PSIR was not error.

We also reject defendant’s proportionality claim. Unless there was an error in scoring or reliance on inaccurate information, we must affirm defendant’s sentence, because it was within the guidelines range. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 268, 272; 666 NW2d 231 (2003). Defendant does not allege an error in scoring and, as noted, has not shown that the court relied upon inaccurate information. We also reject defendant’s argument that his sentence violated his constitutional rights as articulated in *Blakely, supra*. Michigan’s sentencing scheme is indeterminate and thus, the rulings in *Blakely* do not affect our legislative sentencing guidelines. *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006).

Defendant also claims that by focusing solely on punishment, the trial court did not properly consider all the factors it must when imposing sentence, and so imposed an excessive

¹ Defendant argues that, because he may have a “mental disease or defect brought on by substance abuse” that may have contributed to the commission of the offense, the trial court should have departed downward according to the Federal Sentencing Guidelines (2002), 5K2.13. We note that in addition to the fact that defendant was not sentenced under the federal guidelines, defendant misinterprets the federal guideline provision he cites. The diminished capacity factor under the federal guidelines does not apply if the reduced mental capacity is the result of the voluntary use of drugs or other intoxicants, which defendant admits is the case here.

punishment in violation of the federal and Michigan Constitutions. We first note that the sentencing guidelines themselves, by considering both the severity of the offense and the defendant's prior record, incorporate the principle of proportionality. *Babcock, supra* at 263-264. Second, we note that the trial court considered other factors beyond punishing defendant, and specifically noted that defendant accomplished some positive things during the brief time he was on parole. It sentenced him accordingly to less than the 46-month maximum minimum authorized. Finally, we note that, when an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limit is proportionate. *People v Colon*, 250 Mich App 59, 65; 644 NW2d 790 (2002). Here, defendant's extensive criminal history of three prior felonies and eight prior misdemeanors by the age of twenty-six, including a prior conviction for delivery of marijuana, along with the fact that he committed the charged offense while he was on parole, demonstrate that he cannot conform his conduct to the requirements of the law. Thus, his sentence for possession of cocaine with the intent to deliver, which was within the guidelines range, is proportionate, *id.*, and it is not cruel and unusual punishment, *Drohan, supra*, 264 Mich App at 92. Further, his sentence for the possession of marijuana was also proportionate to the seriousness of his crime and his prior record. *Babcock, supra* at 264. We conclude that the trial court did not abuse its discretion.

Defendant's final argument is that he is entitled to credit for time served while awaiting trial. He claims a remand is necessary to determine whether he received credit against the jail sentence for the offense for which he was on parole or whether additional time on the sentence from which he was paroled was imposed, because the record is unclear. We disagree. MCL 769.11b requires that a defendant who is denied or unable to make bond must be given credit against the sentence for the offense for which he is jailed. The statute does not entitle a defendant to credit for time served before sentencing if he is incarcerated for a prior crime or for other unrelated reasons. *People v Seiders*, 262 Mich App 702, 706-707; 686 NW2d 821 (2004). "When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense." *Id.* at 705. "A parole detainee convicted of a new offense is entitled to have jail credit applied exclusively to the sentence from which parole was granted." *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006), quoting *Seiders, supra* at 705. Remand in this case is unnecessary because, regardless whether additional time was imposed on defendant for his parole violation, he is not entitled to credit on his sentence for the offenses at issue in this case.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Christopher M. Murray