

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WESAM SALAH AHMED ALOBAIDI,

Defendant-Appellant.

UNPUBLISHED

October 12, 2010

No. 292638

Oakland Circuit Court

LC No. 08-219402-FH

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of marijuana, MCL 333.7403(2)(d) and possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 28 days' imprisonment for his possession of marijuana conviction and two years' imprisonment for his felony-firearm conviction. We affirm.

I. BASIC FACTS & PROCEDURAL HISTORY

On December 26, 2007, police officers observed defendant engage in what they believed to be a narcotics transaction. Defendant's vehicle was pulled over and searched. Police found 10 pounds of marijuana in defendant's vehicle and a handgun. Defendant was arrested and charged with possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), felony-firearm, MCL 750.227b, and commission of a felony with a motor vehicle, MCL 257.732(6).

A. PRETRIAL MOTION

Before trial, defendant moved to suppress the drugs. At the motion hearing, Detective Daniel Pizana testified that on December 26, 2007, he observed a Chevrolet Uplander go to and park in the parking lot of a strip mall; the driver did not exit the vehicle. Pizana and his surveillance team had been watching the Uplander for approximately six days prior to the 26th because they had received a tip from a confidential informant that it was involved in narcotics trafficking. During those six days, Pizana did not observe any overt illegal activity. However, Pizana testified that the driver of the Uplander did not go to work or go shopping, but met people for short periods of time either in his hotel parking lot or restaurant parking lots.

Shortly after the Uplander arrived at the parking lot on the 26th, a Chevrolet Cavalier drove up and parked along-side the Uplander. At no point did either driver go into the mall. The

driver of the Cavalier got out of his car, removed a red and white shopping bag from his trunk, and put it in the Uplander behind the driver's seat. The drivers of the two vehicles did not engage in any conversation. The driver of the Cavalier got back in his car and left the area immediately. The Uplander then left the area and Pizana contacted a member of his surveillance team, Sergeant Tyrone Jackson, to assist him in following the Uplander. Subsequently, Jackson relayed information to Pizana that he had observed the same bag that had come from the Cavalier being transferred in a Chevrolet Avalanche. Pizana testified that based on his experience as a detective and undercover drug dealer, that he believed he had just witnessed a narcotics transaction. According to Pizana, drug dealers like to meet in parking lots and other secluded areas, to move around frequently in order to detect any possible surveillance, and to conduct their transactions as quickly as possible in order to avoid getting caught.

Sergeant Tyrone Jackson testified that he observed the Uplander and Avalanche parked parallel to one another in the mall parking lot. The vehicles were "off to the side" behind the strip mall, not parked in the area where customers visiting the mall had parked, and their drivers' sides were next to each other. Jackson observed a person get out of the Avalanche and get into the driver's seat of the Uplander, while simultaneously, defendant got out of the passenger side of the Avalanche, removed a white and red shopping bag from its interior, and placed the bag in the tailgate of the Avalanche. While defendant was placing the bag in the Avalanche, the Uplander drove away. Jackson testified that he believed he had witnessed a narcotics transaction based upon his training and experience. Jackson believed this to be the case because the individuals never went into the mall to go shopping, the transaction was a "short meet," and the individuals had sought out a parking spot in the rear of the businesses that was less observant to the "public eye." He also testified that it was common for people in the narcotics trade to put illegal drugs in the back of their vehicles.

Deputy James Kavalick testified that he pulled defendant's vehicle over for tinted windows at around 5:25 p.m. Defendant appeared nervous, was gripping the steering wheel, and refused to consent to a search of the vehicle. According to Kavalick, a canine unit was called to the scene about 10 to 15 minutes after the initial stop. Defendant stayed in his car until the canine unit arrived, at which point he stood outside the vehicle. Kavalick indicated that defendant was not free to leave the scene.

Officer Ian Kershaw testified that he and his dog, Bunti, were called to the scene at around 6 p.m. and arrived fifteen to twenty minutes later. Kershaw indicated that Bunti sniffed the outside of the car and alerted to the presence of narcotics in the tailgate area of the vehicle. Bunti was then permitted to sniff the inside of the vehicle; Bunti alerted to the presence of narcotics inside the car. According to Kershaw, five minutes elapsed from the time he arrived on the scene to the time that drugs were found. After the dog alerted in the car, Pizana searched the tailgate area of the vehicle around 6:25 p.m. and found the shopping bag with marijuana inside it.

At the end of the motion hearing, the trial court denied defendant's motion. The court reasoned:

I think this case fits into the *Terry v Ohio*-type of situation with actually more facts than they had in *Terry v Ohio* [392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968)].

Because in this particular case you have an ongoing investigation of an out-of-state defendant, who apparently is here in Michigan, or at least -- or they said it started on December 19th. The stop was made on December 26th.

You have an individual here from out-of-state doing what? No one seems to know for sure. But you're right, counsel. There was [sic] no crimes being committed, or no illegal activity as far as the officers could see. However, there was a situation where it's unexplainable why he was here.

So you take that one circumstance, you add to that the fact that there was a -- that a confidential informant had indicated that the person was here for drug trafficking. So that's the other circumstance you have to look at.

Then you look at the circumstances of the activity in the parking lot with the -- with the two separate cars coming in.

One car coming in, a person getting out transferring a bag from his car to the Uplander, and then you have the Uplander driving from that particular parking area in the parking lot around the back of the buildings. And within ten minutes another vehicle coming in parking next to it with a transfer of that same bag from the Uplander to the Avalanche.

So I believe in this particular case that you look at the totality of the circumstances. There was an exchange. The officers, I think, had a *Terry v Ohio*-type of reasonable suspicion that a drug transaction was taking place. Either drugs were being exchanged, or possibly money and/or both. And I think the officers had a right to stop the vehicle to check it out.

It was a brief detention. They didn't know at the time whether the occupant of the car would give consent to search. Sometimes they do. They do so on the false belief that, well, if I say the officer can search, he won't bother searching, because he'll feel I have nothing to hide.

So I don't think they had any reason to call on a canine for sure until the Defendant indicated that he would not consent to a -- to a search.

So for those reasons I feel -- I do find that there was a reasonable suspicion that gave the officers rise to make a brief detention.

And then you have to look at the detention in light of all the circumstances. And a possible fifteen minutes I don't think is that unreasonable under the circumstances.

In addition to the -- to the *Terry v Ohio*-type of stop, you also have a stop for a-- a traffic violation. Although, I think that really was an excuse for stopping the car.

* * *

And I think it's different from [*People v LoCicero*, 453 Mich 496; 556 NW2d 498 (1996)] because in *Losisero* [sic] the stop is based strictly on an informant. And on the other case that was cited, *Ithrich*, there was information given but there was nothing that the officers observed, such as I indicated before, either an exchange of anything, or furtive-type gestures. In this case there's both the exchange and furtive movement.¹

B. TRIAL

The matter went to trial. Police officers Daniel Pizana, James Kavalick, and Tyrone Jackson testified. Defendant did not testify.

C. JURY INSTRUCTIONS & DELIBERATIONS

The parties then discussed the instructions that the trial court would provide the jury. Defense counsel suggested that if the jury found defendant guilty of the lesser included offense of possession of marijuana, then it could not find him guilty of felony-firearm. The trial court disagreed and indicated it would "follow the law as it exists"

The trial court instructed the jury after closing arguments. With regard to the possession with intent to deliver marijuana charge, the trial court instructed the jury that it could find defendant guilty of the lesser offense of simple possession of marijuana. The trial court instructed the jury on the elements of these crimes. It also instructed the jury on the elements of felony-firearm. It stated:

To prove this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:

First of all, that the Defendant committed the crime of Possession with Intent to Deliver the Controlled Substance Marijuana, which I've already defined for you. It's not necessary, however, that the Defendant be convicted of that crime.

And the second element is that at the time the Defendant committed the crime, he knowingly carried or possessed a firearm. And a pistol is a firearm.

The jury was provided with a typed copy of the jury instructions. Both counsel indicated that they were satisfied with the instructions.

The next day, the jury sent a note to the trial court, asking, "Is possession of marijuana a felony or a misdemeanor?" The trial court sent a handwritten note to the jury, stating, "[You're]

¹ Defendant moved for reconsideration of the trial court's decision on his motion to suppress. The trial court also denied this motion, reasoning that defendant merely presented the same issues that the court had already ruled upon and that defendant failed to demonstrate a palpable error.

not to consider this because it's not relevant" Defense counsel objected; counsel preferred the trial court to instruct the jury that possession of marijuana is a misdemeanor.

The jury then asked another question, "If there's conviction on the lesser included,' which would have been simple possession, 'can we still find the Defendant guilty of possession of a firearm in the commission of a felony?'" The trial court responded "yes" and defense counsel objected. Defense counsel urged the trial court to inform the jury as follows, "You are the sole judges of the facts and the law in this case. You can interpret the law. You can consider any and all the information from this case and come to any verdict you see fit." The court rejected defendant's request.

Deliberations continued into the next day. The jury asked the trial court another question; specifically, it asked, "The jury instructions on Count II [felony-firearm] . . . contradict your answer to one of our questions yesterday. . . . [I]f the lesser charge is chosen on Count I, can we find him guilty of [felony-firearm]?" The trial court answered the jury in the affirmative, "because that's what the instructions say" The jury followed-up with another question, suggesting some confusion with regard to whether it should follow the trial court's guidance as provided in court's note or the written jury instructions as originally provided by the court. The trial court told the jury to follow its written instructions; it sent the jury a handwritten note, stating, "Please look at paragraph three and two of instruction [CJI2d] 11.34." Defense counsel did not object and indicated that his concern had been addressed. Defense counsel, however, re-iterated his objection with regard to the trial court's answer to the question whether simple possession was a felony or a misdemeanor.

E. VERDICT & SENTENCING

The jury convicted defendant of possession of marijuana and felony-firearm. Defendant was sentenced to 28 days' imprisonment on his possession charge and two years' imprisonment on his felony-firearm charge. This appeal followed.

II. RESPONSE TO JURY QUESTIONS

Defendant first argues that reversal of his convictions is required because the trial court erroneously instructed the jury that it could convict defendant of felony-firearm if it was supported by proof of the misdemeanor offense of possession of marijuana. We disagree. We review claims of instructional error de novo. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Jury instructions are reviewed as a whole, in their entirety, to determine whether any error requiring reversal occurred. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). However, a trial court's decision to provide additional instruction in response to the jury's questions is reviewed for an abuse of discretion. *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998). Reversal is not required, even where jury instructions are imperfect, so long as the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights. *Chapo*, 283 Mich App at 373.

"A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *Dobek*, 274 Mich App at 82. Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories supported by the evidence. *Id.* If a trial court chooses to respond to a jury's questions, it

should do so in a fair and complete manner and should not mislead the jury. *McDonald v Stroh Brewery Co*, 191 Mich App 601, 609; 478 NW2d 669 (1992). Further, a trial court must not allow a jury to concern itself with the punishment a defendant might face, as such a consideration is extraneous to the jury's role of determining guilt or innocence. *People v Goad*, 421 Mich 20, 25-26; 364 NW2d 584 (1984).

At the outset, we note that while defendant initially objected to the trial court's response to the jury's questions, he ultimately affirmatively stated on the record that his concern had been addressed with regard to whether the jury could convict defendant of simple possession and of felony-firearm. Thus, defendant has waived any error in this regard to the jury instructions, absent a miscarriage of justice. *People v Bonham*, 182 Mich App 130, 135; 451 NW2d 530 (1989).²

However, even assuming defendant had not waived the alleged error, we conclude that the jury instructions sufficiently presented the issues to be tried and sufficiently protected defendant's rights. Although the jury expressed some confusion regarding the instructions for the felony-firearm count, the trial court clarified for the jury that it should follow the instructions as written, which were those that were originally provided to the jury. Those instructions were consistent with the law. See CJI2d 11.34. Conviction of a felony is not an element of felony-firearm, MCL 750.227b, and a jury may reach an inconsistent verdict with regard to a felony-firearm charge, *People v Lewis*, 415 Mich 443, 449-452; 330 NW2d 16 (1982). In other words, it may convict a defendant of felony firearm if it finds proof beyond a reasonable doubt that a defendant committed the underlying felony; however, it need not convict the defendant of that underlying felony in order to convict the defendant of felony-firearm. *Id.* at 454-455. Here, the instructions, as provided to the jury, embody this concept. Defendant's argument that the trial court instructed the jury that it could convict defendant of felony-firearm on proof of simple possession, absent proof beyond a reasonable doubt of possession with intent to deliver, mischaracterizes the trial court's instructions and is disingenuous. Further, it was not an abuse of discretion for the trial court to clarify the instructions by referring the jury to the original instructions. The court was not required, as defendant contends, to specifically tell the jury to disregard some of its prior confusing, albeit technically correct, answers to the jury's questions. There was no error.

III. MOTION TO SUPPRESS

Defendant next argues that the trial court erred by denying his motion to suppress evidence. Defendant asserts that the police did not have a reasonable articulable suspicion that justified their stop of defendant's vehicle, that the police officers involved did not explain how their training and experience led to a conclusion that criminal activity was afoot, and that, assuming the initial stop was valid, the seizure was so prolonged that it subsequently became unlawful. We disagree with defendant. We review de novo the trial court's determination

² During the proceedings below, defense counsel continued to object to the trial court's answer to the question whether simple possession was a misdemeanor or a felony. However, defendant's argument on appeal is unrelated to this objection.

whether an illegal search or seizure has occurred and whether evidence obtained through a search or seizure should be suppressed. *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009). However, we review the trial court's factual determinations for clear error. *Id.*

Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Generally, warrantless searches or seizures are unreasonable; however, certain exceptions to the warrant requirement permit law enforcement officers to engage in warrantless searches and seizures so long as those searches and seizures are reasonable. *People v Chowdhury*, 285 Mich App 509, 516-517; 775 NW2d 845 (2009). One of these exceptions is the investigatory stop, wherein a police officer observes behavior that leads him to conclude that criminal activity is occurring or about to occur. See *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[Such a] brief detention does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of the totality of the facts and circumstances. A determination regarding whether a reasonable suspicion exists must be based on commonsense judgments and inferences about human behavior. [*People v Horton*, 283 Mich App 105, 109; 767 NW2d 672 (2009) (citation omitted).]

Under such circumstances, the officer may briefly detain a person and conduct a reasonable investigation to either confirm or dispel his suspicion. *Terry*, 392 US at 30-31. "The question that must be asked in assessing whether a detention is too long in duration to be justified as an investigatory stop is whether the police were diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain those stopped." *People v Chambers*, 195 Mich App 118, 123; 489 NW2d 168 (1992).

After our review of the record, we cannot conclude that that the trial court erred by denying defendant's motion to suppress the evidence. The officers in the present case had been conducting surveillance on an Uplander for approximately six days because of a tip received from a confidential informant. Detective Pizana testified at the evidentiary hearing that, although he did not observe any overt illegal activity during this time, he believed, based on his experience, that the individual in the Uplander was involved in narcotics trafficking. He cited behavior consistent with trafficking drugs, such as meeting individuals for short periods of time in parking lots, but never patronizing the businesses connected to the parking lots. Both Pizana and Jackson believed criminal activity was occurring on December 26th when Pizana observed the Uplander briefly meet a Cavalier and exchange a red and white shopping bag, which was subsequently moved to defendant's Avalanche. Pizana explained that this activity was suspicious because none of the individuals went into the shopping mall, no conversations appeared to take place, the transactions occurred quickly, and the vehicle moved around in order to avoid detection. Pizana testified that these occurrences and behaviors were consistent with illegal drug activity. Jackson also testified that the activity was suspicious because the vehicles were parked far from the mall and then behind the mall in a somewhat secluded area and because the shopping bag was placed in defendant's trunk, which is typically where individuals trafficking illegal drugs put them. Thus, based on the totality of the circumstances, the officers

had a reasonable articulable suspicion that justified their investigative stop of defendant, who they reasonably believed had just engaged in an illegal drug transaction.³

We further conclude, contrary to defendant's position, that defendant's detention was not so prolonged as to violate his constitutional rights. The officers only detained defendant for as long as it reasonably took to confirm or dispel their suspicions. Once defendant was stopped and his firearm was removed from his person, the officer asked for consent to search defendant's vehicle. When defendant refused, Pizana immediately summoned a canine unit to the scene. The record reveals no lack of diligence by the police. Defendant was detained, at most, 45 minutes from the time the canine unit was summoned until it arrived. Such a detention was not unreasonable under the circumstances. See *People v Yeoman*, 218 Mich App 406, 582; 554 NW2d 577 (1996) (explaining detention of 45 minutes not unreasonable where officer was diligently pursuing means of investigation). Accordingly, the trial court properly denied defendant's motion to suppress evidence.

IV. SENTENCING

Lastly, defendant argues that he is entitled to a correction of his presentence investigation report (PSIR). Specifically, defendant objects to numerous statements contained in the PSIR indicating that defendant was involved in trafficking drugs in connection with a Mexican drug cartel and that While Lake police officers had been trying to "pin the defendant down" regarding his involvement in drug trafficking. We disagree. At the outset, we note that defendant waived any error when defense counsel stated, "[E]verything contained [in the PSIR is] factually accurate." Thus, his claim is unavailing.

Defendant, however, contends that counsel's failure to object to the accuracy of the PSIR constituted ineffective assistance of counsel. Again, we disagree. Because defendant did not raise this argument below, our review is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To prevail on this claim, a defendant must show that counsel's performance fell below an objective level of reasonableness and that defendant was prejudiced as a result. *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). To establish prejudice, a defendant must demonstrate that but for counsel's errors, the outcome of the proceedings would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). Further, a defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy. *Matuszak*, 263 Mich App at 58.

Defendant has not met this burden here. Had defendant objected to the accuracy of the report, defendant would have had to substantiate an effective challenge showing that the remarks were inaccurate. *People v Lloyd*, 284 Mich App 703, 705-706; 774 NW2d 347 (2009). Such a challenge likely would have been futile, given that the prosecution would have had the opportunity to confirm the facts, *id.*, and the challenged statements were assertions apparently made by the prosecution's witnesses. Moreover, defendant has pointed to no evidence on the

³ We note that the officer's initial stop of defendant was a valid traffic stop for tinted windows. See *People v Haney*, 192 Mich App 207, 210; 480 NW2d 322 (1991).

record showing that defendant was not involved in drug trafficking or that White Lake police officers were not attempting to “pin” him down. Thus, defendant has not overcome the presumption that counsel’s decision to confirm the accuracy of the PSIR was sound trial strategy. Moreover, defendant has not shown that he has been prejudiced as a result of counsel’s alleged deficient performance. The trial court was required to sentence defendant to a minimum of two years’ imprisonment for his felony-firearm charge. It sentenced defendant to 28 days’ imprisonment for his possession charge, with 28 days’ credit for time served. Defendant has not explained how his sentence would have been different had the allegedly inaccurate PSIR been corrected.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly