

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW ANTHONY JONES,

Defendant-Appellant.

UNPUBLISHED

January 24, 2003

No. 234423

Genesee Circuit Court

LC No. 00-006475-FC

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

The trial court convicted defendant and defendant appeals as of right his sentences for armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant to ten to twenty years in prison for the armed robbery conviction, ten to twenty years in prison for the assault with intent to rob conviction and 23 months to 5 years in prison for the concealed weapon conviction, all of which are consecutive to a two-year felony-firearm sentence. We affirm in part and remand in part for correction of the judgment of sentence.

On May 31, 2000, defendant used a pistol to rob Barbara Armstrong and her boyfriend, Roger Brown, in the driveway of a home owned by Armstrong. On appeal, defendant argues that he received ineffective assistance of counsel at sentencing because defense counsel failed to challenge the scoring of offense variable 14 (OV-14). We disagree.

“In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that, but for defense counsel’s errors, there was a reasonable probability that the result of the proceeding would have been different.” *People v Lee*, 243 Mich App 163, 184-185; 622 NW2d 71 (2000).

Defendant claims that defense counsel should have challenged the trial court’s scoring of OV-14 at ten points because, in defendant’s presentence investigation report, Armstrong stated that defendant “was basically a follower” and that the other perpetrator, Tyrone Jackson, gave defendant the gun and told defendant to rob the victims. Notwithstanding Armstrong’s assertion, ample evidence in the record supports the trial court’s finding that defendant was the leader in the robbery. Further, defendant’s attorney raised this issue in a motion for resentencing and the trial court soundly rejected this claim on the basis of evidence presented.

At trial, the prosecutor presented evidence that, while Jackson spoke to the victims, it was defendant who jumped off his bicycle, pulled out the pistol, pointed the gun at the victims, and made the demand for money. Further, defendant checked Armstrong's pockets when Armstrong denied having any money and, when Brown stepped out of the car, again, it was defendant, not Jackson, who confronted Brown and ordered him back inside the vehicle. According to Brown, defendant repeatedly flashed his gun at the victims and defendant took the money, while Jackson stood a few feet away. According to both victims, as they drove away after the robbery, Jackson looked as though he was surprised about the incident. In his presentence investigation report, defendant admitted that the robbery was his own idea, that the gun belonged to him and that "he committed the crime of his own volition." Moreover, the presentence investigation report indicates that, after his arrest and conviction, defendant stated that he continues to believe he is entitled to keep the money he stole from Brown because he "did the crime."

While "*uncontroverted* evidence contained within [a] presentence report may be used to support [a] trial court's scoring of offense variables," here, the evidence presented at trial clearly contradicted Armstrong's opinion about defendant's role in this crime. *People v Warner*, 190 Mich App 26, 28; 475 NW2d 397 (1991) (emphasis added). Indeed, overwhelming evidence showed that defendant "was a leader in a multiple offender situation." MCL 777.44. Because we will not find trial counsel ineffective for failing to raise an argument that would have been futile, defense counsel was not ineffective for failing to object at sentencing to the ten points scored for OV-14. *People v Sabin*, 242 Mich App 656, 660; 620 NW2d 19 (2000).

Defendant further asserts that the trial court erred by imposing a consecutive sentence for his felony-firearm and carrying a concealed weapon convictions. As the prosecutor concedes, it is well-settled that, "[b]ecause there is no statute mandating that a sentence for a CCW conviction run consecutively to a sentence for a felony-firearm conviction, the sentence should run concurrently." *People v McCrady*, 213 Mich App 474, 486; 540 NW2d 718 (1995). Accordingly, the trial court should have imposed concurrent sentences for the CCW and felony-firearm convictions and we remand to the trial court for correction of the judgment of sentence.

Finally, defendant contends that the trial court erred by ordering that his sentences for armed robbery and assault with intent to rob while armed run consecutively to his felony-firearm sentence. We agree. Pursuant to MCL 750.227b(2) and *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000), defendant's felony-firearm sentence may only run consecutively to defendant's sentence for the felony on which the felony-firearm conviction is based.

"The proper interpretation of a statutory provision is a question of law that we decide de novo." *Clark, supra* at 464 n 9. The felony-firearm statute, MCL 750.227b, provides, in pertinent part:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years.

(2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the

felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

As our Supreme Court explained in *Clark, supra* at 463-464:

From the plain language of the felony-firearm statute, it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony. Subsection 2 clearly states that the felony-firearm sentence “shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the *felony* or attempt to commit the *felony*.” It is evident that the emphasized language refers back to the predicate offense discussed in subsection 1, i.e., the offense during which the defendant possessed a firearm. No language in the statute permits consecutive sentencing with convictions other than the predicate offense.

Here, the prosecutor filed one felony-firearm count and did not specify which underlying felony supported the charge. Similarly, the trial court convicted defendant of felony-firearm without specifying which underlying felony supported the conviction. Because the information refers to “the” underlying felony, defendant’s sentence for the predicate felony on which his felony-firearm conviction is based must run consecutively to the felony-firearm sentence.¹ Accordingly, because the record does not specify which felony supports defendant’s felony-firearm conviction, and because the sentence for that felony must run consecutively to the felony-firearm sentence, we remand this case to the trial court for clarification and correction of the judgment of sentence.

Affirmed in part and remanded in part. We do not retain jurisdiction.

/s/ Brian K. Zahra,
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

¹ Here, as in *Clark*, the prosecutor “could have listed additional crimes as underlying offenses in the felony-firearm count, or the prosecutor could have filed more separate felony-firearm counts.” *Clark, supra* at 464 n 11. The prosecutor did not do so.