

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARC JOSEPH MCCLAIN,

Defendant-Appellant.

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UNPUBLISHED

September 21, 2006

No. 260679

Berrien Circuit Court

LC No. 2004-403755-FH

Before: Whitbeck, CJ., and Hoekstra and Wilder, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and maintaining a vehicle for the selling of a controlled substance, MCL 333.7405(d). He was sentenced to 18 months to 240 months' imprisonment. We affirm but remand for the ministerial task of correcting the judgment of sentence.

Acting on anonymous tips of heroin trafficking at a certain location, Officer John Hopkins and Officer Eugene Castor, who was a drug dog handler, went to the location. When they arrived, they found defendant, informed him why they were there, and patted him down for weapons. The officers found a cell phone and 17 pieces of paper on which were written the name "Mookey" and a cell phone number. Defendant told the officers that he had a car parked about 40 yards away. After Officer Hopkins placed defendant into the patrol car, he asked defendant if they could drive to his car and if there was anything illegal in the car. Officer Hopkins asked defendant for permission to search his car, and defendant refused. Officer Castro then walked the drug dog around defendant's car. When the dog approached the driver's side window, which was partially open, the dog alerted, indicating that he smelled drugs. Officer Hopkins told defendant what the dog had done.

The parties differ with respect to what happened next. According to Officer Hopkins, defendant told him that the keys were locked inside the car but that he could search the car if he could get into it. Officer Hopkins gained entry to the car using a wire through a partially opened window. Officer Hopkins searched the car and found 53 folded, lottery betting slips, each with a small amount of heroin in it. According to Officer Hopkins, defendant denied any knowledge of the heroin and thought that it might possibly belong to Jerome Atkins, who had ridden with him to the location. According to Officer Hopkins, defendant later admitted he knew about the drugs but maintained that the drugs did not belong to him, that he was a drug user, that the cell phone

was his, that his nickname was “Mookey,” and that he handed out the betting slips to female friends.

According to defendant, he loaned his car to Atkins, and Atkins had locked the keys inside the car. Defendant claims that a friend gave him a ride to his car, that he was trying to unlock the car when the officers arrived, and that one of the officers put a gun to his head. Defendant maintains that he did not consent to any search of his car and that Officer Hopkins told him that if he did not consent to the search that he would get a warrant and tow defendant’s car. Defendant claims that he told Officer Hopkins that he would have to get a warrant because he would not consent to a search of his car. Defendant contends that he did not consent to the search because he had syringes in his trunk.

The court denied defendant’s motion to suppress the evidence, finding Officer Hopkins’s testimony to be more credible, consistent, and believable than that of defendant and that the search was valid because it was done with defendant’s consent.

Defendant challenges the court’s denial of his motion to suppress the evidence, contending that the officers lacked probable cause and searched his car without a warrant based on three anonymous tips, no exception to the warrant requirement existed, and he did not consent to the search. We review for clear error a trial court’s findings of fact in deciding a motion to suppress evidence as unconstitutionally seized, and we review de novo the trial court’s decision whether to suppress the evidence. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). A search without a warrant may be reasonable when based upon valid consent to the search. *People v Dagwan*, 269 Mich App 338, 342-343; 711 NW2d 386 (2005). Whether a person has freely and voluntarily consented to a search is a question of fact for the trial court to determine based on an assessment of the totality of the circumstances. *Id.* at 342-343.

In this case, the circuit court assessed the credibility of defendant and Officer Hopkins, determined that Officer Hopkins was more credible than defendant, and factually concluded that defendant consented to the search of his car. Defendant fails to show that the trial court’s finding in this regard was clearly erroneous, and therefore, we find no error in the trial court’s decision to deny defendant’s motion to suppress evidence seized from the search of his car.

Defendant also claims that the judgment of sentence showing that he was convicted as an habitual offender, third offense, is inaccurate and must be corrected. We agree. Resolution of a challenge to information in a presentence report is reviewed for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

The prosecutor failed to timely file a notice of intent to seek the enhancement of defendant’s sentence as an habitual offender, thus precluding the charging of defendant as an habitual offender. MCL 769.13(1); *People v Bollinger*, 224 Mich App 491, 492; 569 NW2d 646 (1997). At sentencing, defendant’s attorney challenged the presentence report’s indication that defendant was convicted as an habitual offender, third offense. The prosecutor did not object. The circuit court agreed to delete the reference to defendant being an habitual offender. Nevertheless, the judgment of sentence reflects that defendant was convicted as an habitual offender, third offense. Based on the record, the judgment of sentence is clearly incorrect, as the prosecutor concedes on appeal, and should be corrected.

Affirmed but remanded for the ministerial task of correcting defendant's judgment of sentence. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder