

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMMETH LEE GRAYS,

Defendant-Appellant.

UNPUBLISHED

October 9, 2007

No. 270699

Saginaw Circuit Court

LC No. 04-024996-FH

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to a prison term of 30 months to 15 years for the felon in possession conviction and a consecutive two-year prison term for the felony-firearm conviction. He appeals by right. We affirm.

I. Facts

On August 31, 2005, defendant and another man were observed arguing with each other at a roadway intersection. A police officer who arrived at the intersection testified that defendant fled on foot through a vacant field. The officer later found a gun in defendant's rear pants pocket. Defendant maintained that the other man tried to rob him and, during a struggle, he took the robber's gun away. Defendant asserted that he was running to meet up with the police officer.

II. Ineffective Assistance of Counsel

Defendant first argues that defense counsel was ineffective in several respects. Because defendant failed to move for a new trial on this issue or request an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish ineffective assistance of counsel, defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel, and that but for counsel's errors, the result of the proceedings would have been different. *Id.* at 663-664.

Relying on *People v Coffey*, 153 Mich App 311, 315; 395 NW2d 250 (1986), defendant first argues that counsel was ineffective for failing to request a momentary innocent possession instruction as a defense to his possession of the gun. In *Coffey*, this Court held that “momentary or brief possession of a weapon resulting from the disarming of a wrongful possessor is a valid defense against a charge of carrying a concealed weapon [CCW] if the possessor had the intention of delivering the weapon to the police at the earliest possible time.” But in *People v Hernandez-Garcia*, 266 Mich App 416; 701 NW2d 191 (2005), aff’d 477 Mich 1039 (2007), this Court held that no such defense to CCW existed because the offense was a general intent crime. Although defendant urges this Court to follow the reasoning in *Coffey*, our Supreme Court in affirming this Court’s decision in *Hernandez-Garcia*, expressly overruled *Coffey*. 477 Mich 1040, n 2. Our Supreme Court stated that the general intent required of the CCW statute did not extend to the reason why the defendant carried the concealed weapon. *Id.* at 1040 n 1.

The felon-in-possession statute prohibits a person convicted of a felony from possessing a firearm. MCL 750.224f. Thus, it is a general intent crime. See *People v Fennell*, 260 Mich App 261, 266; 677 NW2d 66 (2004) (a general intent crime requires only the intent to perform the physical act itself). Felony-firearm is also a general intent crime. *People v Burgess*, 419 Mich 305, 308; 353 NW2d 444 (1984). Because momentary innocent possession is not a defense to a general intent crime, defense counsel neither erred nor deprived defendant of a reliable fair trial by not requesting the instruction. *Solmonson*, *supra* at 663, 667-668.

Defendant also argues that counsel was ineffective for not moving to suppress defendant’s police statements. Defendant asserts that his statements were inadmissible because the record does not indicate whether he was advised of his *Miranda*¹ rights or that his statements were given voluntarily. But it is incumbent on defendant to establish factual support for his ineffective assistance of counsel claim. There being no indication in the record that defendant’s statements were either involuntary or taken in violation of *Miranda*, there is no basis for concluding that defense counsel was ineffective for not filing a motion to suppress. To the extent that defendant argues that defense counsel should have refiled his request for an independent examination after the court-ordered examination by the prosecution, we believe that any decision whether an independent examination was warranted would depend on the results of the court-ordered examination. Because the results of any examination are not apparent from the record, there is no basis for concluding that defense counsel acted unreasonably by failing to request further testing. Further, defendant testified at trial that he possessed the gun and that he was a felon ineligible to do so.

Defendant also argues defense counsel was ineffective because he failed to have a bottle defendant claimed the alleged robber threw into defendant’s car tested for fingerprints by an independent examiner and have the results compared to the police database to determine the identity of the robber. Because the existence and identification of fingerprints on the bottle were not relevant to whether defendant possessed the firearm, defendant was not prejudiced by counsel’s failure to file a motion for an independent examination of the bottle.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Independent from his ineffective assistance of counsel claim, defendant asserts a claim based on the failure of the prosecution or the police to preserve and analyze the bottle. Because defendant did not raise this issue below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

“Failure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown.” *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). Further, “[a]bsent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process.” *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). See, also, *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

In this case, there is no basis in the record for concluding that the police failed to preserve the bottle. On the contrary, the trial court ordered the prosecution to process the bottle for fingerprints and submit a report to defense counsel. Defendant does not allege that he was unable to obtain the bottle because it was not preserved. Also, neither the prosecution nor the police had an independent duty to analyze the bottle apart from the trial court's order. *Coy*, *supra* at 21. There is no indication in the record, nor does defendant allege, that the trial court's order was not followed. For these reasons, plain error has not been shown.

III. Motion to Dismiss

Defendant argues that the trial court erred in denying his motion to dismiss when the prosecutor failed to produce a *res gestae* witness, Jaylysa Trayleor, for trial. Defendant also argues that the trial court erred by failing to give a missing witness instruction. This Court reviews a trial court's decision on a motion to dismiss for an abuse of discretion. *People v Stone*, 269 Mich App 240, 242; 712 NW2d 165 (2005). An abuse of discretion occurs when the trial court's decision falls outside of the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The prosecutor has an obligation to inform the defense of all *res gestae* witnesses and notify the defense of all witnesses he intends to call at trial. MCL 767.40a(1) and (3). On the information, the prosecution endorsed Trayleor as a witness it intended to produce at trial. But in two subsequent amended witness lists filed more than thirty days before trial, the prosecution gave notice it did not intend to produce Trayleor as a witness at trial. See MCL 767.40a(3) and (4). Although the prosecution attempted to re-endorse Trayleor on a third amended witness list filed five days before trial, defendant objected to this witness list. The trial court did not allow it to be filed. Because Trayleor was not endorsed on the last filed witness list, the prosecutor had no duty to produce her for trial. *People v Paquette*, 214 Mich App 336, 343; 543 NW2d 342 (1995). This record does not reveal a circumstance where a missing witness instruction might be appropriate. *People v Perez*, 469 Mich 415, 418-421; 670 NW2d 655 (2003).

Defendant's reliance on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), is misplaced. Because the prosecutor notified defendant that Trayleor was a *res gestae* witness, he did not suppress her testimony, a necessary element of a *Brady* violation. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

We also reject defendant's related claim that defense counsel was ineffective for failing to otherwise secure Trayleor's presence at trial. Defense counsel asserted that Trayleor could identify the other man involved in a confrontation with defendant. However, defendant never indicated that Trayleor would testify that she saw this other person attempt to rob defendant, and Trayleor allegedly told the police that she saw defendant retrieve a gun from his car. Moreover, even if Trayleor could identify the other person, her testimony would not have affected the undisputed evidence that defendant possessed a firearm. Because felon in possession and felony-firearm are general intent crimes, it was immaterial whether defendant obtained the gun from the other person as he claimed.

IV. Sentencing

Defendant argues that his sentence for the felon in possession of a firearm conviction is disproportionate and fails to reflect his family support and rehabilitative potential. The sentencing guidelines range for defendant's felon-in-possession conviction was 10 to 46 months. The trial court sentenced defendant with that range to a term of 30 months to 15 years' imprisonment. Therefore, under MCL 769.34(10), this Court must affirm defendant's sentence absent the trial court erroneously scoring of the guidelines or using inaccurate information in determining the sentence. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Defendant does not allege a specific scoring error, but argues that the trial court violated the principles announced in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), cases in which the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme that allowed the sentencing judge to increase a defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. As defendant recognizes, however, our Supreme Court has determined that *Blakely* and *Booker* do not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Our Supreme Court has again recently reaffirmed that Michigan's intermediate sentencing scheme is unaffected by *Blakely* principles. *People v McCuller*, 479 Mich 672, 676-678, 698; ___ NW2d ___ (2007). This Court is bound by our Supreme Court's determination. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).

We reject defendant's argument that his sentence was not based on accurate information because the trial court failed to consider his strong family support and his addiction to drugs and alcohol. Defendant's family support was addressed in the presentence report, which was available to the trial court. Defendant did not object to the accuracy of that information. Additionally, there was no evidence that defendant had any diagnosed addictions, but the presentence report accurately reported that defendant had a history of substance abuse and had been in treatment centers in the past. Contrary to what defendant asserts, the trial court was not required to order an assessment of defendant's rehabilitative potential through intensive substance abuse and psychiatric treatment under MCR 6.425(A)(5). This court rule only states that the presentence report must include, if appropriate, a defendant's medical and substance abuse history and a current psychological or psychiatric report if indicated. The presentence report noted defendant's medical and substance abuse problems and stated that defendant had not been diagnosed with any mental issues. Thus, it complied with MCR 6.425(A)(5).

We also reject defendant's argument that he was improperly sentenced as a fourth-felony habitual offender. The presentence report indicates that defendant has prior felony convictions for delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), felon in possession of a firearm, MCL 750.224f, and attempted jail escape, MCL 750.195(1), each arising from a separate criminal transaction. All three offenses are punishable by imprisonment for more than one year and are expressly designated as felonies in the respective statutes. Therefore, they qualify as felonies for purposes of habitual offender sentencing. MCL 761.1(g).

Defendant asserts that, according to the presentence report, the delivery of cocaine charge was actually "nolle prossed" on January 3, 1995, leaving only two prior felony convictions. Although the presentence report indicates that a charge of possession of less than 25 grams of cocaine was "nolle prossed" on January 3, 1995, it indicates that defendant pleaded guilty to an additional charge of delivery of less than 50 grams of a controlled substance on that same date and was sentenced to 3 to 20 years' imprisonment. Thus, there is no merit to this issue.²

Because defendant has not shown that the sentencing guidelines were improperly scored or that the trial court relied on inaccurate information when sentencing defendant within the guidelines range, we must affirm defendant's sentence. MCL 769.34(10).

Lastly, defendant argues that the trial court erred by failing to award sentence credit pursuant to MCL 769.11b. We disagree. Defendant was on parole when he committed the instant offenses. "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." *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Contrary to what defendant argues, the failure to apply sentence credit against defendant's new sentences does not implicate the state and federal Double Jeopardy Clauses, and this Court has already held that application of MCL 791.238 does not constitute cruel and unusual punishment or violate a defendant's due process or equal protection rights. *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 491 (1994). Defendant does not develop his Ninth Amendment argument; consequently, we deem this issue abandoned. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

We affirm.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

² Accordingly, we also reject defendant's related claim that defense counsel was ineffective for failing to object to his habitual offender fourth status.