

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT MICHAEL BARBER,

Defendant-Appellant.

UNPUBLISHED

May 21, 1999

No. 203130

Wexford Circuit Court

LC No. 96-004904 FH

Before: Hoekstra, P.J., and Saad and R.B. Burns,* JJ.

PER CURIAM.

A jury convicted defendant of carrying a concealed weapon¹, ("CCW"), and resisting and obstructing a police officer² ("resisting arrest"). Wexford Circuit Judge Charles D. Corwin sentenced defendant as a fourth habitual offender³ to twenty to forty years in prison for the CCW conviction and ten to fifteen years in prison for resisting arrest. Defendant challenges the trial court's order denying his motion to suppress the .32 revolver, and also the proportionality of his sentence, and the ruling permitting the prosecutor to amend the habitual offender notice in the information. We affirm.

I

In the course of investigating a break-in at an automobile dealership, Michigan State Police Trooper Glen Goldner encountered defendant walking southbound along US 131. Although Goldner did not suspect that defendant had been involved in the break-in when he first saw him, he believed he might have information on the crime, so he beckoned to defendant to approach him. As defendant approached Goldner, he stuck his thumbs in his pants pockets. As defendant came within six to seven feet of Goldner, Goldner observed a bulge in defendant's pants pocket which resembled a gun. Goldner instructed defendant not to move, and put his hand in defendant's pocket to feel the object, which turned out to be a loaded .32 revolver. As Goldner seized the gun, defendant pushed Goldner backward and fled. He was later apprehended in a swamp.

Based on this evidence, the jury convicted defendant of CCW and resisting arrest. Judge Corwin sentenced defendant as a fourth habitual offender, to twenty to forty years in prison for the CCW conviction and ten to fifteen years in prison for resisting arrest.

II

Defendant argues that the trial court erred in denying his motion to suppress the gun. We disagree.

On appeal of a motion to suppress, this Court examines the trial court record to determine if the trial court's findings of fact underlying the decision to grant or deny the motion were clearly erroneous. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997). A decision is clearly erroneous when the reviewing court is "left with a definite and firm conviction that a mistake has been made." *Id.* However, this Court considers the trial court's ultimate decision to grant or deny the motion de novo. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998).

Both the Michigan and federal constitutions afford citizens protection from unreasonable governmental seizures. US Const, Am IV; Const 1963, art 1, § 11. The Michigan Constitution does not afford greater protection than its federal counterpart absent a "compelling reason." *People v Champion*, 452 Mich 92, 97-98 n 3; 549 NW2d 849 (1996). Consequently, the analysis for an alleged unreasonable seizure is the same whether challenged under the Michigan or federal constitution.

Here, we need to consider whether the trial court correctly characterized Goldner's contact with defendant for purposes of determining whether the gun was seized pursuant to a lawful seizure. Determining the point at which seizure took place is crucial to a Fourth Amendment inquiry because it is at that point that the officer must have probable cause. *People v Taylor*, 454 Mich 580, 589; 564 NW2d 24 (1997).

In *People v Shabaz*, 424 Mich 42, 56-59; 378 NW2d 451 (1985), our Supreme Court explored the "three tiers" of lawful police contact with citizens as described by Justice White in *Florida v Royer*, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983). The distinguishing characteristic among these three tiers is the degree of justification that the officer must have to initiate the contact. *Id.* The first two tiers, as described below, are relevant to the prosecutor's arguments in this appeal and track the trial court's findings. In contrast, defendant argues that a third tier contact impermissibly occurred in this case.

A. The three tiers of contact

The first tier contact between a police officer and a citizen involves the least amount of force or display of authority and does not amount to a Fourth Amendment seizure. *Shabaz*, 424 Mich 56-59. In this tier, police officers may lawfully approach individuals in public areas and request that they answer questions voluntarily. *Id.*, 56-57. The citizen has complete discretion to answer the questions or to leave the officer's presence, and the officer does not need any level of justification to initiate the contact. *Id.*; *People v Bloxson*, 205 Mich App 236, 242; 517 NW2d 536 (1994) (police interaction with an individual is lawful and does not require any level of suspicion as long as the officer does "not convey a message that compliance with their requests is required"). Under these public and voluntary circumstances, benign and non-coercive indications of authority, such as a police officer's self-identification as a law enforcement agent, do not convert the encounter into a seizure. *Shabaz*, 424

Mich 57; see generally *Bloxson*, 205 Mich App 242-243 (describing various factual scenarios in which officers refrained from using force or other methods that would coerce an individual and make them feel that they were not free to terminate the contact).

In second tier encounters, police officers have the authority to stop and investigate a person if they can articulate a reasonable suspicion, based on objective observations, that the person investigated is engaged in criminal activities. *Shabaz*, 424 Mich 57; *Terry v Ohio*, 392 US 1; 85 S Ct 1868; 20 L Ed 889 (1968); *People v Whalen*, 390 Mich 672, 682; 213 NW2d 116 (1973), after remand 65 Mich App 687 (1975). This type of stop is a seizure within the meaning of the Fourth Amendment. *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). This sort of seizure short of a full arrest, known as a *Terry* stop or an investigatory stop, is different from a first tier stop and occurs when, “in view of all the circumstances surrounding an encounter with the police, a reasonable person would have believed that the person was not free to leave.” *Id.*, citing *People v Armendarez*, 188 Mich App 61, 69; 468 NW2d 893 (1991); *Terry*, 392 US 19-20. This government action is not subject to the Fourth Amendment warrant requirement, but it is subject to the Fourth Amendment’s reasonableness standard. *Terry*, 392 US 19-20.

As part of an investigation a police officer may frisk an individual he or she encounters in public as a safeguard from dangerous items that may be used as weapons as long as he or she can articulate a reasonable suspicion to prompt the search. *People v Taylor*, 214 Mich App 167, 169-170; 542 NW2d 322 (1995). A trial court must suppress evidence seized during an investigatory stop unless that stop passes a two-part constitutional test. *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993), citing *United States v Cortez*, 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981). First, the court must look at the totality of the circumstances and determine from the police perspective that there was a reasonable suspicion that the defendant had committed a crime, was committing a crime, or was about to commit a crime. *Nelson, supra*. Second, the trial court must find that the police suspicion was both reasonable and articulable under *Terry*. *Id.* “Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or ‘hunch,’ but less than the level of suspicion required for probable cause.” *Champion*, 452 Mich 98, citing *United States v Sokolow*, 490 US 1; 109 S Ct 1581; 104 L Ed2d 1 (1989). If the court cannot make these findings, it must exclude the evidence. However, even if the initial stop is invalid, if the officers discern a lawful basis for arresting an individual during the improper detention, they may do so and “properly obtain evidence that flows from such an arrest.” *People v Lambert*, 174 Mich App 610, 612; 436 NW2d 699 (1989).

A third tier police-citizen contact occurs when the officer arrests (seizes) an individual. *Shabaz*, 424 Mich 58-59; *Shankle*, 227 Mich App 693 (test for when a seizure occurs). Probable cause must exist at the time of the seizure, but it “requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity.” *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998); *Shabaz*, 424 Mich 58-59.

B. The trial court’s findings of fact

The trial court denied the motion to suppress the .32 handgun after engaging in a two-part factual analysis at the first suppression hearing. The court specifically relied on this same analysis when it reviewed defendant's second motion to suppress the gun and arrived at the same conclusion.

The court found that Goldner had carried out a second-tier stop within the meaning of the Fourth Amendment by motioning to defendant to approach him. The court found that the trooper had not suspected that defendant was involved in the car dealership break-in, but that the stop was only minimally obtrusive in light of his efforts to investigate a recent crime that occurred near where he encountered defendant on the road. Second, the court determined that defendant's action of placing his thumbs in his pockets was reasonably suspicious to a law enforcement agent trained to be on alert for danger and because defendant's hands drew the trooper's attention to the discernible outline of a gun. Consequently, the court reasoned, it was reasonable for the officer to reach into defendant's pocket and remove the gun for his own protection. Furthermore, at that time Goldner had probable cause to believe that defendant was committing the crime of CCW. The trial court concluded that Goldner conducted a constitutionally sound investigatory stop and lawfully seized the weapon.

C. Analysis and conclusion

While the trial court's application of the law to the facts was not entirely accurate, we are satisfied that its analysis was sufficient and that it reached the correct result. Contrary to the trial court's findings, we conclude that Goldner's initial contact with defendant was only a first-tier contact, rather than second-tier. Goldner testified at the first suppression hearing that he did not suspect defendant of any crime when he first saw him walking along the highway, and that he merely intended to question defendant regarding any information he might have about the events at the High Point car dealership. *Id.* This scenario qualifies as a first-tier stop. *Shabaz*, 424 Mich 56-57. For instance, at the time Goldner motioned to defendant they were physically distant, separated by the lanes of traffic on US 131. Although Goldner was dressed in uniform and was driving a marked vehicle when he first saw defendant, he did not activate the flashing lights on his vehicle. There was no testimony suggesting that Goldner displayed any intent to seize defendant prior to seeing the gun. Goldner's testimony that he would have crossed the highway to speak with defendant had he not chosen to approach him does not lead to any rational inference that the officer had changed his mind about engaging in a first tier stop at that point. There simply is no evidence that Goldner used any technique to coerce defendant into approaching him to answer questions or that a reasonable person in the same circumstance would have felt compelled to stay and respond to the trooper. *Shankle*, 227 Mich App 693. Therefore, we conclude that the trial court erroneously found that Goldner seized defendant when he initially motioned for defendant to cross the highway and approach him.⁴ *Shabaz*, 424 Mich 57; *Bloxson*, 205 Mich App 242-243.

However, the contact became a second-tier investigatory stop when defendant was six to seven feet away, and Goldner decided to inspect his pocket. This heightened degree of contact was, however, constitutionally permissible, because Goldner had a reasonable and articulable suspicion that defendant was committing the crime of CCW. Goldner was able to articulate how the bulge corresponded to the shape of a gun. *Nelson*, 443 Mich 632. He further testified that when he placed his hand in defendant's pocket, he felt the handle of a gun and decided to remove the object, a .32

revolver. It is reasonable to infer that as a trained law enforcement agent, Goldner was able to identify the shape of a gun from a distance of six to seven feet and confirm his suspicion by feeling the suspicious object.⁵ *Nelson*, 443 Mich 632.

In a highly analogous case, this Court determined that a police officer acted lawfully when he approached a group of high school students and frisked one individual who had a bulge in his jacket pocket, which turned out to be a gun. *Taylor*, 214 Mich App 167. The Court noted that the arresting officer's experience in law enforcement and testimony that he had previously encountered individuals carrying concealed weapons provided the "particularized suspicion that a crime was afoot to justify the stop" *Id.*, 170. Here, Goldner had even more compelling reasons to suspect defendant of carrying a gun in his pocket. Unlike the officer in *Taylor*, Goldner's suspicions were not subjective, but rather were based on his visual observation of a gun-shaped bulge. Consequently, we conclude that the trial court did not err when it determined that Goldner was able to sufficiently articulate a reasonable suspicion which justified the investigatory stop. The trial court correctly denied the motion to suppress the gun.

III

Defendant contends that his sentences should be vacated because they are disproportionate to the seriousness of the offenses. We find no error in sentencing.

We apply the abuse of discretion standard in reviewing a sentence, *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994); including sentences for habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). "[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990); see also *People v Cervantes*, 448 Mich 620, 626-630; 532 NW2d 831 (1995). Sentencing guidelines do not apply to habitual offender sentences, so we assign no merit to defendant's claim that the trial court erroneously departed from the presentence investigator's recommendations. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996).

A fourth-time habitual offender is subject to sentence enhancement according to the statutory scheme set forth in MCL 769.12; MSA 28.1084. If the subsequent felony carries a maximum term of five or more years' imprisonment, or life imprisonment, the court may sentence the defendant to life imprisonment. MCL 769.12(1)(a); MSA 28.1084(1)(a). If the subsequent felony carries a maximum term of less than five years' imprisonment, the court may sentence the defendant to up to fifteen years' imprisonment. MCL 769.12(1)(b); MSA 28.1084(1)(b). Here, defendant's CCW conviction carries a statutory maximum sentence of five years, thereby falling under the first category. MCL 750.227(3); MSA 28.424(3). His resisting arrest conviction carries a statutory maximum of only two years, hence, it fits the second category. MCL 750.479; MSA 28.747. Defendant's twenty to forty year sentence for CCW, and his ten to fifteen year sentence for resisting arrest are both consistent with the statutory maximum sentences under the habitual offender statute. MCL 769.12(1); MSA 28.1084(1).

Defendant claims that his sentence is disproportionately harsh for a nonviolent offense and an offender who has committed predominantly property-related crimes. We disagree. At the time of sentencing defendant, who was twenty-five years of age, had a criminal history that included five juvenile convictions, five adult convictions, and pending charges in three Michigan counties. He also faced the possibility of federal charges stemming from a Bureau of Alcohol, Tobacco, and Firearms investigation into whether he committed felony-firearm and trafficked in stolen weapons. The court reviewed this criminal history on the record, specifically noting that the crimes in the instant case occurred while defendant was on lifetime parole for a felony conviction in Alabama for receiving and concealing stolen property. Contrary to defendant's argument that he is a good candidate for rehabilitation, this criminal history supports the court's conclusion that defendant is a career criminal that the judicial system is unlikely to reform. See *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998) (likelihood that a defendant can be rehabilitated is a proper consideration at sentencing). As our Supreme Court has said, when an habitual offender demonstrates that he cannot conform his conduct to the law, particularly by re-offending while on parole, a sentence within the statutory limits does not constitute an abuse of discretion. *Hansford*, 454 Mich 326.

The record also belies defendant's contention that he is, at heart, a peaceful offender. He committed an assault on an officer of the law. The trial court further noted that defendant was carrying a loaded revolver, and possessed a speed loader and tools for cutting telephone lines. On this record, the trial court's assessment that defendant is a "menace to society" who "should be lock[ed] up as long as reasonably possible" is well substantiated.

Defendant maintains that the trial court should not have considered multiple pending charges against him. He is wrong. Our Supreme Court has held that the sentencing court may consider uncharged criminal activity, activity for which criminal charges are still pending, and even criminal activity of which the defendant has been acquitted, so long as it satisfies the preponderance of the evidence test. *People v Ewing (After Remand)*, 435 Mich 443, 473; 458 NW2d 880 (1990). We also find no error in the trial court's inference that defendant was prepared to do violence because he was carrying a loaded revolver, even though he never used the weapon.

In sum, the trial court did not abuse its discretion in sentencing defendant. The sentence was proportionate to both the seriousness of the offense and the background of the offender.

IV

Finally, defendant argues that he cannot be sentenced as a habitual offender, fourth offense, because the trial court allowed the prosecution to add a new felony to the information on the day of sentencing. We disagree.

This Court generally reviews a trial court's decision to permit a prosecutor to amend a criminal information for an abuse of discretion. MCL 767.76; MSA 28.1016. However, we review this issue de novo because it involves statutory interpretation. *People v Webb*, 458 Mich 265, 274-275; 580 NW2d 884 (1998).

The prosecutor filed a criminal information against defendant on August 14, 1996. Count VI in that information gave notice that the prosecutor intended to seek sentence enhancement for defendant as an habitual offender who committed a fourth or subsequent offense. That original information alleged that defendant was convicted of breaking and entering, UDAA (unlawful driving away an automobile), and “UDAAiving [sic] & Concealing Stolen Property” on November 11, 1989 in Van Buren County. *Id.* The first (9/17/97) and second (9/23/97) amended criminal complaints fixed what appeared to be a typographical error by changing the “UDAAiving” conviction to receiving and concealing property.

Defendant did not challenge the accuracy of these alleged prior convictions, including the typographical error, until after a jury convicted him in the present case, slightly more than six months after the original complaint gave notice that the prosecutor intended to seek sentence enhancement. At that time, he claimed that the Van Buren County prosecutor had dismissed the receiving and concealing charge by entering a nolle prosequi. The prosecutor apparently conceded the point when he moved to amend the information to include additional prior felony convictions on April 18, 1997. According to the prosecutor’s motion, he was seeking permission to substitute a UDAA conviction for receiving and concealing stolen property and to list a receiving and concealing stolen property felony conviction from Alabama. The prosecutor explained that the error in the information stemmed from an unclear criminal history regarding defendant.

The trial court observed that the prosecutor’s motion to amend the habitual offender notice in the criminal information exceeded the twenty-one day limit imposed by MCL 769.13; MSA 28.1085. However, the trial court found that amending the information would not prejudice defendant because he had been aware that the prosecutor was seeking the habitual offender, fourth offense, sentence enhancement since the first information was filed and the amendment would not increase defendant’s potential punishment. The court also noted that defendant had an ongoing opportunity to challenge the accuracy of the convictions listed in count VI and had failed to do so. The court granted the prosecutor’s motion. The court evidently did not rule on defendant’s motion challenging the accuracy of the Van Buren County receiving and concealing stolen property conviction because the order granting the prosecutor’s motion to amend the information resolved that issue.

Defendant argues that MCL 769.13; MSA 28.1085 does not permit a prosecutor to amend notice of an intent to seek habitual offender sentence enhancement more than twenty-one days after filing an information. Subsection one states:

In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.

In *People v Ellis*, 224 Mich App 752, 756-757; 569 NW2d 917 (1997), the prosecutor timely charged defendant as an habitual offender, but moved to amend the supplemental information six weeks later to allege two additional prior convictions. *Id.*, 755. This Court held:

the supplemental information may be amended outside the statutory [twenty-one day] period only to the extent that the proposed amendment does not relate to the specific requirements of MCL 769.13; MSA 28.1085, i.e. the amendment may not relate to additional prior convictions not included in the timely filed supplemental information. To hold otherwise would be to permit prosecutors to avoid making the necessary “prompt” decision regarding the level of supplementation, if any, they wish to pursue and would materially alter the “potential consequences” to the accused of conviction or plea. [*Id.*, 756-757 (citation and footnote omitted).]

At first glance, this passage from *Ellis*, 224 Mich App 756-757, appears to create a firm rule prohibiting any amendments to list prior convictions any time after the twenty-one days has passed. “As this Court has recently held, this statute reflects a bright-line test for determining whether a prosecutor has filed a supplemental information ‘promptly.’” *Id.*, 755, citing *People v Bollinger*, 224 Mich App 491, 491; 569 NW2d 646 (1997). If that were true, this Court’s analysis would end here with a finding of error. However, the last sentence in the passage above and footnote two, discussed below, suggest that a trial court may still properly permit a prosecutor to amend the information when doing so will not affect “potential consequences,” i.e., the length of defendant’s sentence.

In footnote 2, the *Ellis* Court distinguished its decision barring a prosecutor from alleging additional prior convictions in an amended information from its previous decision in *People v Manning*, 163 Mich App 641; 415 NW2d 1 (1987). In *Manning*, this Court found no error where the trial court permitted the information to be amended outside the fourteen-day rule that was then in effect.⁶ *Id.*, 644-645; *Ellis*, 224 Mich App 757. The prosecutor in *Manning* filed a timely supplemental information charging habitual offender, fourth offense. *Manning*, 163 Mich App 644. Approximately two months later, the prosecutor in *Manning* moved to amend the habitual offender notice to correct an error regarding the defendant’s criminal record. *Id.* This Court approved the amendment, noting that the purpose of the fourteen-day rule was “to provide a defendant with notice, at an early stage of the proceedings, of the potential consequences should the defendant be convicted of the underlying offense.” *Id.*, citing *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982). The Court held that “the expressed purpose of the underlying *Shelton* rule has been effectuated” despite the belated amendment. *Manning*, 644-645.

In contrast, the belated amendment in *Ellis* heightened the risk to the defendant. The timely information subjected the defendant to a seven-year enhancement, but the late-amended information subjected him to a potential life sentence. *Ellis*, 224 Mich App 757. The *Ellis* Court did not overrule *Manning* with a holding that late amendments will never be permitted. Rather, the *Ellis* Court harmonized its decision with the *Manning* decision by drawing a distinction between amendments which elevate the level of the supplemental charge and amendments which do not. *Ellis*, 757, n 2. The *Ellis* Court’s distinction was *not* entirely predicated on the fact that the Legislature statutorily superseded the *Shelton* fourteen-day rule by enacting the twenty-one day rule in MCL 769.13; MSA 28.1085. Clearly, the *Ellis* Court did not preclude amendment of a *timely* sentence enhancement information to correct a technical defect where the amendment does not increase the potential sentence. See generally *People v Hardiman*, 132 Mich App 382, 386; 347 NW2d 460 (1984).

Here, the amended information did not increase the potential sentence. Defendant does not dispute that he had notice that he was charged as a fourth-time habitual offender. He has not alleged any other sort of prejudice arising from the late amendment. Furthermore, the amendment did not change defendant's habitual offender level; the Legislature has not prescribed any higher level of punishment for defendant than at the fourth-time offender level. Accordingly, the amendment did not change defendant's potential punishment in any way, and the trial court properly granted the prosecutor's motion.⁷

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Robert B. Burns

¹ , MCL 750.227; MSA 28.424.

² MCL 750.479; MSA 28.747.

³ MCL 769.12; MSA 28.1084.

⁴ The trial court's erroneous determination that a Fourth Amendment seizure took place as soon as Goldner gestured to defendant does not require reversal of his decision to deny the motion to suppress the gun because it did not interfere with the court's analysis of whether the trooper had the requisite justification for seizing the gun. *Nelson*, 443 Mich 632. If anything, the trial court's error was actually to defendant's advantage because it required a greater showing of justification on Goldner's part.

⁵ Goldner's observation of the gun would have also supported a third tier arrest at that time because carrying a concealed weapon is unlawful in Michigan. *Id.*; MCL 750.227; MSA 28.424. However, Goldner did not apprehend defendant. Therefore, a third tier seizure did not occur.

⁶ The fourteen-day rule in effect at the time of the *Manning* decision was established by our Supreme Court in *People v Shelton*, 412 Mich 565; 315 NW2d 537 (1982).

⁷ Defendant insinuates that this amendment improperly allowed the prosecutor to charge defendant with a new, substantive offense. However, it is well settled that the habitual offender statutes merely provide for sentence enhancement without establishing substantive offenses. *People v Zinn*, 217 Mich App 340, 344-346; 551 NW2d 704 (1996); MCL 769.13(5); MSA 28.1085(5).