STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2004
v	No. 247560 Genesee Circuit Court
BRIAN WILLIAM VESSELLS, Defendant-Appellant.	LC No. 02-010962-FH

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of operating a vehicle while under the influence of intoxicating liquor and while having an unlawful blood alcohol content, MCL 257.625(1)(a) and (1)(b). He was sentenced to 26 to 120 months' imprisonment. Defendant received an enhanced sentence, pursuant to MCL 257.625(8)(c), for having two prior convictions for operating a vehicle under the influence of intoxicating liquor. Defendant's sentence was also enhanced, pursuant to MCL 769.11, for being a third habitual offender. He appeals as of right. We affirm.

I

Defendant argues that he was denied his constitutional right to a fair trial. The gist of defendant's argument is that defense counsel failed to inform defendant that if he waived his right to a jury trial the judge who heard testimony during hearings on defendant's pretrial motions would try him. His argument is based on the assumption that the trial judge was biased because he heard testimony and made rulings in defendant's pretrial motions to dismiss and to suppress. We disagree. The mere fact that a judge was involved in a prior trial or other proceeding against the same defendant does not amount to proof of bias. *People v Upshaw*, 172 Mich App 386, 388; 431 NW2d 520 (1988). Defendant does not cite to any conduct on the part of the trial judge that would support a finding of bias.

Defendant also claims that he was denied a fair trial because jail officials denied him access to legal material while he was in custody. This Court has treated similar claims as alleging a denial of the constitutional right of access to the courts. See *People v Mack*, 190 Mich App 7; 475 NW2d 830 (1991). "The state [is] not required to offer defendant law library access once it [has] fulfilled its obligation to provide him with competent legal assistance." *People v*

Yeoman, 218 Mich App 406, 415; 554 NW2d 577 (1996). Defendant was represented by an attorney at trial, and therefore had the "assistance from [a person] trained in the law."

II

Defendant argues that defense counsel committed several errors and that he was denied the effective assistance of counsel as a result of the errors. Defendant did not preserve this issue, since he moved for neither a new trial nor for an evidentiary hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Thus, this Court's review is limited to mistakes apparent on the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

"To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy." *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *Stewart (On Remand), supra* at 42.

Defense argues that his trial counsel failed to object to the admission of evidence regarding defendant's field sobriety test. The record reveals that the trial court held an evidentiary hearing regarding defendant's motion to suppress the results of the field sobriety tests. Given this prior ruling, defense counsel's failure to object to the evidence at trial does not constitute ineffective assistance of counsel, since "[c]ounsel is not obligated to make futile objections." *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant next argues that his trial counsel failed to point out to the jury the police officer's "inconsistent or embellished testimony." Defendant's list of these embellishments and inconsistencies includes the tipster's account of what the tipster saw thrown from defendant's vehicle, the amount of time the officer lost sight of defendant's car before he stopped the vehicle, whether there were other red vehicles in the park where defendant was arrested, and when the field sobriety checklist was filled out.

All of the "embellishment and inconsistencies" cited by defendant, if they can even be called such, are minor. For example, the officer that stopped defendant testified at the preliminary examination that the tipster had said that a beer can *or bottle* had been thrown from the window of defendant's vehicle. At the hearing on defendant's motion to suppress, the officer testified the tipster told him that it was a beer can that had been thrown out the window. These statements are not necessarily inconsistent, since the officer's first statement indicated that the tipster said that a *can or a bottle* was thrown out of the car. We also note that, contrary to defendant's claim that his trial counsel did not note inconsistencies in the prosecution's case, during his closing argument, defense counsel did draw attention to the officer's lack of certainty regarding exactly what the tipster said.

Assuming that the other "inconsistencies and embellishments" cited by defendant are indeed inconsistencies, they are of an equally minor nature. The officer stated at one point that he lost sight of defendant's car for "probably a minute, minute and a half at the most." Later, he testified that he lost sight of the car for "probably 40 seconds maybe." The officer also testified that he was not sure if there were other red vehicles in the park at the time he was looking for defendant's car; later, he stated unequivocally that there were not. Regarding the sobriety checklist, the officer at one point indicated he filled it out "in the immediate timeframe of the . . . arrest." At trial, he indicated that the checklist was filled out "if not the [day of the arrest], then the day after." Whether the officer's two statements are inconsistent depends on the meaning of the phrase "immediate timeframe."

Defendant does not explain how his trial counsel's failure to object to these alleged "inconsistencies" and "embellishments" affected his trial. Given the fact that some of them do not even appear to be inconsistencies and those that do appear to be are minor, it was not unreasonable for defense counsel to fail to point them out. Indeed, emphasizing the inconsistencies could have made it appear that his case was so weak that defendant had to rely on such questionable "inconsistencies."

Defendant further argues that his counsel failed to file a brief or provide any argument regarding defendant's motion to dismiss pursuant to MCR 6.004. However, as discussed, *infra*, defendant's argument based on MCR 6.004 is without merit. Consequently, failing to file a brief on this issue or argue it before the trial court does not constitute ineffective assistance of counsel, since "[t]rial counsel is not required to advocate a meritless position." *Snider*, *supra* at 425.

Defendant's final argument is that his trial counsel failed to ask the police officer who arrested him the question, "How could the tipster have known a 'beer' bottle or can was thrown from the vehicle, when they could not even differentiate between a can and a bottle?" It is unclear from defendant's statement and its context what the antecedent of "they" is. Defendant provides no citation to the record for his contention that "they could not even differentiate between a can and a bottle." "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Consequently, defendant has abandoned this argument.

III

Defendant asserts that the trial court erred by denying his motion to dismiss under MCR 6.004 for violation of the 180-day rule. He argues that the time period began to run when he was returned to prison on June 17, 2002, not on the date he was charged with the offense as the trial court held. We disagree.

Defendant was on parole for another offense when he was arrested on the charges that are the subject of his appeal. He concedes in his brief on appeal that he "was returned to prison on June 17, 2002, based on these allegations for parole violation hearings." The 180-day rule does not apply to an incarcerated parolee unless and until parole is revoked. *People v Chavies*, 234 Mich App 274, 279; 593 NW2d 655 (1999). There is no indication in the record that parole was

revoked on June 17, 2002. However, the record does indicate that defendant was charged with the present offense when the warrant was signed on September 10, 2002, and trial commenced on January 10, 2003. Thus, the 180-day rule was not violated.[1]

Defendant has abandoned his claim that he should have been granted credit for time served between his arrest on May 24, 2002, and his sentencing on February 18, 2003. Defendant does not provide any of the facts necessary for a thorough assessment of this claim. Because defendant has failed to argue the merits of this allegation of error, this issue is not properly presented for review, and he has abandoned it. *People v Jones*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).[2]

IV

Defendant maintains that the trial court erred by denying his motion to suppress the evidence because the police lacked reasonable suspicion to make the investigatory stop that led to the discovery of the evidence. We review a trial court's findings of fact on a motion to suppress for clear error and the ultimate decision de novo. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997).

A brief investigatory stop short of arrest is a seizure implicating Fourth Amendment rights, and as such, is permitted only where a peace officer has a reasonable suspicion that criminal activity is afoot. *Terry v Ohio*, 392 US 1, 16; 88 S Ct 1868; 20 L Ed.2d 889 (1968). The investigatory stop must be justified by a particularized suspicion, based on some objective manifestation, that a person is, has been, or is about to be engaged in some type of criminal activity. The suspicion must be based on the totality of the circumstances presented to the officer. *People v Shields*, 200 Mich App 554, 557; 504 NW2d 711 (1993). "In determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001), quoting *People v LoCicero*, 453 Mich 496, 501-502; 556 NW2d 498 (1996). The determination whether the police had reasonable suspicion to support an investigatory stop is made considering the totality of the circumstances "as understood and interpreted by law enforcement officers, not legal scholars." *Oliver, supra*. The reasonable suspicion necessary to stop a motor vehicle need not arise from a police officer's personal observation, "but may also be supplied by a citizen-informant if the information carries enough indicia of reliability to provide the officer with a reasonable suspicion that criminal activity is afoot." *People v Armendarez,* 188 Mich App 61, 67; 468 NW2d 893 (1991). If the initial

[1] Defendant suggests that he was "charged" when he was issued a traffic citation at the time of his arrest. He contends that a traffic citation is the equivalent of a complaint for purposes of MCR 6.004(D)(1). Defendant's reliance on MCR 4.101(A)(1)(b) in support of this assertion is misplaced because the charges against him are criminal, rather than civil.

[2] Nonetheless, it appears that defendant was not entitled to sentence credit because he was obligated to serve the time that he was incarcerated between his arrest and his sentencing as a result of the parole violation. See *People v Tilliard*, 98 Mich App 17; 296 NW2d 180 (1980).

investigatory stop is justified, then the police officer can seize without a warrant any item that is in plain view and has an immediately apparent incriminatory nature. *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996).

The facts surrounding the police officer's stop of defendant are largely undisputed, and indicate that the officer had a reasonable suspicion that someone in defendant's vehicle was involved in unlawful activity. A man in a truck flagged the officer down and said that he observed someone throw a beer can out of the window of a red Pontiac Vibe. At that time, the officer could see the vehicle. After seeing the car drive into a nearby park, the officer lost sight of it for approximately forty seconds. He then came upon the car parked in the travel lane of the road that wound through the park and sat behind the car for approximately ten to fifteen seconds. Once the occupants of the vehicle saw the officer behind them, "they kinda scrambled around a little bit and then started to drive away." Based on his experience and training and the behavior of the car's occupants, the officer suspected that the occupants were drinking and were trying to hide beer cans or bottles. Given this suspicion, the officer stopped the vehicle. As he approached the vehicle, the officer observed open containers of beer inside the car. Based on the totality of the circumstances, the officer had a reasonable and articulable suspicion that criminal activity was afoot and, therefore, he was justified in making an investigatory stop.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra