STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2008
v	No. 275207 Oakland Circuit Court
KEONTA JERMAIN GILES, Defendant-Appellant.	LC No. 2006-208247-FH

Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for carrying a concealed weapon ("CCW"), MCL 750.227, assaulting, resisting and obstructing a police officer (resisting arrest), MCL 750.81d(1), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, possession of marijuana, MCL 333.7403(2)(d), and operating a motor vehicle with a suspended license (second offense), MCL 257.904(1). Defendant was sentenced, reflecting an enhancement pursuant to MCL 769.13, to one year to seven and one-half years' imprisonment for the CCW conviction, one to three years' imprisonment for the resisting arrest conviction, two years' imprisonment for the felony-firearm conviction, one to two years' imprisonment for the possession of marijuana conviction, and 208 days jail, time served, for the operating a motor vehicle with a suspended license conviction. For the reasons set forth in this opinion we affirm.

I. Facts.

Defendant's convictions arise from a traffic stop that took place on April 5, 2006, around 8:47 a.m. At that date and time, Waterford Township Police Officer Larry Novak noticed that the driver of a tan Cadillac, the sole occupant of the vehicle, was not wearing his seat belt. Novak ran a Law Enforcement Information Network (LEIN) check on the tan Cadillac's license plate and learned that the license plate was invalid. Based on that information, Novak followed the Cadillac into a Belle Tire parking lot with his vehicle's rooftop lights activated. Before Novak had the opportunity to park his vehicle, Novak observed the occupant of the Cadillac walk in the direction of the Belle Tire building. Novak approached the man, identified at trial as defendant, and asked defendant for his driver's license, vehicle registration and proof of insurance. According to Novak's testimony, defendant never made eye contact with him, was looking to the left and right, and was excited. Because of defendant's behavior, Novak directed defendant to return to and reenter his vehicle. When defendant reentered the vehicle, Novak

closed the vehicle's door. At that point, defendant proceeded to reach toward his mid-waist, and also reached toward the floor of the vehicle.

Based on defendant's movements, Novak suspected that defendant intended to either confront Novak with a weapon, or cache contraband in the vehicle. For this reason, Novak ordered defendant to lower the vehicle's driver-side window and place both of defendant's hands outside the window. Defendant complied with Novak's directions, and Novak placed handcuffs on defendant's wrists. According to Novak, as soon as he handcuffed defendant, defendant "immediately swung his body back to the right and kept making these, these movements, these movements onto the floorboard, his mid-waist again." Novak responded to defendant's behavior by ordering defendant out of the vehicle. Novak testified that as soon as defendant alighted from his vehicle, defendant lunged at Novak screaming, "I'm not going to jail, I'm not going to jail." After defendant pushed Novak, but before Novak lost his balance, Novak grabbed defendant's jacket, which Novak described as a partially zipped "winter jacket with fur around the collar." Because defendant continued to struggle, Novak eventually released his grip on defendant's jacket, and Novak then activated his department-issued Taser. Novak then deployed his Taser, which failed to subdue defendant because both prongs of the Taser were necessary to contact defendant in order for the Taser to operate, and one of the two prongs of the Taser was deflected. Defendant continued to run away and Novak did not pursue him; instead, Novak contacted the police department and requested the assistance of several police officers.

In response to Novak's call for assistance, Oakland County Sheriff's Deputies and Pontiac Police Officers arrived on the scene, as well as officers from the Waterford Township Police Department. Coincidentally, canine officers and their dogs were attending a training session a short distance from the scene. While the assisting officers searched for defendant, Novak searched defendant's Cadillac and found a plastic bag containing suspected marijuana on the floorboard, which Novak estimated would have been about one foot away from where defendant was seated in the vehicle.

Oakland County Sheriff's Deputy Gary Murray testified that at 9:00 a.m. on the date of the incident, he was attending a meeting with other canine officers with his dog, "Sulli." Accompanied by Sulli, Murray walked along a driveway and encountered an individual wearing a coat with a fur collar hiding underneath a wooden staircase. Murray ordered the individual to come out from underneath the staircase, and other officers placed the individual under arrest.

While Murray was leaving the scene with Sulli, Deputy David Curtis who had met up with Murray, called Murray's attention to a sandwich bag containing a large white ball that was on the ground near the entrance of a nearby house. Murray estimated that Curtis found the bag containing the white ball about 30 feet from the place where defendant was apprehended. According to Murray, the ground was damp resulting from rain earlier in the morning. According to Curtis, the ground was wet, but the plastic bag was dry. When Curtis picked up the bag, he suspected that it contained crack cocaine. Tests later concluded that the items seized from the car and close to where defendant was apprehended were marijuana and cocaine.

Gary Tarket, a resident of a trailer park in Waterford Township located within walking distance of Belle Tire, testified that at around 9:00 a.m. on April 5, 2006, police officers knocked on the doors of the residents of the trailer park and advised them that they were searching for a person, and that the residents should stay in their residences. Later that day, at around 5:00 p.m.,

Tarket was walking between a neighboring trailer and a garage, and noticed "something shiny on the ground." The shiny object was a gun. According to Tarket, the distance between where he found the gun and where he saw defendant "pinned down" was at least 20 feet. Tarket testified that he had not noticed the shiny object the day before. Tarket recalled that he found the gun on the north side of the trailer's staircase. After he picked up the gun, Tarket telephoned police who retrieved the weapon. No useable prints were found on the bag of cocaine or the gun.

The next day, Novak asked a reserve deputy with Lapeer County and a bloodhound handler named Burt Crawford to see if his dogs could match the scent off the defendant's coat to the bag of cocaine or the gun. Crawford took scent pads from the gun and coat. Crawford explained that he prepared a scent pad by taking a four-inch sterile gauze pad using rubber gloves and placing the pad on the gun, for the purpose of "absorption," for a period of about five minutes. After the five minutes had elapsed, Crawford then placed the scent pad in a freezer bag, sealed the bag, and marked the bag with information regarding where the sample had been obtained, who obtained it, and the date. Crawford created a second scent pad from the plastic bag containing the cocaine using the same procedure. After Crawford departed from the police station with the scent pads, Crawford returned to his house and placed the scent pads in a refrigerator. Next, Crawford conducted what Crawford called a "scent pad line-up." Crawford testified that both his dogs identified the scent of the coat from the scent of the gun. Crawford then notified Novak that his dogs successfully matched the scent from the gun with the scent from the coat.

II. Sufficiency of the Evidence.

On appeal, defendant first argues that there was insufficient evidence to support his conviction for carrying a concealed weapon and felony-firearm.

This Court reviews the record de novo when presented with a claim of insufficient evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Reviewing the evidence in a light most favorable to the prosecution, this Court determines whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). This Court will not interfere with the fact-finder's role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Conflicts in the evidence are resolved in the prosecution's favor. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

The elements of carrying a concealed weapon are: (1) defendant carried a pistol and (2) defendant carried the pistol concealed on or about his person. *People v Davenport*, 89 Mich App 678, 682; 282 NW2d 179 (1979). "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Constructive possession of a firearm exists when the defendant knows the location of the weapon and it is reasonably accessible to the defendant. *People v Bergenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Reasonable inferences arising from circumstantial evidence can be sufficient evidence to sustain a criminal conviction. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). "There must be other

corroborating evidence presented before identification based on tracking-dog evidence is sufficient to support a guilty verdict." *People v Stone*, 195 Mich App 600, 603; 491 NW2d 628 (1992).

Officer Novak testified that when he first made contact with defendant he noticed defendant was "excited" and refused to make eye contact with Novak. As Novak placed defendant inside of his vehicle, Novak noticed that defendant made "furtive movements" and kept reaching for the area around his waistband, where the officer believed the defendant may have been hiding a weapon. When Novak attempted to put defendant under arrest, defendant jumped out of his car yelling "I'm not going to jail; I'm not going to jail." Additionally, evidence was presented by residents of the trailer park where defendant was apprehended, that they found a gun near the area where defendant was apprehended.

Because no one actually viewed the gun on defendant, the evidence presented at trial against defendant on this issue consisted solely of circumstantial evidence. However, we take note that our Supreme Court in *People v Wolfe*, 440 Mich 508, 526; 489 NW2d 748 (1992) [quoting *State v Poelling*, 153 Wis 2d 493, 501-502; 451 NW2d 752 (1990)] observed that "circumstantial evidence is often times stronger and more satisfactory than direct evidence." In this case, there was strong circumstantial evidence that defendant possessed the gun at the time he ran from Novak. Based on Novak's observations of defendant's actions prior to his fleeing, defendant's actions by fleeing form the police coupled with defendant's concerns about going back to jail and the location of the weapon in relation to where defendant was apprehended, even if we were to exclude the "scent line-up" evidence as requested by defendant, there was sufficient evidence for a rational trier of fact to conclude that the elements of carrying a concealed weapon were proven beyond a reasonable doubt. Accordingly, we reject defendant's arguments that there was insufficient evidence to sustain his conviction for carrying a concealed weapon and felony-firearm.

III. Appointment of Expert.

Defendant next argues that the trial court abused its discretion when it denied defendant's motion for the appointment of an expert at public expense.

A trial court's decision to grant or deny an indigent criminal defendant's motion for appointment of an expert witness at public expense is reviewed for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). An abuse of discretion exists where the trial court's decision results in an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

An indigent criminal defendant does not have an automatic right to a court-appointed expert. *Tanner*, *supra* at 442-443. Rather, a defendant must persuade the trial court to exercise its discretion by demonstrating a "nexus between the facts of the case and need for an expert." *People v Jacobson*, 448 Mich 639, 641; 532 NW2d 838 (1995). The defendant is required to show more than a possibility that the expert would assist the defendant. *Id*. A defendant may not predicate error in the denial of a motion for the appointment of an expert witness in the absence of "an indication that expert testimony would likely benefit the defense." *Tanner*, *supra* at 442-443. Moreover, a defendant must convince the trial court that without the witness, the

defendant would be unable to safely proceed to trial. MCL 775.15; *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Defendant concluded that he needed an expert because: "Defense counsel does not have the expertise to cross examine [Crawford] nor analyze his methods or determine if his methods are scientifically accepted." Defendant requested "that this Court appoint an experts [sic] that Will [sic] be able to assist in the determination of the methods that were used in this Case [sic]." At the hearing, defense counsel repeated that he did not know anything about bloodhounds. Although defendant demonstrated, to a limited extent, some nexus between the facts of the case and the need for an expert, defendant failed to show either how the expert testimony would benefit the defense or that defendant could not safely proceed to trial without the expert. At most, defendant sought the appointment of the expert to assist counsel in some unexplained manner with cross-examination of Crawford.

Accordingly, because defendant failed to persuade the trial court that the proposed expert would likely benefit the defense, and because defendant did not show that defendant could not safely proceed to trial without the witness, the trial court did not abuse its discretion when it denied defendant's motion for appointment of an expert.

IV. Ineffective Assistance of Counsel

Defendant next argues that defense counsel ineffectively assisted defendant because counsel failed to challenge the reliability of Crawford's scent line-up procedure and he failed to request a clarifying jury instruction in response to the prosecution's statements during rebuttal argument.

Defendant argues that his counsel was ineffective because defense counsel failed to challenge the admissibility of Crawford's testimony regarding his scent line-up procedure under MRE 702. Because defendant stipulated to Crawford's qualifications as an expert at the *Ginther* hearing, defendant does not allege that trial counsel was ineffective for failing to challenge the general admissibility of Crawford's expert witness testimony. Instead, defendant presents the narrower allegation that his trial counsel was ineffective in failing to challenge the reliability of Crawford's techniques.

An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *LeBlanc*, *supra* at 579. Both the United States Constitution and the Michigan Constitution protect the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. It is presumed that a defendant received the effective assistance of counsel; to prevail on an ineffective assistance of counsel claim, a defendant bears the heavy burden of proving that counsel was ineffective. *LeBlanc*, *supra* at 578. A defendant must establish that: "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor

makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Recently, our Supreme Court in *People v Dendel*, __ Mich ___; ___NW2d ___; (Docket No. 132042, issued May 28, 2008) reiterated its prior holding in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), wherein the Court stated that for a claim of ineffective assistance of counsel to be successful, the defendant must show that counsel's performance "prejudiced the defense." Relying on the standards announced in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the Court stated in order for a defendant to demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland, supra* at 694.

Defendant asserts that defense counsel in this case erred in not realizing that the "scent line-up" was the type of evidence under which counsel should have mounted a challenge under *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), or that defense counsel erred by simply failing to challenge the reliability of the evidence. We are not persuaded that the evidence offered was of such a "scientific" nature as to necessitate application of *Daubert* to the scent line-up and defendant has not presented a case which would persuade us to do so. Additionally, defendant argues that even if *Daubert* does not apply, counsel should have challenged the methods and procedures Crawford used in conducting the scent line-up. This would necessitate that we review counsel's trial strategy in hindsight which we are forbidden from doing pursuant to the dictates found in *Matuszak, supra.* Were we to assign error to those alleged failures by trial counsel, in order to grant defendant the remedy he requests, we must also find that "there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *Odom, supra.*

We cannot conclude that counsel's omissions in challenging the techniques employed by Crawford would have led to a different result. The jury in this case was presented with a myriad of circumstantial evidence that defendant possessed the gun at the time of the initial traffic stop. We therefore conclude that defendant did not establish a "reasonable probability" that the outcome of the trial would have been different had defense counsel undertaken the measures now argued by defendant, *Strickland, supra,* or that the result was fundamentally unfair or unreliable. *Odom, supra.*

We similarly reject defendant's claim of ineffective assistance of counsel for failing to request a clarifying instruction in response to the prosecution's statements during the prosecution's closing rebuttal argument.

> In their rebuttal, the prosecution argued:
> Defense counsel also wants to talk about this instruction with regard to tracking dogs. You heard testimony with regard to tracking dogs. That would be deputy Curtis, that would be also Deputy Murray. Deputy Murray's dog found the Defendant. Deputy Curtis's dog found the cocaine.
>
> You heard testimony, however, of a trailing dog. Trailing dogs are from Mr. Crawford. Mr. Crawford also testified as to his – his dogs' certification. And,

> remember, when he went through those certifications, he talked about Alzheimer patients and children. They were trailed. They were trailed. These are trails that he had committed – he had done.

Defendant has failed to persuade us why these comments from the prosecution necessitated a special jury instruction. From the record it appears these remarks were merely an attempt by the prosecution to clarify any juror confusion between the dogs that discovered defendant and the dogs used by Crawford.

> We note that the Court instructed per CJI2d 4.14 the jury on this issue as follows: And with respect to the dog tracking evidence, you have heard evidence about the use of a tracking dog. You must consider tracking dog evidence with great care and remember it has little value as proof. Even if you decide that it is reliable, you must not convict the Defendant based only on tracking dog evidence. There must be other evidence that the Defendant is guilty.

The standard jury instruction informed the jury that tracking dog evidence "has little value as proof." Consequently, we cannot ascertain what additional instruction defendant could have requested that would establish a reasonable probability that had such an instruction been given, the outcome of the trial would have been different. We are also not persuaded that but for an additional jury instruction in response to rebuttal arguments of a prosecutor, the result of this trial was fundamentally unfair or unreliable.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Stephen L. Borrello