STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2008
v	No. 279638 Oakland Circuit Court
NANA KWASI ACQUAAH, Defendant-Appellant.	LC No. 2007-212487-FH

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(iii), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 15 to 40 years' imprisonment for the possession with intent to deliver 50 to 449 grams of cocaine conviction, and three to five years' imprisonment for the possession with intent to deliver marijuana conviction. We affirm.

I. Other Acts Evidence

Defendant first argues that the trial court erred in admitting the testimony of Pontiac Police Officer Charles Janczarek, who testified that while conducting surveillance during the course of an unrelated narcotics investigation, he had observed defendant engage in actions consistent with "hand to hand" drug transactions. Defendant contends that this testimony constituted inadmissible evidence of defendant's prior bad acts under MRE 404(b)(1), and asserts that the prosecution failed to give notice of its intent to use this evidence pursuant to MRE 404(b)(2). We disagree.

Defendant did not preserve this issue in the trial court. Unpreserved issues are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Evidence of other bad acts may be admitted at trial so long as it is offered pursuant to MRE 404(b):

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

> however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
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> (2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only to the defendant's privilege against self-incrimination.

In addition, evidence of prior criminal acts is admissible if the evidence is presented as part of the res gestae of the charged offense, for the purpose of setting forth a comprehensive overview of the circumstances of the case for the jury's consideration. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). As explained by the *Sholl* Court:

> Evidence of other criminal acts is admissible when so blended with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime. [*Sholl, supra* at 742, quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).]

Here, defendant argues that Janczarek's testimony regarding the "hand to hand" drug transactions was offered by the prosecution only to prove that defendant acted in conformity with that conduct in committing the instant offense, and was not probative of any issue in the case.

We conclude that Janczarek's testimony is admissible under MRE 404(b)(1). Testimony regarding the "hand to hand" drug transaction was relevant to address defendant's argument at trial that police mistakenly searched his residence, Apartment Two, instead of Apartment Seven pursuant to the May 3, 2005, search warrants. According to defendant, after the May 3 search of his apartment the police specifically questioned him regarding the occupant of Apartment Seven, and requested information regarding drug trafficking in defendant's apartment building generally. The testimony regarding defendant's subsequent "hand to hand" drug transactions was thus admissible for the purpose of showing the absence of mistake or accident, and tended to support Officer Main's testimony that defendant's apartment, Apartment Two, and not Apartment Seven, was in fact the location the police intended to search. Further, Janczarek's testimony is admissible under MRE 404(b)(1) because it was relevant to the issue of defendant's knowledge about the drugs that were discovered in his apartment on May 3, 2005, and whether defendant intended to deliver the cocaine and marijuana that was seized from his apartment on that date. Accordingly, Janczarek's testimony regarding the "hand to hand" narcotics transactions was offered for a proper purpose under MRE 404(b)(1).

The testimony regarding defendant's "hand to hand" narcotics transactions was also relevant as part of the res gestae of the offense. Janczarek's testimony regarding defendant's deficient performance as a confidential informant was necessary to explain the circumstances

leading to the government's decision to subsequently seek the May 16, 2006, search warrant and the December 22, 2006, arrest warrant.

Before trial, the trial court ruled that defendant's other bad acts relating to the evidence seized pursuant to the May 16, 2006, search warrant and the December 22, 2006, arrest warrant were admissible. Defendant does not contest on appeal the admissibility of evidence of these other bad acts, aside from the testimony regarding the "hand to hand" drug transactions. The uncontested bad acts evidence relating to the May 16, 2006, search warrant and the December 22, 2006, arrest warrant were part of the res gestae of the charged offenses because this evidence tended to provide a comprehensive overview of the circumstances, including an explanation of the interaction between defendant and the police from the time of the initial, May 3, 2005, search warrant, to defendant's arrest on December 22, 2006. *Sholl*, *supra* at 742. In turn, Janczarek's testimony regarding defendant's drug transactions while performing as a confidential informant assisted in providing a comprehensive overview of the events that culminated in the May 16, 2006, search warrant.

Defendant's theory was that he initially agreed to perform as a confidential informant because the police falsely accused him of possessing drugs they had found in the common bathroom of defendant's apartment building. Defendant maintained that he never possessed the drugs the police discovered in his apartment. Defendant also testified that he stopped working as a police informant because the police insisted on compensating him with drugs, and further testified that he had no experience with drug trafficking. Thus, the testimony regarding the "hand to hand" drug transactions was relevant in order for the jury to assess the circumstances relating to the issue raised by defendant, particularly whether defendant actually possessed the cocaine and marijuana with the intent to deliver on May 3, 2005, or conversely, whether the police planted the evidence in order to secure defendant's services as an informant. Because we conclude that Janczarek's testimony is admissible under MRE 404(b)(1), and was also part of the res gestae of the offense, the trial court did not commit plain error affecting defendant's substantial rights.

We reject defendant's claim that the prosecution failed to provide proper notice of its intent to use other acts evidence under MRE 404(b)(2). The record reveals that the prosecution did, in fact, provide such notice. The prosecution is required only to provide notice regarding "the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence." MRE 404(b)(2).

In its pretrial motion, the prosecution sought the trial court's leave to introduce evidence "relating to the facts and circumstances surrounding" the May 3, 2005, search warrants, the May 16, 2006, search warrant, and the December 22, 2006, arrest warrant, and articulated a sufficient rationale underlying its intent to use such evidence. Thus, contrary to defendant's argument, the prosecution did in fact provide sufficient notice of the "general nature" of Janczarek's testimony when it filed its motion to use other acts evidence under MRE 404(b). The trial court did not abuse its discretion when it admitted Janczarek's testimony as evidence. Accordingly, defendant is not entitled to a new trial.

II. Sentencing

Defendant next argues that the trial court abused its discretion when it scored ten points for Offense Variable ("OV") 19 under defendant's sentencing guidelines because the trial court failed to articulate which parts of defendant's testimony were perjurious and amounted to an attempt to interfere with the administration of justice. We disagree.

When reviewing a sentencing court's scoring of a defendant's sentencing guidelines, this Court determines whether the evidence adequately supports a particular score, and whether the sentencing court properly exercised its discretion. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). This Court reviews a trial court's scoring decision under the sentencing guidelines for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A trial court does not abuse its discretion where its decision falls within the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The construction and application of the sentencing guidelines presents a question of law, which is reviewed de novo. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006).

This issue involves the application of offense variable (OV) 19 of the statutory sentencing guidelines, MCL 777.49. The rules of statutory construction govern the application of the statutory sentencing guidelines. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). In interpreting a statute, the fundamental task of a court is to discern and give effect to the Legislature's intent as provided in the plain language of the statute. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). Where the ordinary meaning of the statutory language is clear, further judicial construction is unnecessary and unwarranted. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). Further, "[w]here a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006), citing *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Pursuant to MCL 777.49(c), a sentencing court allocates ten points where "[t]he offender otherwise interfered or attempted to interfere with the administration of justice." This Court has recognized that perjury is a basis for assessing points under OV 19. *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008). The elements of the crime of perjury are: "(1) the administration to the defendant of an oath authorized by law, by competent authority; (2) an issue or cause to which facts sworn to are material; and (3) wilful false statements or testimony by the defendant regarding such facts." *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996). Where a defendant elects to testify at trial, and thereby gives up his right to remain silent, he is obligated to testify truthfully. *People v Adams*, 430 Mich 679, 689; 425 NW2d 437 (1988).

Defendant argues that the trial court improperly scored ten points under OV 19 based upon the trial court's belief that defendant committed perjury when defendant testified at trial. Defendant also argues that the trial court failed to articulate which portions of defendant's testimony it believed constituted perjury. The prosecution argues that defendant's testimony was replete with false statements, and the jury's rejection of defendant's testimony, as represented by the jury's verdict, demonstrates that defendant testified falsely to the extent that defendant's description of the offense conflicted with the testimony of the police officers. Although the prosecution does not persuade us that the jury's verdict standing alone establishes that defendant committed perjury, we nonetheless agree with the prosecution that there was some evidence in

the record that defendant testified falsely, and thus, "interfered or attempted to interfere with the administration of justice" for the purposes of scoring OV 19.

Defendant testified that he had no experience with selling drugs. However, defendant admitted that he was, in fact, on parole for a conviction for narcotics distribution. The prosecution argues that this testimony constitutes sufficient record evidence to justify the trial court's decision to assess ten points under OV 19. We agree. Our Supreme Court has concluded that a defendant's act is not "necessarily [required to] rise to the level of a chargeable offense" for the purposes of scoring OV 19. *People v Barbee*, 470 Mich 283, 287; 681 NW2d 348 (2004). Here, defendant's testimony that he was on parole for a manufacture or delivery of narcotics conviction constitutes record evidence that defendant testified falsely when he claimed he had no prior experience with the drug trade. For purposes of scoring sentencing guidelines, these facts establish that defendant attempted to interfere in the administration of justice. "Scoring decisions for which there is any evidence in support will be upheld." *Hornsby*, *supra* at 468. Because there was evidence in support of its decision to assess ten points under OV 19, the trial court did not abuse its discretion when it did so. In any event, the alleged scoring error does not alter the guidelines range under which defendant was sentenced. Thus, defendant is not entitled to resentencing. *Francisco, supra* at 89 n 8.

Defendant next raises several arguments attacking the constitutionality of his sentence. We disagree with all of defendant's arguments. Because defendant failed to preserve this sentencing issue, we review it for plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003). Pursuant to MCL 769.34(10), if a defendant's minimum sentence falls within the proper guidelines sentence range, "the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's range." However, this Court has recognized "that MCL 769.34(10) cannot constitutionally be applied to preclude relief for sentencing errors of constitutional magnitude." *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). Questions of constitutional law are reviewed by this Court de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008).

Defendant first argues that the trial court was required to articulate reasons underlying its decision to impose defendant's minimum and maximum sentences, and erred when it failed to do so, citing *People v Lemons*, 454 Mich 234; 562 NW2d 176 (1996). However, we note that *Lemons* was decided during the era of the former judicial sentencing guidelines, and does not apply to the statutory sentencing guidelines under which defendant was sentenced here. MCL 769.34(1). Defendant's claim fails because defendant's sentences fall within the appropriate sentencing guidelines range and defendant has not rebut the presumption of proportionality of his sentences with evidence regarding "extraordinary circumstances" indicating that the sentences were otherwise disproportionate.

Defendant next contends that the trial court abused its discretion by failing to downwardly depart from defendant's recommended sentencing guidelines range on the basis of defendant's assistance to law enforcement as an informant, defendant's "strong family support," and defendant's drug dependency problems. Contrary to defendant's argument, nothing in MCL 769.34(10) requires a trial court to depart from the sentencing guidelines. Further, defendant's claims that there were substantial and compelling reasons requiring a downward departure lacks

support in the record. Accordingly, the trial court did not abuse its discretion when it imposed a minimum sentence that fell within the appropriate guidelines range.

Defendant next argues that the trial court was required to assess defendant's potential for rehabilitation through intensive alcohol, drug, and psychiatric treatment under MCR 6.425(A)(5), and erred when it failed to do so. MCR 6.425(A)(5) applies to the probation officer's preparation of the presentence investigation report, and, contrary to defendant's argument, does not require a trial court to assess a defendant's potential for rehabilitation.

To the extent that defendant argues that his sentences constitute cruel and unusual punishment, this Court recently observed that "a sentence within the guidelines range is presumptively proportionate, and a sentence that is presumptively proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (citations omitted). Defendant's argument that his sentence constitutes cruel or unusual punishment fails.

Defendant next argues that the trial court erred when it engaged in judicial fact-finding to score defendant's sentencing guidelines, contrary to the principles set forth in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and Michigan case law. However, a sentencing court does not violate a defendant's Sixth Amendment rights by engaging in judicial fact-finding to assess points under the offense variables of a defendant's sentencing guidelines. *People v McCuller*, 479 Mich 672, 676-677; 739 NW2d 563 (2007). Thus, defendant's argument fails. Further, defendant provides no legal support for his claim that the trial court violated his federal Ninth Amendment rights "to the lawful sentencing to protect his inherent liberty interests[.]" Because, none of defendant's arguments that he is entitled to resentencing are meritorious, we affirm defendant's sentences.

Lastly, in his Standard 4 pro se brief defendant argues that he was denied the effective assistance of counsel when counsel failed to raise arguments at a pretrial motion to quash the warrant and suppress the evidence. We disagree.

Defendant did not bring a motion for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*[1] hearing before the trial court. Accordingly, this Court's review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). 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). A trial court's findings of fact, if any, 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. *Id.*

An ineffective assistance of counsel claim is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is required to overcome a strong presumption that

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

sound trial strategy motivated trial counsel's conduct. *Id*. Additionally, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for the counsel's errors. *Id*. at 302-303.

Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). 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).

Defendant argues that he received the ineffective assistance of counsel because his attorney failed to argue, in the motion to quash the warrant and suppress the evidence, that two statements in the affidavit supporting the second search warrant were false, and that the "good faith" exception to the exclusionary rule did not apply. We disagree.

The United States Supreme Court has concluded that in order to be entitled to an evidentiary hearing, a defendant challenging the statements within an affidavit supporting a search warrant must come forward with more than a bare allegation of falsehoods therein. *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674, 57 L Ed 2d 667 (1978). Further, this Court has reaffirmed the principles set forth in *Franks, supra*, that a defendant must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth" in order to be entitled to an evidentiary hearing. *People v Sawyer*, 215 Mich App 183, 194-195; 545 NW2d 6 (1996).

Here, defendant relies on his bare allegations alone to conclude that the statements set forth in the supporting affidavit were false. Defendant offers no evidence to substantiate his argument. Thus, we cannot conclude that offers of proof necessary to support an allegation that the affiant had made deliberately false statements in the affidavit existed and were available to defense counsel at the time defendant's attorney prepared his arguments.

Defendant last contends that he received ineffective assistance of counsel because his attorney did not argue that the "good faith exception" to allow evidence seized under a defective warrant ought not apply. Defendant alleges that two statements in the affidavit supporting the second search warrant were false. However, the prosecution correctly points out that defendant's contention that the statements in the affidavit were false are unsubstantiated; thus, defendant cannot demonstrate that the warrant contained statements that the affiant knew or should have known to be false. *People v Goldston*, 470 Mich 523, 531; 682 NW2d 479 (2004)

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter