

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DEPORT WALLACE,

Defendant-Appellant.

UNPUBLISHED

November 19, 2009

No. 287172

Wayne Circuit Court

LC No. 08-004544-FH

Before: Talbot, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.22f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced as an habitual offender, fourth offense, to concurrent terms of three to 15 years’ imprisonment for his carrying a concealed weapon and felon in possession convictions, and he was sentenced to a consecutive five-year term for felony-firearm. We affirm defendant’s convictions, but remand for correction of defendant’s judgment of sentence.

Detroit Police Officers Calvin Lewis and Andrew Berry were driving a marked police car when they observed a van approaching them on a cross street. The van made an abrupt turn, almost striking the police car. Lewis testified that the driver of the van made the turn after seeing the police car. The officers made a u-turn and pursued the van, which had slowed to a “slow roll” by the time the officers caught up to it. When the officers were six to ten feet from the rear of the van, Lewis observed “the arm from the passenger side of the vehicle toss something from the car.” The van then accelerated, but it stopped when the officers activated their siren. Defendant was in the passenger seat. Officers searched the area where the object had been discarded and found a loaded nine-millimeter handgun. Approximately five minutes had elapsed between the disposal of the object and the discovery of the handgun.

Defendant first argues that he was denied due process because the police officers did not preserve the dashboard video camera recording, and trial counsel did not move to dismiss the case on that ground. We generally review de novo defendant’s claim of a constitutional due process violation. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). However, because this objection was not raised below, it is reviewed for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A plain error affects a defendant’s substantial rights when the error results in outcome

determinative prejudice. *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). We disagree.

The prosecution's suppression of material evidence favorable to the accused constitutes a due process violation. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). The necessary elements of a *Brady* violation are "(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Schumacher*, *supra* at 177, quoting *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). The defendant bears the burden of establishing that the evidence was exculpatory and that the police acted in bad faith. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988); see also *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993); *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

Defendant's claim that he was denied due process is based on Lewis's testimony that he believed the video camera in his vehicle was functional and that he "could only assume" that the incident was taped. However, Lewis did not know whether this was the case. Defense counsel did not follow up with further questions concerning whether the tape ran continuously during Lewis' shift or, if not, whether Lewis remembers turning on the camera before the incident. Nor did counsel did not explore how long any video would have been kept. Defendant states that this Court "can only assume" that the police destroyed or suppressed the tape. However, even if we were to assume that any videotape might have been exculpatory, defendant has not met his burden of proof to establish that the police actually acted in bad faith here.

Defendant next argues that his trial counsel's failure to seek dismissal based on the absent videotape amounts to constitutionally deficient performance and requires a new trial. We disagree. First, as noted, there is no evidence showing that any video recording of the incident was actually made. More significantly, counsel's decision to stipulate that no dashboard camera videotape existed was coupled with a successful motion to have a defense "reenactment" admitted in its place. This sound strategy allowed counsel to present the jury with the most favorable view of the incident to the defense, in an attempt to discredit Lewis' testimony as to whether his partner could make a u-turn and actually get close enough to defendant's car for Lewis to see what was occurring in defendant's car, especially given the poor lighting. This also allowed counsel to fault the police for failing to record the incident. We will not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Trial counsel did not render ineffective assistance simply because his trial strategy was not successful. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant finally argues that trial court erred when it ordered that defendant serve his felony-firearm sentence consecutively to the sentences for both carrying a concealed weapon and felon in possession. We agree. A sentence for felony-firearm must be served consecutively and prior to a sentence for the underlying felony, but not consecutively to a sentence imposed for any other offense. MCL 750.227b(2); *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). We remand to the trial court solely for the ministerial purpose of correcting the judgment of sentence to clarify the order of defendant's sentences. Specifically, the felon in

possession and CCW convictions are to run concurrently. The felony-firearm conviction is to precede and run consecutive to the felon in possession conviction and cannot be applied to defendant's CCW conviction. The trial court should also provide 109 days of jail credit against defendant's carrying a concealed weapon conviction. See *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994).

Defendant's convictions are affirmed. We remand for correction of defendant's judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis