STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2010
v	No. 292908 Wayne Circuit Court
CORTASEZE EDWARD BALLARD, Defendant-Appellant.	LC No. 09-002536-FH

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial convictions of possession with intent to deliver less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 8 to 20 years for the possession with intent to deliver conviction and one to five years for the felon-in-possession conviction, and a consecutive five-year term of imprisonment for the felony-firearm conviction. We affirm.

I. BASIC FACTS

On February 23, 2008, police officers Nadir Jamil and Brian Shafer responded to a dispatch regarding a report of domestic violence and drug trafficking at defendant's motel room. The officers knocked on defendant's motel room door and defendant answered, dressed only in boxer shorts. The officers asked if they could come inside to see if another person was in the room. Defendant permitted the officers to enter. Because the shower was running, Jamil went to the back of the room and looked in the bathroom. He found no one and upon returning to the front of the room to exit, Jamil observed a scale, a razor, a box of sandwich bags, and an open box of crackers on a table near the doorway. When he looked at the box of crackers more closely, Jamil observed what appeared to be crack cocaine inside the box. Defendant was arrested and allowed to put on a shirt and pants. As Jamil took defendant out to a police vehicle, Shafer moved from the room's doorway to the bedside table to retrieve defendant's shoes. Upon bending over to the retrieve the shoes, Shafer noticed the handle of a gun under the nightstand.

Before trial, defendant moved to suppress the gun and the drugs on the ground that the search violated his Fourth Amendment rights. The trial court denied the motion, reasoning that the officers were legally in the motel room, pursuant to defendant's consent, when they viewed the contraband in plain sight and, therefore, the search and seizure was reasonable. On the day

of trial, defendant moved for an adjournment. This motion was also denied. Defendant was convicted as charged and this appeal followed.

II. MOTION TO SUPPRESS

Defendant first argues that the trial court's erred by denying his pretrial motion to suppress the cocaine and firearm. We disagree. We review a trial court's findings of fact at a suppression hearing for clear error and review de novo the trial court's ultimate decision on a motion to suppress evidence. *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001).

An occupant of a motel room is entitled to the Fourth Amendment protection against unreasonable searches and seizures. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). "[T]he basic rule [is] that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v Gant*, ___ US ___; 129 S Ct 1710, 1716; 173 L Ed 2d 485 (2009) (citations and quotation marks omitted). In other words, warrantless searches and seizures are presumptively unreasonable unless an exception to the warrant requirement applies. "It is the prosecutor's burden to show that a search and seizure challenged by a defendant were justified by a recognized exception to the warrant requirement." *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

On appeal, the prosecutor posits that two exceptions to the warrant requirement—consent to search and the plain view doctrine—applied and therefore the officers' seizure of the contraband was constitutionally sound. A consent to search permits a search and seizure without a warrant when the consent is unequivocal, specific, and freely and intelligently given. *People v Beydoun*, 283 Mich App 314, 337; 770 NW2d 54 (2009). "The scope of a consent search is limited by the object of that search." *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005). "[C]onsent may be limited in scope and may be revoked." *Frohriep*, 247 Mich App at 703. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect." *Id*. (citations and internal quotations omitted). In addition,"[t]he plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent." *Wilkens*, 267 Mich App at 733 (emphasis added). Conversely, if the officer was not lawfully in the place from which he viewed the evidence, the seizure may not be made. *Galloway*, 259 Mich App at 639.

A. NARCOTICS

The trial court did not err by denying defendant's motion to suppress with respect to the narcotics. Jamil lawfully entered defendant's motel room based on defendant's consent to search the room for another person. Thus, Jamil was lawfully in the room and the scope of the search was limited to a search for places within the room that could contain a person. Because the shower was running, Jamil went to the back of the room to the bathroom, but he found no one there. Upon returning to the room's front door, Jamil observed in plain sight a scale, a razor blade, a box of sandwich bags, and an open cracker box. It was immediately apparent, according to Jamil, upon glancing at the cracker box that it contained packages of crack cocaine.

Significantly, he did not have to lift up the box, uncover it, or open it in order to see the narcotics. Thus, because Jamil was lawfully present pursuant to defendant's consent when he observed the cocaine in plain sight, the seizure of the drugs was legal and did not violate defendant's Fourth Amendment rights.

B. FIREARM

We are also of the view that the trial court did not err by denying defendant's motion with respect to the seizure of the gun. After Jamil and defendant left the room and were heading to a police car, Shafer moved from the room's doorway toward the bed, with the purpose of retrieving defendant's shoes. As he bent over to retrieve them, he noticed under the nightstand the handle of a gun. Shafer's entry into the room to look for defendant's shoes was not a purpose within the permission to search granted by defendant. Defendant granted the officers consent to enter the room to look for another person. Nonetheless, Shafer was legally present in the room when he discovered the gun because he was acting in a caretaking capacity. The courts of this state have recognized this exception to the warrant requirement where police are acting, not to search for evidence of crimes, but to perform a duty separate from criminal investigation. *Davis*, 442 Mich at 20. Further, "[w]hen police, while performing one of these functions, enter into a protected area and discover evidence of a crime, this evidence is often admissible." *Id*.

Here, Shafer was not searching for further evidence of a crime, but was simply attempting to locate defendant's shoes. In other words, Shafer was confronting a common situation that local police officers encounter when a non-dressed or partially dressed defendant is arrested and he was acting in a caretaking, rather than investigatory, capacity when he sought to provide defendant with his shoes on a February day in Michigan. In looking for defendant's footwear, Shafer saw the gun, which was plainly observable when he bent over to pick up the shoes. Accordingly, the gun was legally seized pursuant to the caretaking exception and the plain view doctrine. And, although the trial court did not deny defendant's motion to suppress on this exact basis, it nevertheless reached the right result. Accordingly, the trial court did not err by denying defendant's motion to suppress.

III. MOTION TO ADJOURN

Defendant also argues that the trial court erred by denying his request for an adjournment on the day of trial. We disagree. We review for an abuse of discretion a trial court's decision to grant or deny an adjournment. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). A motion for adjournment must be based on good cause. MCR 2.503(B)(1). When the motion is based on an absence of evidence, a trial court may grant such a motion only if the missing evidence is material and diligent efforts have been made to produce the evidence. MCR 2.503(C)(2). "Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Coy*, 258 Mich App at 18-19.

Here, defendant moved for an adjournment on the day of trial to obtain a court-appointed investigator to determine whether one of the officers had been suspended since his arrest and to investigate the physical characteristics of the motel room. This request was untimely made and does not reflect due diligence on defendant's behalf. Nearly two months elapsed between defendant's arraignment and his trial date, and defendant did not, and has not, explained why

these matters could not have been investigated during this time. Nor has defendant explained how this evidence, if produced, was material to his defense. Accordingly, we conclude that the trial court did not abuse its discretion by denying the motion. Further, even if the trial court had erred, defendant has failed to show that he was prejudiced as a result. Nothing in the character of the missing evidence sought suggests that the trial's outcome would have been different had it been produced. Accordingly, defendant is not entitled to relief on this basis.

IV. STANDARD 4 BRIEF

Defendant raises several other arguments pro per, none of which require reversal.

A. BRADY VIOLATION

Defendant first alleges that his constitutional rights were violated because the prosecutor did not disclose the identity of the person who reported his behavior to the police. This claim fails. Certainly, a defendant has a constitutional due process right to the production of evidence that is favorable to him, which is material, and that is in the possession of the prosecution, regardless of whether the defendant requests the evidence. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). "[T]o establish a Brady violation, a defendant must prove (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of 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." *People v Fox*, 232 Mich App 541, 549; 591 NW2d 384 (1998).

Defendant has not established a *Brady* violation. Defendant has pointed to no factual support in the record indicating that the prosecutor knew the identity of the person who reported defendant's behavior to the police. Even if the prosecutor knew this information and failed to disclose it, defendant has not established that this evidence was favorable to him. Simply put, knowledge of the person's identity would not have exonerated defendant nor would it have provided a basis for suppressing the evidence that the officers found in defendant's motel room. There is no reasonable probability that the trial's outcome would have been different had the information been disclosed. Defendant is not entitled to relief on this basis.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant lastly asserts that counsel was ineffective for failing to investigate his case, failing to gather and present evidence, and for failing to object. Defendant, however, cites no specific instances or facts relating to counsel's alleged deficient performance and fails to specify the evidence that counsel was supposed to procure, but did not. And, while defendant suggests that his case was previously dismissed and re-filed, there is no record of this event in the lower court's register of actions. Because defendant has failed to provide factual support for his claim, we consider it to be abandoned. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Defendant is not entitled to the requested relief.

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio