STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DEROME MCCLINTON,

Defendant-Appellant.

UNPUBLISHED

No. 196097
Calhoun Circuit
LC No. 95-002906-FH

Before: Markey, P.J., and Michael J. Kelly and Whitbeck, JJ.

PER CURIAM

Defendant appeals as of right his conviction of possession with intent to deliver 225 to 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). We affirm.

On August 31, 1995, Michigan State Police Todd Underwood and Joseph Garrett observed defendant speeding on I-94 in Marshall Township. Also, the license plate on defendant's vehicle did not appear to be fastened securely. Garrett and Underwood followed defendant and turned on the patrol car's overhead lights and siren. Defendant attempted to flee from the police, traveling at speeds exceeding one hundred m.p.h. Defendant struck a semi-truck and his vehicle became wedged underneath the truck. After the truck stopped, Garrett approached defendant's vehicle and arrested him. Defendant was removed from his vehicle by emergency personnel and was transported by ambulance to the hospital.

A Marshall fireman discovered a plastic bag containing cocaine on the ground near the area where emergency workers had provided medical treatment to defendant. Garrett searched defendant's car at the scene and discovered two rocks of crack cocaine, two plastic bags containing cocaine, and a package containing small plastic bags which are commonly used for packaging cocaine. A total of 325.81 grams of cocaine was found in and around defendant's car. Garrett conducted a patdown search of defendant at the scene of the accident and found $593 in defendant's right pocket, $28 in his left pocket, and a pager. Garrett testified that it is typical of someone involved in drug dealing to carry a pager, to carry large amounts of cash in bills of small denominations, to separate drug-related money from personal money, and to fold the money in a particular manner.

I

Defendant contends that Garrett's warrantless search of his vehicle violated his Fourth Amendment rights. Specifically, defendant claims that the search was not permissible pursuant to the automobile exception to the warrant requirement because defendant's vehicle was inoperable at the time of the search. Because defendant did not object to the search on these grounds at trial, the trial court did not address this issue and an evidentiary hearing was not conducted to fully develop the facts surrounding the search of the vehicle.

It is unnecessary to determine whether the warrantless search of defendant's car was permissible pursuant to the automobile exception, because the search was authorized as incident to defendant's arrest. The lawfulness of a search or seizure depends upon its reasonableness. *People v Armendarez*, 188 Mich App 61, 66; 468 NW2d 893 (1991). Although the record is not entirely clear, it appears that defendant had been removed from the vehicle, and possibly from the scene, at the time his vehicle was searched. Generally, "[t]he search of an automobile is . . . reasonable even if the defendant has already been removed from the automobile to be searched and is under the control of the officer." *People v Fernengel*, 216 Mich App 420, 423; 549 NW2d 361 (1996).

> "Where the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartment falls within the scope of *Belton*[1] and will be upheld as reasonable. Our decisions have consistently upheld the search of the passenger compartment of an automobile when the officer initiated contact with the defendant while the defendant was still within the automobile later searched, regardless of whether the defendant was arrested while actually occupying the automobile or after having recently been removed from the automobile." [*Id*. (quoting *United States v Hudgins*, 52 F3d 115, 119 (CA 6, 1995).]

In this case, the record reveals that defendant had attempted to flee from police, traveling at speeds exceeding one hundred m.p.h. Additionally, the license plate on defendant's vehicle was not securely fastened. Defendant was initially contacted by Garrett while defendant was in his vehicle. Defendant was arrested at the scene of the accident before leaving in an ambulance. Although the record does not reveal precisely when Garrett searched defendant's vehicle, the search was conducted while the vehicle was at the scene of the accident. Therefore, the search of defendant's car was permitted as incident to defendant's lawful arrest.

Defendant also argues that his attorney's failure to motion the trial court to suppress the cocaine evidence found during the search of his car amounted to ineffective assistance of counsel. Having found that the search of defendant's vehicle was constitutional as a search incident to arrest, we conclude that defendant has failed to establish that his trial counsel's failure to object to the search was prejudicial. *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989). Further, because the search of defendant's vehicle was lawful, defense counsel's motion would have been futile. *People v Tullie*, 141

Mich App 156, 158; 366 NW2d 224 (1985). Defense counsel is not required to make useless motions. *Id*.

II

Next, defendant argues that the prosecutor improperly elicited criminal profile testimony from a witness, resulting in a manifest injustice. Defendant did not object to the prosecutor's questions at trial, so this issue has not been preserved for appeal. Because any prejudicial effect of the prosecutor's questions could have been cured by an appropriate instruction, we need not review this issue on appeal. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

III

Finally, defendant contends that he is entitled to resentencing because the sentencing judge failed to state adequate reasons for the sentence imposed, and the sentence was so excessive and disproportionate as to constitute an abuse of discretion. We find that the trial court did not abuse its discretion in imposing defendant's sentence and the sentence is proportionate.

Defendant was convicted of possession, with intent to deliver, between 225 and 650 grams of cocaine, an offense which carries a mandatory sentence of twenty to thirty years. MCL 333.7401(2)(a)(ii); MSA 14.15(7401(2)(a)(ii). Because defendant had previously been convicted of a controlled substance offense, the sentencing court was authorized to sentence defendant to twice the term otherwise authorized. MCL 333.7413(2); MSA 14.15(7413)(2). Defendant was sentenced to a term of thirty-two to sixty years.

To facilitate appellate review, the sentencing court must articulate on the record the criteria considered and the reasons for the sentence imposed. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). Failure to articulate the reasons for sentencing requires remand for a statement of the reasons sentence was imposed. *People v Triplett*, 432 Mich 568, 569; 442 NW2d 622 (1989). In this case, the trial court stated that defendant's sentence was based on defendant's recent criminal history and the nature of the crime he committed. These are both permissible considerations for imposing a sentence. *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989); *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). Additionally, because one of the objectives of sentencing is the protection of society, *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), the trial court properly stated that the sentencing parameters established for defendant's crime reveal the impact on society that the Legislature feels such crimes have. Therefore, it is unnecessary to remand for further articulation.

Next, defendant argues that the testimony at his trial indicated that he was merely a drug "courier" or a "mule" and that the harsh penalties contained in the controlled substances act were intended to punish "drug kingpins." While a sentencing court may consider the circumstances surrounding a defendant's criminal behavior, *Ross, supra* at 495, the court is not required to consider any or every particular allowable criterion when imposing a sentence. *Coles, supra* at 550. The guidelines allow defendant to be sentenced to imprisonment for twenty to thirty years. Because this was defendant's second drug-related offense, the trial court could have doubled defendant's sentence to forty to sixty years. Defendant was sentenced to thirty-two to sixty years. Defendant's minimum

sentence fell below the maximum allowable minimum term. Therefore, the sentencing court did not abuse its discretion in imposing defendant's sentence. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996) (a sentence that falls within the guidelines' range is presumptively proportionate).

Finally, defendant argues that the presentence report evaluation and recommendation of forty to sixty years is unfounded, and may have interfered with the trial court's exercise of sentencing discretion. At sentencing, either party may challenge the accuracy or relevancy of any information contained in the presentence report. MCL 771.14(5); MSA 28.1144(5); *People v Hoyt*, 185 Mich App 531, 533-534; 462 NW2d 793 (1990). If the court finds that the challenged information is inaccurate or irrelevant, that finding must be made part of the record and the information must be corrected or stricken from the report. *Id*.

In this case, the trial court stated that it recognized his discretion in sentencing defendant and changed the minimum sentence in the presentence report to twenty years. The trial court sentenced defendant to a minimum term of thirty-two years, which is below the forty-year minimum recommended in the presentence report. The trial court corrected the inaccurate information in the presentence report and acknowledged its discretion to sentence defendant below the minimum of forty years contained in the recommendation section of the report. Therefore, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ William C. Whitbeck

[1] *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981).