STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PJETER GRISHAJ,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 200033
Oakland Circuit Court
LC No. 95-141864 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARION ADRIAN SHORDI,

Defendant-Appellant.

No. 200034
Oakland Circuit Court
LC No. 95-141865 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GJERGJ DELIA,

Defendant-Appellant.

No. 200998
Oakland Circuit Court
LC No. 95-141866 FH

Before: Saad, P.J., and Kelly and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendants were convicted of attempted breaking and entering, MCL 750.92(2); MSA 28.287(2), MCL 750.110; MSA 28.305.[1] Defendants were each sentenced to terms of two to five years in prison. They now appeal their convictions and sentences as of right. We affirm.

Defendants first argue that their convictions must be reversed because evidence was introduced at their trial which was obtained as a result of an unlawful stop of defendants by police. Defendants raised this challenge below on several occasions. The last time was during trial, after the judge had heard substantial testimony regarding the circumstances of the stop. We will defer to findings of historical fact by the trial court that are not clearly erroneous, but we review the application of the constitutional standard for lawful police stops to those facts de novo. *People v LoCicero*, 453 Mich 496, 500-501; 556 NW2d 498 (1996).

The right of an individual to be free from unreasonable searches and seizures is recognized under both the federal and state constitutions.[2] An investigative stop, or *Terry*[3] stop, is a type of seizure, less than an arrest, and is reasonable if it is based on "specific and articulable facts sufficient to give rise to a reasonable suspicion that the person detained has committed or is committing a crime." *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). See also *LoCicero supra* at 501. The validity of a police officer's investigative stop turns on whether the requisite suspicion existed at the stop's inception, considering the totality of the circumstances. *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996); *People v Shabaz*, 424 Mich 42, 59; 378 NW2d 451 (1985); *People v Peebles*, 216 Mich App 661, 664-665; 550 NW2d 589 (1996).

The suspicion raising facts of the instant case fall closer to those in *Peebles* and *People v Yeoman*, 218 Mich App 406; 554 NW2d 577 (1996) than to the facts of *LoCicero*. The time of night that defendants were seen by the officers venturing behind two different commercial buildings was suspicious because the stores were long since closed. See *Peebles, supra*. The fact that defendants parked in a neighboring apartment complex and scaled the wall to access the K-mart parking lot, combined with the fact that one defendant remained circling in the car while two defendants went behind Foodland, also suggests that defendants' presence behind the buildings was inconsistent with legitimate behavior. Moreover, one of the observing officers had knowledge of a specific technique used by break-in artists which was consistent with defendants' conduct and involved monitoring the police response. See *Yeoman, supra*. When the surveillance units switched to one of the regular Southfield frequencies, the manner in which defendants' vehicle was driven changed noticeably. Under the totality of the circumstances, we agree with the trial court that the detaining officers had reasonable suspicion, based on objective and specific criteria, that criminal activity was afoot before they initiated the stop.[4] Therefore, the trial court did not err in denying defendants' motions to suppress.

Defendants next assert that because the minimum sentences exceeded the sentencing guidelines' recommended ranges of zero to nine months, their sentences of two to five years in prison violate the principle of proportionality. We review the sentence imposed by a trial court for abuse of discretion in that it must be proportionate to the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Generally, a sentence within the guidelines is presumed to be proportionate. *People v Kennebrew*, 220 Mich App 601, 611; 560 NW2d 354 (1996). On the other hand, unless there are factors which should be considered at sentencing which the guidelines do not adequately address, an upward departure from the sentencing guideline range signals a potential disproportionate sentence and thus, an abuse of discretion. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); *Milbourn*, *supra* at 659-660.

In written evaluations, the trial judge indicated that he sentenced defendants outside of the recommended guideline range because (1) they showed no remorse, (2) they had a large amount of burglary tools, (3) it was a calculated crime, (4) they possessed a police scanner, (5) they fled, and (6) they rammed a police car. Given defendant Delia's prior conviction for a similar crime, the subsequent arrest of defendants Grishaj and Shordi for two more similar crimes, and the large amount of tools they possessed when apprehended (including gloves, walkie-talkies, a police scanner, crowbars, and an electric circuit tester), we agree with the trial court's assessment that defendants appear to have made a substantial commitment to the business of breaking and entering. It then follows that a minimum sentence of zero to nine months was insufficient impetus to persuade defendants of the folly of this career.

Because the two-year minimum sentences imposed appropriately address the circumstances of the offense and the offenders, including their lack of remorse, their flight from the police, their prior and subsequent involvement in similar activity, and their apparent commitment to breaking and entering as a commercial endeavor, the sentences do not violate the principle of proportionality. Accordingly, the court did not abuse its discretion in sentencing defendants.

Affirmed.

/s/ William Henry Saad
/s/ Michael J. Kelly
/s/ Richard A. Bandstra

[1] Defendant Shordi was also convicted of equipping a vehicle with a police radio scanner, MCL 750.508; MSA 28.776, fleeing or eluding a police officer, MCL 257.602a(1); MSA 9.2302(1), failure to display his operator's license upon demand, MCL 257.311; MSA 9.2011, and driving in violation of license restrictions, MCL 257.312(4); MSA 9.2012(4).

[2] The Fourth Amendment of the United States Constitution protects the "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches or seizures . . . ." US Const Am IV. It was incorporated and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. US Const Am XIV; *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). The Michigan Constitution provides "[t]he person, houses, papers and

possessions of every person shall be secure from unreasonable searches and seizures . . . ." Const 1963, art 1, § 11.

[3] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[4] The prosecution also contends on appeal that because defendant Shordi was cited for driving with his bright lights on, the stop was justified based on a traffic violation. In light of our above analysis and because the record is absent any assertion by the police officers that they were cognizant of the traffic violation at the inception of the stop, we do not address the issue.