STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 9, 1999
v JAMES A. CARPENTER, Defendant-Appellee.	No. 214745 Saginaw Circuit Court LC No. 98-015237 FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JAMES A. CARPENTER, Defendant-Appellant.	No. 215254 Saginaw Circuit Court LC No. 98-015237 FH

Before: Whitbeck, P.J., and Gribbs and White, JJ.

PER CURIAM.

In these consolidated cases, defendant appeals by delayed leave granted his plea-based convictions of felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and possession of a firearm during the commission of a felony, second offense, MCL 750.227b; MSA 28.424(2), and plaintiff appeals by delayed leave granted the sentence imposed on defendant's conviction of felony-firearm, second offense. We affirm defendant's convictions, vacate the sentence imposed on his conviction of felony-firearm, second offense, and remand for resentencing. These appeals are being decided without oral argument pursuant to MCR 7.214(E).

The police responded to a report that defendant had threatened to shoot his neighbor. When officers knocked on defendant's door and identified themselves, they heard sounds of furniture being

moved, and multiple voices talking. After defendant walked out of the residence and turned a dog loose on the officers, he was restrained. A patdown search failed to produce a gun. One other person left the residence at the officers' direction, and was restrained. The officers entered the residence to look for any other person who might be present. No other person was found; however, the officers observed scales in plain view. A second, more detailed but warrantless search revealed marijuana and ammunition. The officers seized the marijuana and the scales.

Subsequently, the police obtained a search warrant for defendant's residence. The affidavit in support of the warrant recited facts relating to the incident with defendant's neighbor, as well as facts relating to a 1995 incident in which defendant threatened a person with a gun. The search conducted pursuant to the warrant revealed a third scale, a plate containing cocaine residue, a gun, a holster, and ammunition.

The trial court denied defendant's motion to suppress evidence. The trial court concluded that the initial warrantless entry of defendant's residence was justified by exigent circumstances. The trial court found that the items discovered in plain view during that protective sweep were admissible. Furthermore, the trial court found that the search warrant was valid even after tainted information was redacted, false information was corrected, and challenged omissions were considered. Finally, the trial court held that items discovered during the second, warrantless search, a search conceded by the prosecution to be illegal, were admissible under the doctrine of inevitable discovery.

Defendant entered conditional pleas of nolo contendere to the charges of felon in possession of a firearm and felony-firearm, second offense, in return for dismissal of other charges. The trial court sentenced defendant to concurrent terms of five years' probation.

On appeal from a trial court's decision on a motion to suppress evidence, we review findings of fact for clear error, and the ultimate decision de novo. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997).

The exigent circumstances exception to the warrant requirement allows police to enter a dwelling if they have probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993). The police have authority to conduct a protective search without a warrant if they reasonably believe that the area in question harbors a person who poses a threat to them or to others. *Maryland v Buie*, 494 US 325, 327-328; 110 S Ct 1093; 108 L ed 2d 276 (1990). Such a search is limited, and is conducted for the sole purpose of ensuring the safety of the police and others. *Id.* At 335-336; *People v Cartwright*, 454 Mich 550, 556; 563 NW2d 208 (1997). The validity of a warrantless entry for a protective search depends on the reasonableness of the response as perceived by the police. *Cartwright, supra* at 559.

Defendant argues that the trial court clearly erred by denying his motion to suppress evidence for the reason that the warrantless entry of his residence for a protective search was invalid. We disagree. When the police approached defendant's residence and identified themselves, they heard

furniture moving and multiple voices talking. The fact that defendant did not have a gun on his person when he exited the residence supported a reasonable inference that the gun was inside the residence. Moreover, the fact that the police had heard multiple voices talking but had accounted for only two persons supported a reasonable inference that at least one other person could be inside the residence. Cf. *United States v Colbert*, 76 F3d 773 (CA 6, 1996). The facts gave the police probable cause to believe that a crime had been committed on defendant's property, and that they needed to conduct a brief search of the residence to protect themselves and others. *In re Forfeiture*, *supra*. The initial warrantless entry for the purpose of conducting a protective search was valid. *Cartwright*, *supra*.

A search warrant may not issue unless probable cause exists to justify the search. MCL 780.651; MSA 28.1259(1). Probable cause exists when the facts and circumstances would allow a reasonably prudent person to believe that evidence of a crime or contraband sought is in the place to be searched. *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995).

Defendant argues that the trial court clearly erred by denying his motion to suppress evidence because the affidavit in support of the warrant for the third search was insufficient to support a finding of probable cause. We disagree. Invalid portions of an affidavit may be severed and the validity of the warrant may be tested by the information remaining in the affidavit. *People v Melotik*, 221 Mich App 190, 200-201; 561 NW2d 453 (1997). The trial court found that the affidavit was sufficient even after the tainted information regarding items seized during the illegal warrantless search was redacted, the false information regarding the discovery of multiple firearms during the 1995 search was corrected, and the challenged omission regarding the discovery of a rifle during the 1995 search was considered. Factoring these alterations into the analysis, the affidavit established that after defendant threatened his neighbor with a gun, the protective search of the residence did not reveal the gun. The allegations that in 1995 defendant threatened a person with a gun, and that he kept a weapon in his residence, served to establish a pattern of conduct on defendant's part. This information is not stale under the circumstances. *People v Stumpf*, 196 Mich App 218, 226; 492 NW2d 795 (1992). Defendant has not established by a preponderance of the evidence that any false or misleading information materially affected the trial court's decision to authorize the warrant. *Chandler*, *supra*. All items seized from defendant's residence are admissible, either under the plain view doctrine, *People v Cooke*, 194 Mich App 534, 536; 487 NW2d 497 (1992), or the doctrine of inevitable discovery. *People v Spencer*, 154 Mich App 6, 18; 397 NW2d 525 (1986).

Plaintiff argues that the sentence of five years' probation imposed on defendant's conviction of felony-firearm, second offense, is invalid. We agree, vacate that sentence, and remand for resentencing. This issue is one of law; therefore, we consider it on appeal, notwithstanding the fact that it was not presented to the trial court in the form of a motion to correct the sentence. MCR 6.429(A); *People v Brown*, 220 Mich App 680, 681; 560 NW2d 80 (1996). A conviction of felony-firearm, second offense, carries a mandatory sentence of five years in prison. MCL 750.227b(1); MSA 28.424(2)(1). A person subject to a mandatory term of imprisonment under this section is not eligible for probation. MCL 750.227b(3); MSA 28.424(2)(3). A sentencing court has no discretion to impose a sentence other than that mandated by the statute. *People v Miles*, 454 Mich 90, 98-99; 559 NW2d 299 (1997).

Defendant's convictions are affirmed. Defendant's sentence for the offense of felony-firearm, second offense, is vacated, and this matter is remanded to the trial court for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Roman S. Gribbs
/s/ Helene N. White