STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2000
v	No. 219011 Muskegon Circuit Court
QUASHON BURNS, Defendant-Appellant.	LC No. 98-042648-FH

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court imposed a six to thirty year sentence, reflecting defendant's status as a second habitual offender, MCL 769.10; MSA 28.1082. Defendant appeals as of right. We affirm.

This case arises out of Muskegon police officers' stop, search, and arrest of defendant. The stop occurred after a detective received a tip from a known, confidential informant.

Defendant first argues that the fruits of the stop, search, and arrest should have been suppressed because: (1) the stop was illegal since nothing was shown to indicate that the informant who supplied the tip was reliable, nor were there any facts introduced to show police corroboration of the tip through independent investigation; (2) the search of the vehicle was therefore illegal because the police lacked probable cause; and (3) without the fruits of the illegal search, the police lacked probable cause to arrest defendant. Each aspect of defendant's argument would have been properly addressed in the context of a defense motion to suppress the evidence; however, no such motion was brought. Because defendant made no such motion, the facts regarding the reliability of the confidential informant were neither elicited nor established on the record.

Defendant also failed to object to the admission of evidence on this basis. Thus, any error is unpreserved. To avoid forfeiture of an unpreserved issue on appeal, an appellant must show: (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This test applies to

unpreserved allegations of both constitutional and nonconstitutional error. *Id.* at 764. Once an appellant has satisfied these three requirements, the appellate court must "exercise its discretion in deciding whether to reverse." *Id.* at 763. Reversal is warranted "only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763-764 (internal punctuation omitted). Defendant has provided no authority indicating any requirement that the prosecution or the trial court inquire about the reliability of the known confidential informant or the corroboration efforts of the police absent any objection by defendant at trial, and we are aware of no such requirement. We therefore cannot conclude that any error that occurred was plain, clear or obvious error that affected defendant's substantial rights and merits reversal.

Next, defendant argues that he was deprived effective assistance of trial counsel because counsel failed to challenge the legality of the stop, search, and arrest, and that such a decision cannot be said to have been sound trial strategy. We disagree. Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

Defendant contends that "[t]here is nothing that could be established at a *Ginther* hearing nor anything apparent from the record that would prove, or tend to prove, the issue should not have been raised" and states that "[t]here can be no question that the failure to raise an issue (i.e., the probable cause involved in the stop, search, and subsequent arrest) of constitutional dimension falls below an objective standard of reasonableness under prevailing professional norms." Defendant's implication is that in every case, defense counsel must challenge the legality of the stop, search, and arrest, regardless of the particular facts of a case, or else representation falls below the standard. This is not true. There exists nothing in the record from which we can conclude that defense counsel's failure to challenge the stop, search, and arrest was unjustified. Because the record is silent on the subject there is no way for this Court, or for defendant, to know what the reasons were for defense counsel's strategy.[1] There are no errors apparent on the record. Thus, defendant has not overcome the heavy presumption against a determination of ineffective assistance. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Next, defendant argues that the trial court improperly allowed double hearsay into evidence by allowing the prosecution to question a witness about the information obtained from the confidential informant. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

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[1] Notwithstanding defendant's initial argument that there is nothing that could be established at a *Ginther* hearing on May 15, 2000, less than one month prior to oral argument, defendant filed a motion to remand for a *Ginther* hearing. This Court denied defendant's motion because it was untimely. See MCR 7.211(C)(1)(a), 7.212 (A)(1)(a)(iii).

The prosecutor's line of questioning to which defense counsel objected was offered to demonstrate the basis for defendant's arrest, rather than for the truth of the matter asserted. Thus, by definition, it was not hearsay. MRE 801(c). As in *People v Pawelczak*, 125 Mich App 231, 235; 336 NW2d 453 (1983), the evidence was offered to show the motives of the detectives for pursuing the vehicle and for arresting defendant, rather than to prove the truth of the matter asserted. Furthermore, the trial court gave the jury specific instructions on this issue as follows:

> You have heard testimony regarding information which a confidential informant allegedly gave to Detective Burnham which, in turn, was passed on to Detective Fine and Flynn. You may not consider those statements of the confidential informant as proof of the truth of the contents of the statements. The statements were admitted for the limited purpose of showing the reasons and motivations of Detective Fine and Detective Flynn in stopping the car in which defendant was a passenger.

Additionally, defense counsel was the one who first introduced the evidence through his questioning of Detective Fine. Clearly, defense counsel was, as part of his trial strategy, attempting to discredit the informant's reliability and to attack the credibility of the police officers. In so doing, the defense opened the door for the prosecution to ask questions regarding that same information supplied by the informant in an effort to rehabilitate the officers by explaining the basis for their actions. Contrary to defendant's statement that there is no known open-the-door exception to the hearsay rule, courts allow otherwise inadmissible hearsay in when the objecting party has already used it to their advantage. See *People v Verburg*, 170 Mich App 490, 498; 430 NW2d 775 (1988); *People v Hunt*, 120 Mich App 736, 740; 327 NW2d 547 (1982). The trial court did not err in allowing the testimony.

Next, defendant argues that the same testimony which constitutes hearsay because it originated from a confidential informant was improperly allowed into evidence for the reason that no proper foundation was laid establishing the reliability of the source of the information. We disagree. For reasons discussed above, such testimony did not constitute hearsay. Furthermore, in the absence of an objection by defense counsel on this basis, and in the absence of a motion to suppress, the prosecution was under no duty to lay any foundation for the evidence.

Finally, defendant argues that the court abused its discretion by sentencing defendant to a term of six to thirty years and that such sentence is disproportionate to the offense and the offender. We disagree. A trial court's imposition of a sentence is reviewed on appeal for an abuse of discretion. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). A sentence constitutes an abuse of discretion when it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *Rice*, *supra* at 445.

Defendant contends that the sentence was disproportionate in light of his minimal criminal history. Defendant's argument overlooks the fact that his prior offenses, assault with a dangerous weapon and discharge of a firearm at a dwelling, involved firing two rounds from a pistol into a home. Defendant minimizes the seriousness of that episode, in which young children, among others, were put in

extreme danger. Thus, while defendant's criminal record may not consist of a large number of crimes, the trial court correctly noted that defendant's prior convictions were serious offenses.

Also, defendant makes much of the fact that, at the time of his arrest, he was found with a relatively small amount of cocaine. The amount of cocaine in his possession was sufficient for the crime for which he was convicted, and the trial court was not required to mitigate his sentence on that basis. The trial court properly considered the seriousness of the crime and defendant's prior record when sentencing defendant to six to thirty years under the habitual offender statute, and such sentence is not an abuse of discretion.

Insofar as defendant argues that the trial court failed to give proper weight to defendant's background, in particular, by failing to consider adequately defendant's potential for rehabilitation, that argument lacks merit. The trial court properly considered the four factors set forth in *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). The trial court found that rehabilitation has "certainly not tak[en] place" in defendant's life, given defendant was unable to "get through parole" and while defendant was "paroled out fairly early" he was "already out there committing another felony." The trial court expressed concern that defendant endangered people in his two prior felonies and then, while on parole, was dealing drugs. This demonstrates defendant's inability to reform and his lack of rehabilitative potential. The trial court concluded that deterrents were in order, and that it was necessary to discipline the offender and protect the public. Thus, the trial court properly considered rehabilitation, deterrence, protection of society, and punishment.

Additionally, even had the sentencing court not considered all of the *Snow* factors, resentencing would not be required. A failure to mention all of the *Snow* factors does not invalidate the court's sentencing rationale. *People v Girardin*, 165 Mich App 264, 267-268; 418 NW2d 453 (1987).

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins