STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 16, 2002
v	No. 226723 Oakland Circuit Court
DONALD MYRON LEE, Defendant-Appellant.	LC No. 99-169364-FH

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of carrying a concealed weapon, MCL 750.227, two counts of felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 1-1/2 to 10 years' imprisonment for each count of carrying a concealed weapon and felon in possession of a firearm, to be served following the completion of defendant's two-year term of imprisonment for the felony-firearm convictions. We affirm.

I. Facts and Proceedings

Defendant's convictions arose out of an incident that occurred on November 6, 1999, when at approximately 10:30 p.m., two Southfield Police officers noticed a vehicle "weaving in and out of its lane" on Lahser Road near Twelve Mile in the city of Southfield. Defendant was driving the vehicle and codefendant Michelle Young[1] was sitting in the front passenger seat. The officers, Nicholas Smiscik and Gerald Sikorski, activated their overhead lights to make a traffic stop and shined a spotlight into the vehicle. Smiscik and Sikorski saw codefendant Young look back at them a couple of times and say something to defendant. She then leaned forward "as if placing something on the floor." Defendant pulled into an elementary school parking lot. The officers saw defendant bending forward before he brought the car to a complete stop.

As the officers left their car, Smiscik approached the driver's side of the vehicle and Sikorski approached the passenger's side of the vehicle. Through the closed window, Smiscik

[1] Codefendant Young was convicted of carrying a concealed weapon and resisting and obstructing a police officer. Her convictions are not at issue in this appeal.

asked defendant for his driver's license, registration and proof of insurance. Defendant stated that the window was stuck and that he did not have his driver's license. Smiscik then asked defendant to get out of the vehicle. When defendant got out of the car, Sikorski, who had been shining his flashlight into the interior of the vehicle, saw two semi-automatic handguns on the floorboard in front of the driver's seat. Sikorski said "Nick, 1015,"[2] and pointed his fingers in the shape of a gun.

Smiscik took defendant to the rear of the vehicle and asked him to place his hands on the trunk. Although defendant tried to break away from Smiscik, he was eventually subdued and placed in handcuffs. After handcuffing defendant, Smiscik placed him in the patrol car. Defendant was "very belligerent" and was swearing at Smiscik, who noticed that defendant had "a strong odor of intoxicants on his breath," bloodshot eyes, and slurred speech.[3] When asked his name, defendant responded "that his last name was Death and his first name was Murder."

After placing defendant in the patrol car, Smiscik returned to the vehicle just as Sikorski was removing codefendant Young from the vehicle. As Young stepped out of the car, both officers saw a third gun sticking out from underneath the floor mat on the passenger side of the vehicle. After Sikorski placed Young under arrest, Smiscik returned to the driver's side of the vehicle and observed two guns on the floorboard in front of the driver's seat "[d]irectly in plain view." According to Smiscik, the guns were not under the seat, "[t]hey were where you would place your feet if driving a vehicle."

Defendant was taken to the police station for processing. Defendant was "very loud, very profane and totally uncooperative" with the officers. At one point, he told the officers that he would be out of jail in 48 hours and would come back to the station and kill them.

Defendant did not testify at trial. However, his defense was that he was "highly intoxicated" on the night in question and that he did not know that there were guns in the car. After hearing the evidence, the jury convicted defendant of two counts of carrying a concealed weapon, two counts of felon in possession of a firearm, and two counts of felony-firearm. Thereafter, defendant pleaded guilty to habitual offender, third offense.[4]

II. Standards of Review

A. Jury Instructions

We review claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Ordinarily, a party may claim error in the giving of jury instructions, or failure to give jury instructions, only if the party objects on the record before the jury retires to consider the verdict. MCR 2.516(C); *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). Absent an objection, a defendant is entitled to relief only if he can

---

[2] Nick is Officer Smiscik's first name. "1015" is a police radio code "for an arrest."

[3] Subsequent testing revealed that defendant's blood alcohol level was .20.

[4] Defendant admitted that he was convicted of resisting and obstructing a police officer on January 15, 1999, and of manslaughter on November 30, 1990.

demonstrate plain error that affected the defendant's substantial rights, in that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only where the error either resulted in the conviction of an innocent person or seriously affected the fairness, public reputation or integrity of the proceedings. *Id*.

B. Double Jeopardy

Generally, whether double jeopardy applies is a question of law that is reviewed de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). However, where the issue is not properly preserved for appellate review, a criminal defendant may obtain relief only if the error is plain and affected the defendant's substantial rights. *Carines, supra* at 763-764.

C. Sentencing

The legislative sentencing guidelines apply to offenses committed on or after January 1, 1999. MCL 769.34(1); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 469 (2000). In most instances, a trial court is required to impose a minimum sentence within the calculated guidelines range. MCL 769.34(2)(a) and (b). This Court must affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or reliance on inaccurate information in determining a defendant's sentence. MCL 769.34(10); *Babcock, supra* at 73, 77-78. The statutory sentencing guidelines do not authorize a further review of the sentence pursuant to the principle of proportionality set out in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Babcock, supra* at 77-78.

III. Analysis

On appeal, defendant first contends that his concealed weapons convictions should be reversed because of the trial court's failure to *sua sponte* instruct the jury in conformity with CJI2d 11.7. We disagree.

CJI2d 11.7 provides:

> (1) An essential element of the crime of carrying a concealed weapon is that the defendant must have knowingly carried the weapon.
>
> (2) If you are not convinced beyond a reasonable doubt that the defendant knew that the weapon was [. . . in the automobile], then you must find the defendant not guilty.

As a preliminary matter, we note that defendant never requested that CJI2d 11.7 be read to the jury nor did he object to the trial court's jury instructions. In fact, the record indicates that defendant informed the trial court that he had no objection to the jury instructions as read. As such, any error in the trial court's failure to instruct the jury pursuant to CJI2d 11.7 has been waived. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). See also *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987) (the defendant's claim that the trial court failed to properly instruct the jury was without merit because the defendant not only failed to request the instruction but gave approval to the trial court's instructions.).

In any event, we note that defendant concedes that the trial court properly instructed the jury in conformity with CJI2d 11.1. Specifically, the court stated:

> The defendant is charged with two separate counts of the crime of Carrying a Concealed Pistol. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that a pistol was in a vehicle that the Defendant was in.
>
> *Second, that the Defendant knew the pistol was there*.
>
> Third, that the Defendant took part in carrying or keeping the pistol in the vehicle.
>
> * * *
>
> The term "possession" means dominion or the right of control over the weapon *with knowledge of its presence* and character. [Emphasis supplied.]

Because the trial court's instruction pursuant to CJI2d 11.1 covered the substance of CJI2d 11.7, no error resulted in the trial court's omission of CJI2d 11.7. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463. Therefore, defendant is not entitled to relief based on the grounds that the jury was not properly instructed.

Defendant also contends that his convictions for both felon in possession of a firearm and felony-firearm violate the multiple punishment component of the Michigan and federal double jeopardy clauses. Again, we disagree. We first note that defendant did not raise his double jeopardy concerns below and, therefore, is entitled to relief only if he can demonstrate that a plain error occurred that affected his substantial rights. *Carines*, *supra* at 763-764.

In *People v Dillard*, 246 Mich App 163; 631 NW2d 755 NW2d 755 (2001), we addressed whether dual convictions for felon in possession of a firearm and felony-firearm violate the double jeopardy prohibitions against multiple punishments for the same offense. There, we held that the Legislature intended to permit a defendant charged with felon in possession to be properly charged with an additional felony-firearm count, and, therefore, was not a violation of the prohibition against double jeopardy. *Id*. at 168, 171. Further, in reaching that conclusion, we specifically rejected the defendant's argument that *People v Mitchell*, 456 Mich 693; 575 NW2d 283 (1998), was "in clear contravention of the United States Supreme Court's decision in *Ball v United States*, 470 US 856; 105 S Ct 1668; 84 L Ed 2d 740 (1985)." *Dillard*, *supra* at 168-169 n 4. Given our holding in *Dillard*, defendant cannot establish error, let alone plain error affecting his substantial rights. *Carines*, *supra*.

Defendant also argues that his eighteen-month minimum sentences for carrying a concealed weapon and felon in possession were disproportionate in the light of the fact that he was intoxicated at the time of the offenses and unaware of the presence of the weapons in the vehicle. However, we note that defendant's crimes took place after January 1, 1999, and the legislative sentencing guidelines, not the judicial guidelines, apply to this case. MCL 769.34(1) and (2); *Babcock, supra* at 72. As we stated in *Babcock*, "[t]he clear language of this subsection

compels the conclusion that the Legislature intended to preclude any appellate scrutiny of sentences falling within the appropriate guidelines range absent scoring errors or reliance on inaccurate information." *Id*. at 73. Here, defendant was sentenced within the guidelines and defendant does not allege a scoring error or assert that the trial court relied on inaccurate information at sentencing. Therefore, appellate relief is not available. MCL 769.34(10); *Babcock, supra* at 73; *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Affirmed.

/s/ Michael J. Talbot
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder