STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2004
v	No. 247390 Calhoun Circuit Court
DARYL ALLEN DANIELS, Defendant-Appellant.	LC No. 02-000690-FH

Before: Sawyer, P.J., and Gage and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, felony firearm, MCL 750.227b, and resisting and obstructing a police officer, MCL 750.479b. He was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent terms of 24 to 120[1] months' imprisonment for the carrying a concealed weapon and the felon in possession counts and 12 to 24[2] months' imprisonment for the resisting and obstructing count, along with a mandatory consecutive two years' imprisonment for the felony firearm count. Defendant was given credit for time served.[3]

[1] Defendant's original judgment of sentence indicated that he was sentenced to consecutive terms of 24 to 120 months' imprisonment for MCL 750.227 and MCL 750.224f; his amended judgment of sentence indicated that the same sentence was imposed; however, credit for time served was removed from the amended judgment of sentence. Moreover, the court indicated at the sentencing hearing that defendant's sentence was 24 to 90 months' imprisonment.

[2] Defendant's original judgment of sentence indicated that he was sentenced to 12 to 24 months' imprisonment for MCL 750.227b; his amended judgment of sentence indicated that he was sentenced to 12 to 48 months' imprisonment. The court indicated at the sentencing hearing that defendant was sentenced to 12 to 24 months' imprisonment with credit for time served. However, the amended judgment of sentence did not indicate credit for time served.

[3] At the sentencing hearing, the court gave defendant credit for 27 days served. However, defendant's judgment of sentence indicated a 55-day credit with respect to MCL 750.227, MCL 750.224f, and MCL 750.479b. The amended judgment of sentence removed the 55-day credit in connection with the three concurrent sentences, but reflected a 55-day credit with respect to the mandatory two-year sentence.

This case arose when police discovered a gun in defendant's bag pursuant to a consensual search during a traffic stop. We affirm but remand for clarification of defendant's sentence.

Defendant first argues that no reasonable suspicion existed to stop and search the car in which he was a passenger where the police relied on an uncorroborated anonymous tip, and the traffic violation was merely a pretext. We disagree.

A court's findings of fact in a suppression hearing are reviewed for clear error. *People v Oliver,* 464 Mich 184, 191-192; 627 NW2d 297 (2001). "'To the extent that a trial court's ruling on a motion to suppress involves . . . the application of a constitutional standard to uncontested facts, our review is de novo.'" *People v Harrington,* 258 Mich App 703, 706; 672 NW2d 344 (2003), quoting *People v Attebury,* 463 Mich 662, 668; 624 NW2d 912 (2001). A person has the right to be protected from unreasonable searches and seizures. *People v Faucett,* 442 Mich 153, 157-158; 499 NW2d 764 (1993), citing *Terry v Ohio,* 392 US 1, 9; 88 S Ct 1868; 20 L Ed 2d 889 (1968); US Const, Am IV.[4]

"An arrest or stop may not be used as a 'pretext' or 'subterfuge' to search for a crime." *People v Haney,* 192 Mich App 207, 209; 480 NW2d 322 (1991). However, if an officer has probable cause to believe that a traffic violation has occurred, he may lawfully stop the driver without violating the Fourth Amendment. *People v Marcus Davis,* 250 Mich App 357, 363; 649 NW2d 94 (2002), citing *United States v Ferguson,* 8 F3d 385, 391 (CA 6, 1993). In the instant case, the officer testified that he stopped the driver of a green Mercury Cougar after he observed the car following too closely behind a semi-trailer. MCL 257.643 prohibits following another vehicle "more closely than is reasonable and prudent" given the driving conditions. Therefore, there was probable cause to make the stop. The fact that the officer did not issue a ticket, had previous knowledge that defendant might have been carrying a weapon and cocaine, and intended to see if there were any weapons in the car did not establish that the stop violated defendant's constitutional rights. An officer's subjective intent behind making a stop is irrelevant as long as the stop is supported by probable cause. *Haney, supra* at 209-210; *Whren v United States,* 517 US 806, 811-813; 116 S Ct 1769; 135 L Ed 2d 89 (1996).

With respect to the search, a person can "waive the protection against unreasonable searches and seizures by consenting to a search." *People v Shankle,* 227 Mich App 690, 695; 577 NW2d 471 (1998). And a defendant has no standing to claim that another person's right to be protected from unreasonable search and seizure was violated. *Id.* at 693. The driver consented to the search of the car. Therefore, no probable cause was required to search the car itself. With respect to defendant's bag in the trunk:

> "[P]olice may open and search any container placed or found in an automobile, as long as they have the requisite probable cause with regard to such a container, even if such probable cause focuses specifically on the container and

[4] "[T]he federal constitutional protections against unreasonable searches and seizures have been extended to state proceedings through the Due Process Clause of the Fourteenth Amendment." *People v Faucett,* 442 Mich 153, 158; 499 NW2d 764 (1993).

> arises before the container is placed in the automobile." [*People v Bullock*, 440 Mich 15, 24; 485 NW2d 866 (1992), citing *California v Acevedo*, 500 US 565, 579-580; 111 S Ct 1982; 114 L Ed 2d 619 (1991).]

Probable cause is "'a fair probability that contraband or evidence of a crime will be found in a particular place.'" *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999), quoting *Illinois v Gates*, 462 US 213, 236; 103 S Ct 2317; 76 L Ed 2d 527 (1983). The trial court found that defendant's behavior when Officer Crawford lifted the bag from the trunk, along with the tip that was somewhat corroborated by Officer Gothard's independent research, established probable cause to justify the search. Flight is some evidence of probable cause. *Garvin, supra* at 105. Before an anonymous tip may constitute probable cause, the noncriminal facts of the tip must be independently corroborated. *People v Levine*, 461 Mich 172, 180-182; 600 NW2d 622 (1999). Officer Gothard independently corroborated tip information regarding defendant's race, gender, and whereabouts. He testified that he called the hotel and learned that Kenny Meyers and another unknown black man had rented room 138. Gothard called back at check-out time and learned that Kenny Meyers had left, but the other occupant was standing in the lobby with a light blue bag. Gothard drove to a location across the street from the hotel and observed defendant, who matched the hotel employee's description, leave the hotel and place a light blue bag in the trunk of a green Mercury Cougar, then climb into the passenger seat. Because the noncriminal facts in the anonymous tip were corroborated, the tip established probable cause to search the bag. *Id.*

Defendant next argues that he was denied the right to an impartial jury where one of the jurors was related to, and did not get along with, his mother. We disagree.

A court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001). "A criminal defendant has a constitutional right to be tried by a fair and impartial jury." *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998), citing US Const, Am VI; Const 1963, art 1, § 20. Voir dire is designed to exclude prospective jurors who are not impartial from the jury. *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (Plurality Opinion). "[W]hen information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause." *Daoust, supra* at 9.

A prospective juror may be challenged for cause if that person indicates prejudice for or against one of the parties, MCR 2.511(D)(3), or "is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys," MCR 2.511(D)(9). MCR 6.412 (D)(1) provides that the grounds to challenge for cause in a civil trial are applicable to a criminal trial. Further, MCR 6.412(D)(2) provides that if the reason to challenge for cause exists, the juror should be dismissed. And we recently stated, "once a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the trial court is without discretion to retain that juror, who must be excused for cause." *People v Eccles*, 260 Mich App 379, 383; 677 NW2d 76 (2004).

Nevertheless, the burden of proof is on the party alleging juror disqualification. *Johnson, supra* at 256, citing *People v Collins*, 166 Mich 4, 9; 131 NW 78 (1911). With respect to the

relationship ground, defendant merely indicated that his mother and the juror were related; he did not indicate how or to what degree they were related. This Court has previously indicated that a relationship between a juror and a party may be so attenuated that cause is not shown. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994) (It was not an abuse of discretion to refuse to excuse a juror where a brother-in-law of an acquaintance of the juror was the victim's uncle, the juror stated she could be impartial, and the defendant did not demonstrate prejudice). Defendant did not meet his burden of proof where the juror did not recognize defendant, and neither defendant nor his aunt recognized the juror.

With respect to a bias-related challenge for cause, a juror may be excused when bias for or against a party is demonstrated. *People v Williams*, 241 Mich App 519; 616 NW2d 710 (2000). Although the juror told defendant's attorney after trial that she was related to defendant, she also informed counsel that her relationship did not affect her verdict. Moreover, while the juror stated she did not like defendant's mother and, thus, may arguably have been biased toward her, this did not mean she was biased toward defendant. The court noted the juror had not seen defendant for quite some time, had not seen defendant's aunt in sixteen years, and initially did not recognize defendant at all. This would indicate a lack of bias. The court did not find bias or partiality. "This Court defers to the trial court's superior ability to assess from a venireman's demeanor whether the person would be impartial." *Id.* at 522. Therefore, defendant failed to meet his burden of proof here as well.

Affirmed but remanded to clarify defendant's sentence.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens