STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY ELLIS,

Defendant-Appellant.

UNPUBLISHED
November 16, 2006

No. 262957
Wayne Circuit Court
LC No. 05-001972-01

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*). Pursuant to MCL 769.12, defendant was sentenced as a fourth habitual offender to two to 15 years in prison. We affirm.

Defendant argues that the evidence obtained from his arrest and the search of his vehicle should have been suppressed, and that the case therefore should have been dismissed. We disagree. We review unpreserved suppression issues for plain error. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Both the United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Bolduc*, 263 Mich App 430, 437; 688 NW2d 316 (2004). The lawfulness of a search or seizure depends upon its reasonableness. *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). An officer may arrest a person without a warrant when he has probable cause to believe that a felony has been committed and probable cause to believe that such person has committed it. MCL 764.15; *People v Potter*, 115 Mich App 125, 134; 320 NW2d 313 (1982). To determine whether an officer had probable cause to arrest a suspect, the Court must consider "whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony," and must analyze each case "in light of the particular facts confronting the arresting officer." *Id*. at 134-135.

In *Potter*, this Court held that a police officer had probable cause to arrest the defendant where the defendant was in an area known for narcotics transactions, the police knew the defendant to be involved in narcotics, the police saw the defendant involved in transactions in which he exchanged items for money, and the police saw the defendant making signals that indicated he was selling drugs. *Id*. at 135. The facts of the instant case are substantially similar to those presented in *Potter*. Like *Potter*, in the present case a police officer saw defendant

exchange an item in a closed fist for money while in an area known for narcotics transactions. The officer noted that defendant's closed-hand motion during the exchange was consistent with his experience of how drug dealers typically sell drugs. In addition, another officer indicated that he had contact with defendant prior to this occasion, and noted that when he approached defendant's car, defendant said, "Oh, [expletive], here we go again," and attempted to get out of the vehicle. Based on these facts, the police had probable cause to arrest defendant. *Id*.

Because defendant's arrest was lawful, the subsequent search of defendant's car in which the police found a pen containing cocaine was proper. *People v Eaton*, 241 Mich App 459, 463; 617 NW2d 363 (2000) (contemporaneous to a lawful arrest, police may search an arrestee and the area immediately within his control, including the passenger compartment of an automobile occupied by the arrestee). Defendant's argument that his confession should have been suppressed because the search was illegal also fails, and the evidence was properly admitted. See *People v LoCicero*, 453 Mich 496, 508; 556 NW2d 498 (1996), citing *Wong Sun v United States*, 371 US 471, 484; 83 S Ct 407; 9 L Ed 2d 441 (1963) (the exclusionary rule only prohibits the use of evidence directly or indirectly acquired from governmental misconduct, such as an illegal police search).

We need not address defendant's argument that he was denied the effective assistance of counsel. Defendant has waived this issue by failing to include it in his statement of the questions presented. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nonetheless, given the lawful arrest and legal search of defendant's vehicle, any motion or objection would have been futile. Defense counsel is not required to make a meritless motion or futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Thus, defense counsel actions did not constitute ineffective assistance. *Id*.

We note that although the arresting officer's account of when defendant was formally arrested is unclear, this does not affect the legality of the search. The officer initially stated that he searched the car after he arrested defendant. However, the officer later stated that he detained defendant and arrested him after finding the cocaine in the car. An arrest is defined as:

> "[T]he taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested." [*People v Gonzales*, 356 Mich 247, 253; 97 NW2d 16 (1959), quoting 4 Am Jur, Arrest, § 2, p 5.]

Given that the officer placed handcuffs on defendant and took him to the rear of the car prior to conducting the search of his vehicle, it is clear that the officer intended to arrest defendant, who was then in custody and under officer's control. *Gonzales*, *supra* at 253. Therefore, defendant was under arrest as soon as he was initially detained and the subsequent search of his car incident to arrest was proper.

Defendant next argues that a corrected sentencing information report and presentence investigation report ("PSIR") must be sent to the department of corrections. We disagree. With respect to the sentencing information report, defendant notes that the sentencing information

report must be corrected to reflect that the trial court changed defendant's guidelines range from five to 46 months, to two to 34 months. However, the sentencing information report already reflects this change. Therefore, defendant's argument is moot with respect to this point.

With respect to the PSIR, defendant failed to object below to the accuracy of the PSIR. *People v Bailey* (*On Remand*), 218 Mich App 645, 647; 554 NW2d 391 (1996). Notwithstanding this, defendant's claim that the PSIR incorrectly indicates that defendant was outside of his vehicle during his drug transaction is mistaken. On the contrary, the PSIR does not specifically identify defendant's location during the transaction, only indicating his location in general terms: "[D]efendant retrieved from a burgundy, 4 door Buick, suspected narcotics." Thus, there is no factual error in the PSIR in this regard. Further, although the PSIR incorrectly lists defendant's guidelines range as five to 46 months, it is clear that the trial court did not rely on this mistake. Indeed, the corrected guidelines range is plainly indicated in the sentencing information report. See *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004) (stating that "if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing"). Because the inaccurate information was not relied on, and was corrected prior to sentencing, no correction need be made to the PSIR.

Finally, defendant argues that the trial court erred in failing to award him credit for time served in jail while awaiting sentencing. We disagree. We review an unpreserved challenge to the validity of a sentence for plain error. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002), citing *Carines*, *supra* at 774. "MCL 769.11b provides that where a sentencing court has before it a convict who has served time in jail before sentencing because he or she could not afford or was denied bond, the court must credit that person with time served." *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006). However, defendant was on parole at the time of his arrest in this case. "'When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense.'" *Id*., quoting *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Rather, the jail credit is to be applied exclusively to the offense from which the parole was granted. *Id.*

Here, prior to sentencing, defendant was in jail. Defendant argues that because the department of corrections did not require him to serve more time on his prior sentence, he is entitled to jail-time credit on his current sentence pursuant to MCL 769.11b. However, this reading of MCL 769.11b is misplaced in light of *Stead* and *Seiders*.

Here, because defendant was on parole when he was arrested for a new offense, he was held on a parole detainer. *Stead*, *supra* at 551. "Credit is not available to a parole detainee for time spent in jail attendant to a new offense, because 'bond is neither set nor denied when a defendant is held in jail on a parole detainer.'" *Id*., quoting *Seiders*, *supra* at 707. Therefore, defendant is not entitled to jail credit for his sentence in this case, and has failed to demonstrate plain error affecting his substantial rights in this regard.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen