STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMESE KION WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
November 21, 2006

No. 262416
Genesee Circuit Court
LC No. 04-014252-FH

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 46 months' to 20 years' imprisonment for both the felon in possession of a firearm and carrying a concealed weapon convictions, two years' imprisonment for the felony-firearm conviction, and one year imprisonment for the possession of marijuana conviction. We affirm.

Defendant first argues that he was denied the effective assistance of counsel due to his trial counsel's failure to make a motion to suppress or object to the admission of evidence acquired from the stop of the vehicle he was driving. We disagree. Claims of ineffective assistance of counsel involve a question of law, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because this issue is unpreserved, this Court limits its review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, "a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

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). "It is well established that brief investigative stops short of arrest are permitted where police officers have a reasonable suspicion of ongoing criminal activity." *People v Christie* (*On Remand*), 206

Mich App 304, 308; 520 NW2d 647 (1994), citing *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). The reasonableness of the stop is evaluated in light of the totality of the circumstances. *People v Armendarez*, 188 Mich App 61, 66; 468 NW2d 893 (1991). Further, a stop in the absence of a traffic violation is proper provided there is an individualized, articulable suspicion for the stop. *People v Burrell*, 417 Mich 439, 450; 339 NW2d 403 (1983).

In *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000), the United States Supreme Court held that an investigatory stop was reasonable where the defendant, who was in an area of heavy narcotics trafficking, fled upon seeing police. The instant case is similar to *Wardlow*. Here, the police officers indicated that it appeared defendant was trying to avoid them when he turned abruptly into the driveway of a seemingly abandoned house in a high crime area after they had been following him for about a block at 2:20 a.m. Both police officers explained that this behavior made them suspicious. Given that "'nervous, evasive behavior is a pertinent factor in determining reasonable suspicion,'" *People v Oliver*, 464 Mich 184, 197; 627 NW2d 297 (2001), quoting *Wardlow*, *supra* at 124, a review of the totality of the circumstances in this case shows that the police officers had a reasonable suspicion. Therefore, the stop of the vehicle defendant was driving was proper.

Further, defendant's subsequent arrest and the search of his person and the vehicle were proper. "A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask reasonable questions concerning the violation of law and its context for a reasonable period." *People v Williams*, 472 Mich 308, 315; 696 NW2d 636 (2005). Following the stop, the police asked defendant what he was doing at a vacant house. Defendant replied that the house was not vacant and that he was going to a different house next door. Given that the windows and door of the house defendant claimed was not vacant were in fact, boarded up, the police decided to investigate further and subsequently asked for defendant's driver's license. When defendant indicated that he did not have a driver's license, defendant was arrested. A police officer may arrest an individual for the misdemeanor of operating a vehicle without a license in the officer's presence. See *People v Boykin*, 31 Mich App 681, 684; 188 NW2d 100 (1971). Therefore, defendant's arrest was lawful. Consequently, the subsequent search of defendant's person and the vehicle was also proper. See *People v Eaton*, 241 Mich App 459, 463; 617 NW2d 363 (2000).

In addition, the police did not unlawfully obtain defendant's incriminating statements. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Custodial interrogation is defined as "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987), quoting *Miranda*, *supra* at 444. Statements made voluntarily by a suspect while in custody do not fall within the purview of *Miranda* and are admissible. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997).

Here, defendant made incriminating admissions at the scene of his arrest and at the police station. At the scene of the arrest, a police officer returned to the police cruiser after searching the vehicle defendant was driving, whereupon defendant asked him why Lakeda Smith, who had been riding in the vehicle with defendant, had been handcuffed. When the officer responded that

Smith was handcuffed because he had found a gun in the car, defendant admitted that the gun was his. The officer noted at trial that defendant, himself, initiated the exchange. Hence, defendant volunteered this incriminating statement without first being subjected to police questioning. Because defendant voluntarily made his statement outside the context of a custodial interrogation, the statement was admissible. *Id.* at 479.

Following his arrest, defendant waived his *Miranda* and admitted that, not only had he purchased the gun for $50, but he had also arranged for someone to steal the gun prior to purchasing it. Defendant further admitted that he did not have a permit for the gun. Given that defendant made these admissions after waiving his rights, these statements were also admissible. *Howard*, *supra* at 538.

Defendant argues that the waiver of his *Miranda* rights was not valid because he had consumed alcohol and was under the influence of drugs. This argument is unpersuasive. For a waiver to be valid, it must be voluntary as well as knowing and intelligent. *People v Daoud*, 462 Mich 621, 639; 614 NW2d 152 (2000). To determine whether a waiver was voluntarily given, the totality of the circumstances must indicate that the admission was made freely and voluntarily. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). To determine whether a waiver was knowingly and intelligently made, "the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996). Although intoxication can affect the validity of a waiver, it is not a dispositive factor. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987).

Police noticed the smell of marijuana and defendant's eyes were glassy and bloodshot at the time of his arrest. However, at the police station, defendant was asked several preliminary questions to determine whether defendant was intoxicated or under the influence of drugs. The interviewing officer explained that defendant appeared competent and understood his questions. Moreover, defendant denied taking any drugs or consuming alcohol. Following this, the interviewing officer presented a form to defendant explaining his rights and read the form to defendant. Defendant indicated that he understood each of his rights, and elected to waive them and make a statement. Under these circumstances, defendant not only waived his rights voluntarily, but he was aware of his rights and the ramifications of making a statement. Even if defendant was minimally intoxicated or under the influence of drugs, it did not affect the validity of the waiver.

In light of the fact that the evidence and defendant's admissions were obtained legally, defendant was not denied the effective assistance of counsel. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Counsel's failure to make a motion to suppress the evidence or object to its admission was objectively reasonable and would not have affected the outcome of the trial given that the evidence was admissible.

Defendant next argues that his sentences for felon in possession of a firearm and carrying a concealed weapon were based on inaccurate information and the trial court failed to consider relevant facts that would have reduced his sentences. We disagree. If a defendant fails to raise below that a sentence is based on inaccurate information, this issue is waived on appeal. See

People v Baldwin, 130 Mich App 653, 655; 344 NW2d 37 (1983). Defendant did not object at the sentencing hearing that the trial court based his sentences on inaccurate information and even approved the presentence investigation report. Therefore, this issue is waived. Notwithstanding the waiver, "[a] judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). Defendant has failed to show that the trial court relied upon inaccurate information. Thus, defendant's speculation concerning information the court used in sentencing is irrelevant.

At sentencing, the trial court noted defendant's conduct while on bond and awaiting trial and the fact that defendant lied were relevant to his sentences. Regarding these findings, the presentence investigation report indicated that defendant, at trial, recanted his prior statements to police regarding the gun and implied that police coerced him into making a false statement Although the presentence investigation report does not specify defendant's conduct while on bond awaiting trial, the report does disclose defendant's pattern of probation and parole violations as well as continued drug abuse despite efforts at rehabilitation. Defendant has not challenged the court's finding regarding his pattern of conduct while on bond awaiting trial. In light of this, defendant has failed to show that the trial court relied on inaccurate information in determining his sentences for his felon in possession of a firearm and carrying a concealed weapon convictions.

Next, defendant argues that his sentences for felon in possession of a firearm and carrying a concealed weapon are cruel or unusual. This Court reviews an unpreserved sentencing challenge for plain error. *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002). Here, defendant was sentenced as a fourth habitual offender, MCL 769.12. The propriety of an habitual offender sentence is determined by whether it is proportionate. *People v McFall*, 224 Mich App 403, 415; 569 NW2d 828 (1997). The test for proportionality of a sentence is whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). When the habitual offender's underlying criminal history demonstrates that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Colon*, 250 Mich App 59, 65; 644 NW2d 790 (2002).

A review of defendant's record reveals he has three prior felony convictions and has repeatedly violated probation. While on probation, defendant was convicted of carrying a concealed weapon. In addition, defendant has a significant history of substance abuse and was terminated from his residential treatment at the Salvation Army and Odyssey House for failing to follow the program rules. During one period of incarceration, defendant received a misconduct ticket for disobeying a direct court order. Therefore, considering defendant's criminal history and involvement with drugs and firearms, his sentences for felon in possession of a firearm and carrying a concealed weapon are proportionate and do not constitute cruel or unusual punishment. *Colon*, *supra* at 65.

Defendant next argues that the trial court improperly relied upon facts not admitted by himself or found by a jury in imposing defendant's sentences in violation of *Blakely* and that his sentences violate his liberty interests protected by the Ninth Amendment. We disagree. The United States Supreme Court has held that it is a violation of the Sixth Amendment for a trial court to increase a defendant's sentence beyond the maximum sentence permitted by law on the basis of facts not found by the jury. *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L

Ed 2d 403 (2004). However, Michigan's sentencing scheme is unaffected by *Blakely* because Michigan uses an indeterminate sentencing scheme in which the trial court sets the minimum sentence but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Therefore, *Blakely* is inapplicable to this case.

Regarding the Ninth Amendment, defendant does not specify what inherent liberty interests his sentences violate, but only vaguely avers that his sentences violate his constitutional rights. Therefore, defendant has abandoned this argument on appeal. *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001).

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski