STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN PATRICK ROSE,

Defendant-Appellant.

UNPUBLISHED
November 30, 2006

No. 263854
Wayne Circuit Court
LC No. 04-008300-01

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced, as a fourth habitual offender, MCL 769.12, to 7½ to 20 years in prison for his felon in possession of a firearm conviction, and two years in prison for his felony-firearm conviction. He appeals as of right his convictions and sentence, and we affirm.

Officer Scott Sczepanski of the Livonia Police Department testified that on July 23, 2004, he responded to a 911 call regarding a dispute at the Days Inn that involved a white male with long blonde hair. As Sczepanski was pulling into the hotel parking lot he saw a white male with long blonde hair pulling out of the parking lot in a green Volkswagen Jetta. Sczepanski stopped the vehicle and noted that defendant was the only individual in the vehicle. After some investigation, Sczepanski arrested defendant. Officer Shane Rebant of the Livonia Police Department stated that when he arrived at the scene in question, Sczepanski had already pulled defendant over. Rebant watched Sczepanski arrest defendant and noted that, while Sczepanski was arresting defendant, a woman came running across the parking lot yelling, "[h]e didn't do anything. The gun is mine." Sczepanski searched the vehicle and eventually recovered a handgun from the engine compartment. Sczepanski stated that the gun was wrapped in a washcloth and located between the battery and the front of the vehicle. Sczepanski noted that his search was conducted according to department policy, and it was a known trend for individuals to hide guns in the engine compartment.

Defendant first argues that the trial court erred when it denied his motion to suppress the fruits of the search of the vehicle he was occupying. When considering a ruling on a motion to suppress evidence, we review the circuit court's findings of fact for clear error, giving deference to the circuit court's resolution of factual issues. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). We may not substitute our judgment for that of the circuit court or make

independent findings. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). We review "[q]uestions of law relevant to a motion to suppress evidence" de novo. *People v Hawkins*, 468 Mich 488, 496-497; 668 NW2d 602 (2003). Similarly, we review the circuit court's ultimate decision on the motion to suppress de novo. *Bolduc*, *supra* at 436.

Generally, materials seized and observations made during an unconstitutional search may not be introduced into evidence. *Hawkins*, *supra* at 498-499. Under the federal and state constitutions, a search must be reasonable. *People v Goforth*, 222 Mich App 306, 309; 564 NW2d 526 (1997). Generally, a search conducted without a warrant is unreasonable unless there exists both probable cause and a circumstance establishing an exception to the warrant requirement. *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000). The prosecutor bears the burden of showing that a search was justified by a recognized exception. *People v Mayes (After Remand)*, 202 Mich App 181, 184; 508 NW2d 161 (1993). Exceptions to the warrant requirement for reasonable searches and seizures include: (1) searches incident to arrest, (2) automobile searches and seizures, (3) plain view seizure, (4) consent, (5) stop and frisk, (6) exigent circumstances, (7) community caretaker, and (8) emergency aid. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). A search of a vehicle without a warrant pursuant to the automobile exception is strictly limited in scope by the objects of the search and the places in which there is probable cause to believe they can be found. *People v Bullock*, 440 Mich 15, 25; 485 NW2d 866 (1992). Probable cause is closely tied to the specific facts of each case. *Id*. at 26. Probable cause to search an automobile exists when the facts and circumstances known to the officers would warrant a person of reasonable prudence to believe that evidence of a crime or contraband sought is in a stated place. *People v Carter*, 194 Mich App 58, 61; 486 NW2d 93 (1992). If probable cause justifies the search, it justifies the search of every part of the vehicle and any of its contents which might conceal the object sought. *Id*.

Furthermore, to be constitutional, an investigative stop must be supported by a particularized suspicion, based upon the totality of the circumstances as understood by a law enforcement officer, that the person being investigated has been, is, or is about to be engaged in criminal activity. *People v Dunbar*, 264 Mich App 240, 247; 690 NW2d 476 (2004). The suspicion must be reasonable and articulable. *Id*. Fewer facts are needed to establish reasonable suspicion when a person is in a moving vehicle than in a house, but a minimum threshold of reasonable suspicion must be established to justify an investigatory stop even if a person is in a vehicle or on the street. *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001). An officer's reasonable suspicion may be based on information obtained from another officer, *People v Chambers*, 195 Mich App 118, 122; 489 NW2d 168 (1992), or an informant, *Dunbar*, *supra* at 248. The officer must be able to articulate specific facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *People v Rice*, 192 Mich App 512, 518; 482 NW2d 192 (1992). The determination whether there was reasonable suspicion must be made case by case under the totality of the circumstances, and based on common sense and inferences about human behavior. *Jenkins*, *supra* at 32.

Here, officer Sczepanski responded to a 911 call regarding a dispute at the Days Inn involving a white male with long blonde hair who threatened to shoot someone. When Sczepanski was pulling into the parking lot of the Days Inn, he had just received information that the perpetrator was leaving the scene, when he saw a white male with long blonde hair exiting the parking lot in a green Volkswagen Jetta. Thus, we conclude that based upon the totality of

the circumstances as understood by Sczepanski, it was reasonable for Sczepanski to believe that the white male with long blonde hair, who later turned out to be defendant in this case, had been engaged in criminal activity. *Oliver*, *supra* at 192; *Dunbar*, *supra* at 247-248; *Rice*, *supra* at 518. Accordingly, Sczepanski's subsequent investigatory stop of the vehicle was proper. *Dunbar*, *supra* at 247. After Sczepanski stopped the vehicle, defendant's girlfriend, Trish Eley, who appeared distraught, came running across the parking lot screaming, "[h]e didn't do anything. The gun is mine." Furthermore, information was obtained from a hotel guest, Michael Heathington, regarding the incident that took place, including information that a gun was involved in the dispute. Thus, we conclude that there was probable cause to believe that a gun could be found in the vehicle in which defendant was driving. Therefore, pursuant to the automobile exception, Sczepanski's search of the vehicle was proper. *Bullock*, *supra* at 25-26; *Carter*, *supra* at 61. Accordingly, the trial court did not err when it denied defendant's motion to suppress the fruits of the search of the vehicle he was occupying. *Hawkins*, *supra* at 498-499; *Snider*, *supra* at 407.

Defendant next argues that the trial court abused its discretion when it granted the prosecution's motion to admit Heathington's prior testimony into evidence. Plaintiff argues that they used due diligence in securing the presence of Heathington at trial. We review a trial court's determination of a finding of due diligence for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 388-389; 677 NW2d 76 (2004). Furthermore, we review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Hearsay is defined as a statement, other than one made by the declarant while testifying at a trial or hearing, which is offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Hearsay is generally not admissible as substantive evidence unless it is offered under one of the exceptions to the hearsay rule. MRE 802; *Tanner*, *supra* at 629. However, former testimony of a witness is admissible in a later proceeding if the witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination at the earlier time. MRE 804(b)(1); *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). A witness is unavailable when he is absent from the hearing and the proponent of his statement has used due diligence to procure his attendance. MRE 804(a)(5); *Briseno*, *supra* at 14. The party proffering the former testimony must demonstrate that he made a reasonable, good faith effort to secure the declarant's presence for trial; the party need not have done everything possible to locate the witness. *Briseno*, *supra* at 14.

Before the trial court granted the prosecution's motion to admit Heathington's prior testimony into evidence, the prosecution established that Heathington had told the police he was moving to North Carolina after he testified at defendant's first trial. The prosecution further established that the police contacted Heathington's father in an effort to locate Heathington, but Heathington's father did not have any helpful information regarding Heathington's whereabouts. Moreover, the prosecution established that the police obtained an address for Heathington from the North Carolina Secretary of State and sent a subpoena to the address via certified mail, but the subpoena was returned as undeliverable. Thus, even though defendant correctly points out that the prosecution could have made other efforts to locate and obtain Heathington, we conclude

that the trial court did not abuse its discretion when it found that the police exercised due diligence in their efforts to locate Heathington. *Id.* Accordingly, given that defendant had an opportunity and similar motive to cross-examine Heathington at an earlier time, the trial court did not abuse its discretion when it granted the prosecution's motion to admit Heathington's prior testimony into evidence. MRE 804(a)(5); MRE 804(b)(1); *Briseno*, *supra* at 14.

Defendant's final argument on appeal is that the trial court abused its discretion when it departed from the sentencing guidelines range when sentencing defendant. We review a trial court's sentencing decision to determine, first, whether it is within the appropriate guidelines range and, second, if it is not, whether the trial court has articulated a "substantial and compelling" reason for departing from such range. *People v Babcock*, 469 Mich 247, 256, 259, 261-262; 666 NW2d 231 (2003). "[T]he existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error." *Id*. at 264. "The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law." *Id*. "A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion." *Id*. at 264-265.

Under the statutory sentencing guidelines, a trial court may only depart from the guidelines if it has substantial and compelling reasons to do so, and states those reasons on the record. MCL 769.34(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The reasons for departure may not be based on an offense characteristic or offender characteristic already considered in determining the appropriate sentence range, unless the court finds from the facts contained in the record that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Abramski*, *supra* at 74. Further, the reasons must be objective and verifiable. *Id*. To be objective and verifiable, a reason must be based on actions or occurrences external to the mind and must be capable of being confirmed. *Id*.

Here, in relevant part, it is undisputed that defendant's sentencing guidelines range for his felon in possession of a firearm conviction was calculated to be 9 to 46 months.[1] MCL 777.66; MCL 777.21(3)(c); MCL 769.12. The trial judge sentenced defendant to 7½ to 20 years in prison for his felon in possession of a firearm conviction. Thus, defendant's minimum sentence exceeds his guidelines range by 44 months. The trial judge stated on the record that his departure from the guidelines range was based on the fact that he believed there were "substantial and compelling reasons to exceed the recommended guidelines" because he did not believe that the sentencing guidelines adequately considered the fact that defendant had been previously convicted of 14 other felonies. We agree with the trial court.

As discussed, *supra*, the trial judge properly stated his reasons for exceeding the guidelines on the record. *Abramski*, *supra* at 74. Furthermore, defendant's presentence investigation report (PSIR) reflects that defendant had been previously convicted of 14 other

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[1] Defendant was sentenced as a fourth habitual offender on his felon in possession of a firearm conviction.

felonies. Therefore, the trial judge's "substantial and compelling" reasons to exceed the sentencing guidelines were "objective and verifiable." *Id*. Thus, whether the trial judge properly exceeded the sentencing guidelines hinges on whether the trial judge's stated reasons for departure were based on offense or offender characteristics that were already considered when determining defendant's appropriate sentence range and were given adequate weight. MCL 769.34(3)(b); *Abramski*, *supra* at 74.

Here, the trial judge considered the fact that defendant had been previously convicted of "3 or more prior high severity felony convictions" when he scored 75 points for prior record variable (PRV) 1, which put defendant at the highest PRV level (F). MCL 777.51; MCL 777.66. As discussed, *supra*, the trial judge exceeded the guidelines because he did not believe that the sentencing guidelines adequately considered the fact that defendant had been previously convicted of 14 other felonies. Given the fact that defendant had more than four times the number of prior high severity convictions needed to merit 75 points under PRV 1, MCL 777.51, we conclude that the trial judge did not abuse his discretion when he found that defendant's 14 prior felonies had been given inadequate or disproportionate weight when calculating defendant's guidelines range, and accordingly, did not abuse his discretion when he found that there were substantial and compelling reasons to depart from the statutory minimum sentence. MCL 769.34(3)(b); *Babcock*, *supra* at 264-265*; Abramski*, *supra* at 74. Furthermore, given defendant's extensive criminal history, we conclude that the sentence imposed by the trial court is proportionate to the seriousness of the crime and defendant's criminal history, and thus, does not violate the principles of proportionality. *Babcock*, *supra* at 264, 273.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello