

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE ANTONY ROCCA,

Defendant-Appellant.

UNPUBLISHED

January 27, 2009

No. 280295

Lapeer Circuit Court

LC No. 07-009093-FC

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

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of three counts of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2)(a), safe breaking, MCL 750.531, two counts of torture, MCL 750.85, two counts of animal torture, MCL 750.50b(2), felon in possession of a firearm, MCL 750.224f, impersonating a police officer, MCL 750.215(3), larceny in a building, MCL 750.360, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to two years for the felony-firearm conviction, to be served consecutively with concurrent terms of 22 years, six months to 75 years for the three counts of armed robbery, two counts of torture, safe breaking, first-degree home invasion, and felon in possession of a firearm, as well as concurrent terms of two to 15 years for the two counts of animal torture, impersonating a police officer, and larceny of a building. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Defendant first argues that the trial court erred in making his felony-firearm sentence consecutive to all other sentences imposed. Because defendant failed to preserve this argument below, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A consecutive sentence may be imposed only if specifically authorized by statute. *People v Lee*, 233 Mich App 403, 405; 592 NW2d 779 (1999). MCL 750.227b provides as follows:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years.

(2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

With respect to the felony-firearm charge, the trial court instructed the jury that defendant could be convicted of the crime if the jury determined that he committed any one of the other 13 felony counts.

In *People v Clark*, 463 Mich 459, 460-461; 619 NW2d 538 (2000), the defendant was convicted of fifteen offenses, including two counts of felony-firearm. The judgment of sentence indicated that the felony-firearm sentences were consecutive to all other convictions. *Id.* at 462. However, the information and amended information made clear that the felony-firearm charges were related to two counts of bomb possession. *Id.* at 461. Further, the jury was specifically instructed that to find the defendant guilty of felony-firearm, it had to first find beyond a reasonable doubt “‘that the defendant committed the crime of possession of a bomb with unlawful intent.’” *Id.* at 462, quoting trial court’s jury instructions. Our Supreme Court explained that even though “it might appear obvious that the defendant also possessed a firearm while committing the other crimes of which he was convicted, neither a trial court nor an appellate court can supply its own findings with regard to the factual elements that have not been found by a jury.” *Id.* at 464. Accordingly, the Court remanded for correction of the judgment of sentence to indicate that “[e]ach felony-firearm sentence is consecutive only to the corresponding conviction for possession of a bomb with unlawful intent.” *Id.* at 465.

The information in the case at hand tied the felony-firearm count to the crime of armed robbery. However, the jury was not instructed that it needed to find that defendant committed or attempted to commit armed robbery, or to which armed robbery count the felony-firearm count was appended. Further, the jury was instructed that in order to find defendant guilty of armed robbery, it needed to find that he “possessed a weapon designed to be dangerous and capable of causing death or serious injury.” Plaintiff’s theory of the case was that defendant and another man entered the residence where the crimes were committed carrying two guns and a taser. This was consistent with the felony information, which indicated that each count of armed robbery was predicated on the possession of a “gun and/or taser.” The jury did find defendant guilty of three counts of armed robbery. Thus, it does seem reasonable to conclude that the jury was convinced beyond a reasonable doubt that defendant was armed with either a gun or a taser. However, the jury was also instructed that for purposes of the felony-firearm count, “[a] firearm can include any weapon from which a dangerous object can be propelled and a pistol is considered to be a firearm for purposes of this crime.” Thus, although the jury must have concluded that defendant was armed with a gun at some point, it did not necessarily find that he was armed with a gun during the commission of the armed robberies.

Accordingly, the trial court did commit a plain error in making the felony-firearm sentence consecutive to all other sentences. Further, the error is prejudicial because it effectively lengthened the terms imposed for all felonies. Moreover, we conclude that the fairness and integrity of the judicial proceedings has been compromised. *Carines, supra* at 763. As *Clark* observed, “No language in the [felony-firearm] statute permits consecutive sentencing with convictions other than the predicate offense.” *Clark, supra* at 464.

In light of the trial court's jury instruction in the case at hand, there is no way for this Court or the trial court on remand to determine which felony the felony-firearm conviction was based upon. Thus, we reverse defendant's felony-firearm conviction and sentence and remand for a new trial on the charge of felony-firearm.

Next, defendant argues that the trial court failed to properly consider on the record his present and future ability to pay attorney fees. In *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004), this Court held that a trial court must indicate on the sentencing record that it has considered a defendant's present and future ability to pay before assessing fees for the reimbursement of attorney fees and when record evidence of such consideration is lacking, a remand is required. In the instant matter, the trial court assigned attorney's fees, yet no mention was made on the record regarding defendant's present or future ability to pay. Further, as in *Dunbar*, "[a]lthough the court had the presentence report before it, the record is devoid of any indication that the court recognized that defendant's ability to pay needed to be considered when imposing a reimbursement requirement, unlike fines and costs." *Id.* at 255. Therefore, we remand for such consideration on the record. The court has the discretion on whether to conduct an evidentiary hearing. *Id.* at n 14.

Lastly, defendant argues that the search warrant to search the residence where he was staying was not based on probable cause and that the trial court erred in failing to quash the evidence discovered under the search warrant. We disagree. This Court reviews de novo questions of law relevant to a motion to suppress a search warrant. *People v Keller*, 479 Mich 467, 476; 739 NW2d 505 (2007). However, the magistrate's probable cause determination is entitled to great deference on review. *Id.* at 476-477.

MCL 780.653 provides:

The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

(a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.

(b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

Defendant argues the affidavit in support of the search warrant failed to provide a nexus between the place to be searched and the criminal activity. "A search warrant should be upheld if a substantial basis exists to conclude that there is a fair probability that the items sought will be found in the stated place." *People v Whitfield*, 461 Mich 441, 444; 607 NW2d 61 (2000). When reviewing an affidavit underlying a search warrant, this Court need only ask "whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause." *Id.* Furthermore, the search warrant and underlying affidavit must

be read in a common sense and realistic manner to determine whether a reasonably cautious person could have concluded that there was a substantial basis for finding probable cause. *Russo, supra* at 604.

From the affidavit provided by the police, it is clear that the victims all explained that they were attacked on November 27, 2006, at approximately 1:30 a.m. Further, according to the affidavit, a confidential informant and two of the victims told the affiant that defendant's codefendant stated that he and defendant had committed the crimes. Finally, the affidavit describes specifically where defendant was living at the time and that information was confirmed when the same address showed up on a prior warrant for arrest through OTIS and through a LEIN search. Accordingly, reading the affidavit in a "commonsense and realistic manner" and giving great deference to the magistrate's decision, there is no reason to believe there was not a substantial basis for the magistrate's conclusion that there was a fair probability that the evidence would be found in the place to be searched. *Whitfield, supra*. Consequently, the search warrant was issued in compliance with MCL 780.653. The court did not err in denying the motion to quash.

We reverse defendant's felony-firearm conviction and sentence and remand for retrial. On remand, the court should also address defendant's present or future ability to pay attorney fees. Defendant's other convictions and sentences are affirmed. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ David H. Sawyer

/s/ Jane E. Markey