

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL ROOSEVELT JONES,

Defendant-Appellant.

UNPUBLISHED
February 26, 2009

No. 283163
Wayne Circuit Court
LC No. 07-011589-FH

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right¹ his bench trial convictions of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b.² We affirm.

Harper Woods Police Sergeant Robert Benson was patrolling on June 30, 2007, at 1:00 a.m. when he observed a white van pass him and change lanes without signaling. Benson followed the van, and observed it traveling at 55 mph in a 40 mph zone. He stopped the van, and the driver informed Benson that his license was suspended. Benson took the driver into custody. Benson noticed that the driver smelled of alcohol and he and the other officers who responded investigated whether the driver was operating while intoxicated. Benson placed the driver under arrest. At approximately the same time, the officers learned the identity of defendant, who was a passenger in the van, determined that traffic warrants had been issued for defendant's arrest, and placed defendant under arrest. A search of the van revealed a loaded .22 caliber pistol under the captain's chair passenger seat behind the driver, an open 40-ounce beer can, and a closed bottle of vodka. A backpack lay on the front floorboard of the passenger seat.

¹ Citing MCR 7.205(F), plaintiff argues that defendant's claim of appeal is untimely because it was filed on January 16, 2008, more than 42 days after entry of the October 19, 2007, judgment of sentence. However, defendant filed a request for appointment of counsel on October 31, 2007. On January 11, 2008, the trial court entered a claim of appeal and an order appointing counsel. Defendant's appeal is timely. MCR 7.204(A)(2); MCR 6.425(G)(3).

² Defendant was acquitted of a charge of possession of open intoxicants in a vehicle.

Defendant requested that the police retrieve his book bag from the van. A search of the book bag revealed seven rounds of .22 caliber ammunition. Defendant made a statement in which he claimed that the gun belonged to the driver of the van, but admitted that he knew the gun was in the van. Defendant also admitted that the bullets in the book bag belonged to him.

On appeal, defendant argues that the trial court erred when it found that defendant was initially arrested for having an open alcohol container in a vehicle, in contrast to the arresting officer's testimony that he arrested defendant for outstanding warrants. Defendant claims that this error should result in a finding that no probable cause existed for his arrest, which in turn requires suppression of all of the evidence against him, and a finding that his convictions were not supported by sufficient evidence.

Defendant admits that trial counsel did not raise any challenge, constitutional or otherwise, to the admission of the evidence in the proceedings before the trial court, nor did defendant assert at trial that the trial court made an erroneous decision concerning its underlying factual finding about the reason for defendant's initial arrest. Defendant's unpreserved contention of constitutional error is therefore reviewed only for plain error affecting substantial rights. See *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007). Under the plain error rule, three requirements must be met, namely (1) an error occurred, (2) the error was plain, and (3) the plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.*

Defendant cannot show that any error in the trial court's finding of fact affected the outcome of the proceedings. Defendant does not challenge the trial court's other factual findings, the validity of the initial stop, or the trial court's finding concerning the reason for the stop. He does not challenge the validity of the arrest of the driver, or the trial court's finding that the officer arrested the driver for operating a motor vehicle while intoxicated and without a valid driver's license. Defendant does not challenge as untrue the officer's testimony that he arrested defendant on outstanding warrants for traffic violations. Defendant does not argue that he did not have outstanding warrants at the time he was arrested. Either the valid arrest of the driver, or a valid arrest of defendant, would have allowed the officer to search the interior of the van, including defendant's book bag, in a search incident to arrest. See *People v Reese*, 281 Mich App 290, 297; ___ NW2d ___ (2008), citing *People v Mungo*, 277 Mich App 577, 585-586; 747 NW2d 875 (2008). Consequently, the trial court's apparent minor error had no effect on the outcome of the proceedings. Defendant was not entitled to suppression of the evidence, or to a finding that the prosecution presented insufficient evidence to support his convictions.

Defendant alternately alleges that trial counsel rendered ineffective assistance by failing to challenge the admission of the evidence or the trial court's factual findings. Any claim of error here by trial counsel likely would have caused the trial court either to revise its factual finding to comport with the officer's testimony, or to rule that the search was proper under the

circumstances. Failure of counsel to champion a meritless position does not constitute ineffective assistance. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering