STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2009
v	No. 282549 Midland Circuit Court
BOBBY LEE SUSDORF, Defendant-Appellant.	LC No. 06-003023-FH

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of felon in possession of a firearm, MCL 750.224f.[1] Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to three to ten years' imprisonment for each conviction. We affirm, but remand for correction of the Amended Judgment of Sentence.

I. Basic Facts and Procedural History

On November 24, 2006, officer Terese Hartley, a conservation officer at Michigan's Department of Natural Resources (DNR), received an anonymous tip that defendant, who is a convicted felon, was hunting with a firearm. Hartley, joined by deputy Kevin Dush and DNR conservation officer Larn Strawn, went to defendant's residence at 5651 West Huckleberry Road, in Shepherd, Michigan. However, when the three officers arrived at defendant's home, they found that defendant was not home.

Wanda Smith, defendant's then live-in girlfriend, however, was at the home and allegedly invited the officers inside the entrance of the home. Before answering the door, Smith had allegedly heard a knocking on her bedroom window, and was surprised to see one of the

[1] Initially, defendant was also charged with hunting or possessing game while ineligible to obtain a hunting license, MCL 324.43558(5) and obtaining a hunting license while ineligible to obtain a hunting license, MCL 324.43558(1)(*i*). He was acquitted of both these counts.

officers peeking into her bedroom. According to Smith, this officer ordered her to answer the door and although she did so, she contends that she never invited the officers into the home. Once the officers were inside, Smith informed the officers that defendant, joined by a group of his relatives, was hunting on state-owned land near Coleman Road. The officers did not conduct a search or seek to obtain evidence at this point, but only sought to locate defendant's whereabouts. Smith, however, alleged that the officers did search her bedroom at this time.

Subsequently, the officers, joined by a fourth officer, deputy Jesse Milks, all went to the state-owned land and located defendant. When the officers approached defendant and his hunting party, officer Hartley noticed that defendant did not have a gun, but that another male, Dwight Crawford, in the party was carrying two rifles, including a 30.06 caliber rifle. Upon questioning, Crawford admitted to the officers that defendant had just handed him the 30.06 caliber rifle. Hartley then seized the weapon from Crawford. The officers arrested defendant. Defendant then told Hartley that he had guns stored at his residence, but that these guns belonged to Smith.

After defendant's arrest, Hartley went to the courthouse to obtain a search warrant for defendant's residence. In the interim, deputy Milks and officer Strawn went to defendant's house to wait for Hartley to return with the warrant. The officers entered the house with Smith's permission. Once Hartley obtained the warrant and returned to defendant's home, Hartley and Strawn conducted the search of the home and seized a "muzzle loader" type rifle and a deer-hunting rifle, both of which were located in an unlocked gun cabinet in defendant's bedroom.

Subsequently, defendant was charged and the matter went to trial. Before trial could begin, defendant moved to suppress the evidence on the grounds that the officers had illegally searched his home. Defendant alleged that the warrant was invalid because it was based on information illegally obtained by the officer who peered through defendant's bedroom window. The trial court denied this motion, finding that Smith had given the officers consent to search the premises and that Smith's testimony was incredible in comparison to the officers' testimonies.

At trial, Smith's testimony revealed that she had seen defendant take a 30.06 caliber rifle from the gun-cabinet when he went hunting on November 24, 2006, and that she had seen him use it other times during the hunting season. Smith testified that she did not use any of the guns in the gun-cabinet and that they were not hers. At the close of testimony, the jury convicted defendant of two counts of felon in possession, specifically finding him guilty of possessing a firearm on state land in count one and possessing a firearm at 5651 Huckleberry Road in count two. This appeal followed.

II. Double Jeopardy

Defendant first argues that his two felon in possession convictions constitute multiple punishments in violation of the Double Jeopardy Clause. Specifically, defendant asserts that he was convicted of possession of two different firearms at the same time and that the Legislature did not contemplate that such an act would result in two separate convictions under the felon in possession statute. We cannot agree with defendant's argument. We review a double jeopardy issue de novo. *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002).

In the instant matter, defendant was convicted of two counts of MCL 750.224f, which prohibits a convicted felon from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm. We see no double jeopardy violation here. Defendant's contention that he was twice convicted for possessing multiple firearms "at the same time" is factually inaccurate. It is true that the Double Jeopardy Clause protects against multiple punishments for the same offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). However, defendant's felon in possession convictions arose from two different and distinct factual scenarios: once when defendant possessed a gun on the state-owned land, and again, when two rifle-type weapons were later found at defendant's residence. Under these facts, defendant's double jeopardy rights were not implicated because he did not receive multiple punishments for the same offense. Rather, he was convicted of two separate counts under the same statute for two separate violations of the same statute. Accordingly, we reject defendant's argument, as there was no plain error affecting his substantial rights.

III. Correction of Judgment of Sentence

Defendant next asserts that the Amended Judgment of Sentence, which imposed state minimum costs of $165, contained a clerical error that should be corrected to reflect the actual amount of costs the trial court imposed, $120. We agree. Because defendant did not preserve this issue, we review the matter for plain error affecting substantial rights. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003).

In the instant case, the Amended Judgment of Sentence assessed state minimum costs at $165. At resentencing, however, the trial court acknowledged that state costs should have been assessed at $120, not $165. When a trial court orders a person convicted of an offense to pay "any . . . applicable assessments" it must "order that the person pay costs of not less than . . . $60.00, if the defendant its convicted of a felony." MCL 769.1j(a).[2] Although the statute permits state costs to be assessed at an amount more than $60 if the defendant is convicted of a felony, and in this case $120 because defendant was convicted of two felonies, the trial court unequivocally indicated that defendant should have been assessed costs of only $120 instead of $165. The Amended Judgment of Sentence, however, was never corrected to reflect this amount. This was plain error affecting defendant's rights. Accordingly, we remand for the ministerial purpose of correcting the Amended Judgment of Sentence.

IV. Standard 4 Brief

Lastly, defendant argues in pro per that the trial court erred by denying his motion to exclude from evidence the two firearms the officers seized from his home because, according to defendant, the underlying warrant was invalid since no exigent circumstances existed justifying the officers' previous entries into the home. We disagree. We review de novo a trial court's ultimate decision on a motion to suppress the evidence. *People v Dunbar (After Remand)*, 264 Mich App 240, 243; 690 NW2d 476 (2004). The trial court's findings of fact are reviewed for

[2] This provision was recently amended by 2008 PA 547, effective January 13, 2009, such that a person convicted of felony pay a minimum state cost of $68.

clear error. *Id*. "A finding of fact is clearly erroneous if, after review of the entire record, an appellate court is left with a definite and firm conviction that a mistake had been made." *People v Wilkens*, 267 Mich App 728, 732; 705 NW2d 728 (2005) (quotation marks and citation omitted). In reviewing the trial court's determination, we defer to its decisions with respect to conflicting evidence and the credibility of witnesses. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

Both the Michigan and United States Constitutions afford protection against unreasonable searches and seizures, and as a general rule, a warrantless search is considered unreasonable. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). Exceptions to the warrant requirement permit warrantless searches and seizures, including exigent circumstances and consent to search. *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997); *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). With respect to the latter, consent obviates the warrant requirement, so long as the consent is granted freely, unequivocally, and intelligently. *Galloway*, *supra* at 648. Consent must be granted by the person whose property is subject to the search, or by a third party possessing common authority over the property. *Illinois v Rodriguez*, 497 US 177, 181; 110 S Ct 2793; 111 L Ed 2d 148 (1990). In the absence of one of the exceptions to the warrant requirement, warrantless searches and seizures will result in the exclusion of the evidence at trial. *People v Goldston*, 470 Mich 523, 528; 682 NW2d 479 (2004).

In the present matter, the trial court denied defendant's motion on the basis that the officers had consent to enter the premises. The trial court stated:

> I have the testimony of every police officer who testified in this case consistent, leaving the possibility that somebody knocked on a window. Because two of them kind of indicated, I don't think it happened but it may have, I just don't recall.
>
> And against that we have Ms. Smith's testimony, which I have to say is totally incredible. I mean, she's testifying here that she never told the police that he's out in the woods. Now, how in the heck did they know he was out in the woods unless she told them, and she's here on the stand saying she didn't tell them that. She's an incredible person; I don't believe anything she said.
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> And, therefore, the only testimony I have that's credible is the officers saying they had permission to go in that house on both occasions and that nothing happened while they were in there that wasn't without permission.
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> With a stronger factual base I'd be very interested in this case, but the facts do not substantiate the position of the defendant. The scenario that is set up is incredible and I don't believe it.

After our review of the record, we cannot conclude that the trial court's findings were clearly erroneous or that it erred by denying defendant's motion to suppress. It is clear that the trial court believed the officers' testimonies over Smith's testimony. And, accordingly, the officers' entry into the home at all times before the warrant was obtained was permitted by consent, which is a valid exception to the warrant requirement, *Galloway*, *supra* at 648. Further, and as the trial

court indicated, the officers acted within the scope of the permission that Smith granted them while inside the home. As such, these previous entries in no way invalidated the warrant that was subsequently obtained.

Defendant's argument that no exigent circumstances existed that would have permitted the officers to enter the house, and therefore the subsequent warrant was invalid, is misguided. The crux of this argument is that the officers did not have consent to enter the premises and the trial court should have found as such by believing Smith's testimony over the officers' testimony. But, as we have already noted, the trial court, in light of the conflicting testimony and incredibility of Smith's testimony, found that the officers had permission to enter the premises through Smith's consent. Because Smith consented, no other exception to the warrant requirement was constitutionally necessary to justify the legality of the officers' presence. And, because we must defer to the trial court on matters of conflicting evidence and the credibility of witnesses, *Farrow*, *supra* at 209, we reject defendant's argument.

Affirmed, but remanded for the ministerial purpose of correcting the Amended Judgment of Sentence to reflect the correct amount of minimum state costs for which defendant is liable. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Jane M. Beckering