STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 16, 2009
v	No. 284158 St. Clair Circuit Court
DAVID LERONE WILLIAMS, Defendant-Appellant.	LC No. 07-002286-FH

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and resisting or obstructing a police officer, MCL 750.81d(1). For those respective convictions, he was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of 30 months to 40 years in prison and 30 months to 15 years in prison. Defendant was not credited for any time served because he was being held in jail on a parole detainer. Defendant appeals as of right. We affirm.

A confidential informant told police officers that a drug dealer named Country or Big Country would be in the area of 18th and Griswold in Port Huron on August 9, 2007, with a large quantity of crack cocaine. Based on this information, the St. Clair County Drug Task Force had that particular area placed under surveillance on the night in question. A green Monte Carlo was seen pulling into an alley on Griswold. The car lights were turned off, but the car was left running. A white male approached the car on the passenger side, leaned in through the window for about fifteen seconds, and then left. Marked and unmarked police cars followed the Monte Carlo. When the car was at a red light, a marked police car, with lights flashing, pulled up behind the Monte Carlo, and an unmarked police car pulled up alongside and slightly in front of the Monte Carlo, blocking its movement forward. Defendant, a passenger in the Monte Carlo, jumped out of the car and began running down the street. He was apprehended following a chase, but no drugs or money were found on his person. The police, however, discovered cocaine bagged for individual sale near a fence that defendant had tried to climb, and money was found along his running route. There were no other people in the area when defendant was fleeing from the police.

Defendant first argues that the trial court erred in admitting hearsay statements made by the non-testifying informant that were elicited during police testimony. Defendant claims that these statements violated his rights under the Confrontation Clause. This argument was not

preserved below. Under *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999), an unpreserved or forfeited claim of error, whether nonconstitutional or constitutional in nature, is reviewed for plain error affecting substantial rights. The *Carines* Court set forth the plain-error test, stating:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Id.* at 763 (citations omitted; alteration in original).]

In *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007), this Court, addressing a Confrontation Clause issue relative to statements made by a confidential informant that were admitted through the testimony of a detective, provided the following analytical framework:

> A defendant has the right to be confronted with the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination. *Id.* at 68. A statement by a confidential informant to the authorities generally constitutes a testimonial statement. *United States v Cromer*, 389 F3d 662, 675 (CA 6, 2004). However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted. *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004), citing *Crawford*, *supra* at 59 n 9. Thus, a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause. *People v Lee*, 391 Mich 618, 642-643; 218 NW2d 655 (1974). Specifically, a statement offered to show why police officers acted as they did is not hearsay. *People v Jackson*, 113 Mich App 620, 624; 318 NW2d 495 (1982).

Here, a portion of the challenged testimony was certainly offered to explain why the police organized the surveillance at 18th and Griswold in Port Huron, which is permissible. See *Chambers*, *supra* at 11 (testimony was not offered to establish the truth of the informant's tip; rather, it was properly offered to establish and explain why the detective organized a surveillance of the defendant's home). Assuming that the challenged testimony went beyond simply explaining the basis for the surveillance and encroached on defendant's rights under the Confrontation Clause by being too detailed and used to prove the truth of certain matters asserted, defendant fails to show that the presumed error affected the outcome of the

proceedings. Moreover, defendant fails to show that any presumed error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence.

The untainted evidence against defendant reflected that he was seen stopping in a car, a Monte Carlo, in an alley that was under surveillance for potential drug activity. A person was seen coming up to the car, leaning in through the passenger side window for about fifteen seconds, and then walking away. Officers testified that these events and circumstances are consistent with a drug transaction. The lights of the car were then turned on and it was driven away. At a stop light, the Monte Carlo, in which defendant was sitting in the passenger seat, was blocked in by an unmarked police car on one side and a marked police car behind it. Defendant jumped out of the car and fled. Crack cocaine, which was packaged individually and clearly meant for sale,[1] was found in the area where defendant had tried to jump a fence; money, including a $100 bill,[2] was found in the area where defendant had been running. The bag of cocaine and the money appeared clean and new, like they had not been exposed to the elements. The police were able to apprehend defendant after the foot chase. Although the police officers did not observe defendant throwing the bag of drugs or the money away, there was testimony that it was common for criminals to "throw away" drugs and money as they are being chased in order to claim that the contraband did not belong to them. Moreover, given the circumstances, it is reasonable to infer that defendant disposed of the drugs and money while in flight; indeed, any other conclusion would be tenuous. The untainted evidence was more than sufficient for a jury to find defendant guilty of possession with intent to deliver less than 50 grams of cocaine; he was effectively caught in the act of committing the crime.[3] Accordingly, any assumed Confrontation Clause violation did not affect defendant's substantial rights, nor was he actually innocent or the integrity of proceedings compromised.

Defendant next argues that he was denied the effective assistance of counsel due to trial counsel's failure to object to the admission of the statements made by the informant that were elicited during police testimony. Assuming a Confrontation Clause violation and that counsel's performance was deficient for failure to object, defendant has failed to show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). In other words, defendant has failed to establish the requisite prejudice. *Id.* The evidence recited by us above in determining that defendant's substantial rights were not affected under the plain-error test serves as a sufficient basis to find a lack of prejudice under the analysis governing review of an ineffective assistance claim. *Id.*

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[1] Police found 21.3 grams of rock cocaine that was individually packaged in 43 small baggies, which were all contained in a large plastic bag.

[2] A total of $280 was discovered.

[3] It is beyond dispute that the challenged testimony had no bearing whatsoever on the resisting and obstructing charge.

Defendant next claims that the trial court erred by denying defendant jail credit for the 166 days he spent in jail between the time of his arrest and sentencing for the instant convictions. We disagree.

While individuals convicted of a crime are generally entitled to credit for jail time served prior to sentencing, MCL 769.11b,[4] defendant was not so entitled because he was in jail during that time due to his parole detainer status. *People v Filip*, 278 Mich App 635, 640-643; 754 NW2d 660 (2008); *People v Seiders*, 262 Mich App 702, 705-708; 686 NW2d 821 (2004). As explained in *Filip, supra* at 641-642:

> MCL 791.238(1) provides that a parolee remains legally in the custody of the Department of Corrections, and that "[p]ending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated." This provision unambiguously declares that parole violators cannot avoid confinement pending resolution of the violation proceedings. Such a period of incarceration thus constitutes part of the original sentence and in that sense is credited against it. Moreover, "denied," as used in MCL 769.11b, implies the exercise of discretion, not the recognition of outright ineligibility. For that reason, MCL 769.11b simply does not apply to parole detainees. Therefore, the trial court erred in setting bond for Filip in the first instance. Simply put, the erroneously granted possibility of posting bond did not secure Filip any rights under MCL 769.11b. In sum, contrary to the trial court's ruling, *Seiders* governs and must be applied.
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> Filip argues that because a parolee has necessarily served his or her minimum sentence, the parolee could never get credit for jail incarceration stemming from a new violation. We disagree. MCL 791.238(2) specifically dictates that a parole violator "is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment." And any remaining portion of the original sentence must be served before a sentence for a second offense may begin. Thus, just because a parolee has served his or her minimum sentence, it does not follow that the credit must therefore be applied against his or her new sentence when he or she remains liable to continue serving out the maximum sentence. Moreover, if a defendant is not required to serve additional time on the previous sentence because of the parole violation, then the time served is

[4] MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

essentially forfeited. [Citations omitted; see also *People v Johnson*, __ Mich App __; __ NW2d __, issued April 14, 2009 (Docket No. 279163).]

Defendant also argues that denial of jail credit for parole detainees violates state and federal constitutional provisions with respect to due process, double jeopardy, and equal protection. US Const, Am V and XIV; Const 1963, art 1, §§ 2, 15, and 17. In *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994), this Court rejected the defendant's similar constitutional arguments in regard to due process and equal protection. This Court stated that "[p]arole detainees can be treated differently than nondetainees because they *are* different than nondetainees: they owe a debt to society they have not yet fully paid." *Id*. at 434.

The United States and Michigan Constitutions protect a defendant from multiple punishments for the *same* offense. US Const, Am V; Const 1963, art 1, § 15; *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008). The "same offense" language under the multiple-punishments strand of double jeopardy is not implicated if each offense requires proof of a fact that the other does not. *Id.* at 227-228. Here, double jeopardy protection was not infringed, where distinct offenses were involved, i.e., the prior offense that gave rise to the parole detainer and the current drug and resisting offenses. By not providing jail credit for defendant relative to the sentences on the instant offenses, defendant was not being punished multiple times on the instant offenses, given that the jail time served by defendant related to a distinct and earlier offense. Credit against the instant sentences is not warranted.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood