

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADRIAN DESHAWN HILL,

Defendant-Appellant.

UNPUBLISHED

October 20, 2009

No. 284527

Wayne Circuit Court

LC No. 07-021245-FH

Before: Saad, C.J., and O’Connell, and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f(1), possession of a loaded rifle in a motor vehicle, MCL 750.227c(2), and possession of a firearm during the commission of a felony, second offense, MCL 750.227b(1). The trial court sentenced defendant as a third-felony habitual offender, MCL 769.11, to concurrent prison terms of five months to ten years for the felon in possession conviction, and five months to four years for the possession of a loaded rifle in a motor vehicle conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. We affirm defendant’s convictions and sentences, but remand for correction of the judgment of sentence to specify that the sentences for felony-firearm and possession of a rifle in a motor vehicle are to be served concurrently, and for an award of sentence credit against both of those sentences.

Defendant’s convictions arise from the discovery of a loaded rifle in a stolen van that defendant was driving. Although defendant was not implicated in the theft of the van, a police officer testified that he observed defendant exit the driver’s seat of the van at a gas station. The officer also testified that, from outside the van, he was able to see the rifle lying in plain view on the floorboard of the van, between the passenger and driver seats.

I. Issues Raised by Appellate Counsel

A. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence in support of his convictions.¹ The court convicted defendant of being a felon in possession of a firearm, MCL 750.224f(1), possessing a loaded firearm in a motor vehicle, MCL 750.227c(2), and possession of a firearm during the commission of a felony. MCL 750.227b(1). Essential to each offense is that defendant possessed a firearm. Possession may be actual or constructive; physical possession is not necessary and more than one person can have actual or constructive possession of an item at the same time. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). “The essential question is whether [the] defendant had dominion or control over” the item. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995); see also *Wolfe*, *supra* at 520-521. In addition, a defendant must have knowledge of an item in order to possess it. *Id.* at 520; *Konrad*, *supra* at 271.

The evidence showed that defendant was observed exiting the driver’s seat of a van, and that a loaded rifle was discovered in plain sight on the floor of the van, between the driver and passenger seats. Defendant’s right to possession could be inferred from the evidence that he was the driver of the van, and thus in control of the vehicle where the weapon was found, and by his proximity to the weapon. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991). Similarly, defendant’s knowledge of the weapon can be inferred from its location in plain view on the floor next to the driver’s seat. *Id.* It is not relevant that another passenger in the van may have had a concurrent right to possess the rifle.

Accordingly, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant possessed and transported a loaded rifle in a motor vehicle. Further, defendant stipulated that he was a convicted felon, and ineligible to possess a firearm. Therefore, the evidence also supported his conviction for felon in possession of a firearm. Because the latter offense is a felony, the evidence also supported defendant’s felony-firearm conviction. Thus, all three convictions were supported by sufficient evidence.²

B. Trial Court’s Findings

Defendant challenges the sufficiency of the trial court’s findings.³ The trial court summarized the testimony and specifically addressed the disputed issues involving alleged

¹ For claims regarding the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); see also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The resolution of credibility disputes is within the exclusive province of the trier of fact, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), which may also draw reasonable inferences from the evidence, *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

² In a separate pro se Standard 4 brief, defendant asserts that the evidence was insufficient to support his convictions because the gun, van, and bullets were not tested for fingerprints, and he was not tested for gunshot residue. We find no merit to these arguments. Fingerprints and gunshot residue are not elements of the charged offenses. Further, it was not necessary that defendant be involved in the theft of the van to be convicted of each of the weapons offenses.

³ A trial court in a bench trial is not required to make specific findings concerning each element
(continued...)

inconsistencies in the officers' testimony, and defendant's claim that he was not the person who was observed exiting the van. The trial court's findings show that it was aware of the issues and resolved them. Remand for further findings is unnecessary.

C. Felony-Firearm Sentence

Defendant observes that possession of a firearm in a motor vehicle is a misdemeanor offense and, therefore, could not have supported his conviction for possession of a firearm during the commission of a felony. He argues that relief is required because the trial court did not specify which offense it found supported the felony-firearm conviction.

In a bench trial, a trial court is presumed to know the law and properly apply it, unless the contrary is clearly shown. See *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). The trial court found defendant guilty of both possession of a firearm in a motor vehicle, a misdemeanor, and felon in possession of a firearm, which is a felony. Although the trial court did not specify which offense it found supported the felony-firearm conviction, it is presumed to have known that only the felon in possession conviction could have supported a felony-firearm conviction. Nothing in the record suggests otherwise. Thus, defendant has failed to overcome the presumption that the trial court knew and properly applied the law.

As the prosecutor concedes, however, the trial court erred when it ordered the sentence for the misdemeanor offense to be served consecutive to the felony-firearm sentence. While MCL 750.227b(2) requires that the sentence for the predicate offense be served consecutive to and following the felony-firearm sentence, other sentences must be made *concurrent* with the felony-firearm sentence. See *People v Clark*, 463 Mich 459, 463-465; 619 NW2d 538 (2000). Accordingly, we remand for correction of the judgment of sentence to reflect that the sentences for felony-firearm and possession of a loaded rifle in a motor vehicle are to be served concurrently, and for an award of sentence credit against both of those sentences.

D. Sentence Enhancement

Defendant contends that he is entitled to resentencing because the trial court erroneously believed that it was required to enhance his sentences pursuant to the habitual offender statute, and was unaware that enhancement was only discretionary. Defendant correctly observes that under MCL 769.11(1)(a), a sentencing court has discretion whether to enhance an habitual offender's sentence. Here, the trial court initially imposed a maximum sentence of five years for defendant's felon in possession conviction, but then announced a maximum sentence of ten years. When defense counsel inquired about the discrepancy, the trial court responded:

It's five—it is five months to 10 years. It's doubled because it's Habitual Third. So if I said five months to five years, I misspoke. It's a 10-year offense.

(...continued)

of a charged crime. *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993). Rather, a trial court's findings of fact are sufficient if it appears that the court was aware of the issues involved and resolved them. *Id.* at 559. Remand for clarification is inappropriate where doing so would not facilitate appellate review. *Id.*

He's Habitual Third as it relates to the Firearm-Possession of a Loaded Firearm in or Upon a Vehicle, which doubles the penalty making [sic] a four year offense. The Felon in Possession is doubled as Habitual Third to a 10-year offense.

"[T]here is no legal requirement that a trial court state on the record that it understands it has discretion and is utilizing that discretion." *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). "Rather, absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *Id.* Here, there is no clear evidence that the trial court believed that it lacked discretion whether to double the statutory maximum sentence because of defendant's habitual offender status. Defendant has failed to rebut the presumption that the trial court knew and properly applied the law.

We also reject defendant's argument that his five-year felony-firearm sentence should be reduced to two years. Defendant was convicted of felony-firearm, second offense. Under MCL 750.227b(1), a five-year sentence was mandatory. There was no error.

E. Imposition of Attorney Fees and Costs

Defendant argues that the trial court erred when it imposed costs and attorney fees without considering his ability to pay. In *People v Jackson*, 483 Mich 271, 298; 769 NW2d 630 (2009), our Supreme Court recently overruled *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004) (holding that a defendant has a constitutional right to an assessment of his ability to pay before a reimbursement order is imposed), and held that a trial court may impose court costs and attorney fees at sentencing without considering the defendant's then-existing ability to pay. Rather, a court is constitutionally required to consider the defendant's ability to pay only upon enforcement of the order. *Id.* at 291-292, 298. Thus, there was no error.

II. Defendant's Standard 4 Brief.

Defendant raises several nonmeritorious issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. Probable Cause for Arrest

Defendant claims that he was unlawfully arrested without probable cause.⁴ A person may be arrested without a warrant when an officer has probable cause to believe that a felony has been committed, and that the individual committed it. *People v Tierney*, 266 Mich App 687, 705; 703 NW2d 204 (2005). An officer may also arrest a person without a warrant for a misdemeanor offense punishable by more than 92 days that is committed in the officer's presence. *People v Stephen*, 262 Mich App 213, 219; 685 NW2d 309 (2004). The record

⁴ Because defendant did not challenge the validity of his arrest in the trial court, this issue is not preserved. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

discloses that two police officers observed defendant exit the driver's seat of a van that had no license plate. One of the officers thereafter observed a rifle lying in plain view on the floorboard of the van, between the driver and passenger seats. Although the officer did not know whether the rifle was loaded, his observations provided probable cause to believe that the offense of possessing or transporting a loaded firearm in a motor vehicle was committed. Therefore, the officers had probable cause to arrest defendant without a warrant, and there was no plain error.

B. Compulsory Process and Confrontation

Defendant argues that his Sixth Amendment rights to compulsory process and confrontation were violated when certain witnesses did not testify at trial.⁵

1. Compulsory Process Clause

Defendant argues that both a woman he claims he was visiting before going to the gas station, and the gas station attendant were not permitted to testify, thereby violating his right to compulsory process.

"The Compulsory Process Clause of the Sixth Amendment guarantees every criminal defendant the right to present witnesses in their defense." *People v McFall*, 224 Mich App 403, 407; 569 NW2d 828 (1997). Here, nothing in the record indicates that defendant was prevented from calling the disputed witnesses. Thus, a plain error has not been shown. Furthermore, "[a] criminal defendant's right to compulsory process, though fundamental, is not absolute." *Id.* at 408. "[I]t requires a showing that the witness' testimony would be both material and favorable to the defense." *Id.* Defendant does not explain what testimony his female friend could have provided, nor has he provided a witness statement or affidavit summarizing what information she possessed. Further, although defendant has submitted a signed document indicating that the gas station attendant would have testified that he did not see defendant exit the van on "Oct 16, 2007," the charged offenses were committed on October 17, 2007. Therefore, defendant has failed to show that either witness could have provided material and favorable testimony. Thus, there is no basis to conclude that the witnesses' absence at trial affected defendant's substantial rights.

2. Confrontation

Defendant maintains that his constitutional right of confrontation was violated when the owner of the stolen van was not permitted to testify. In *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001), this Court reaffirmed that the Confrontation Clause grants an accused the right to

- (1) a face-to-face meeting of the defendant and the witnesses against him at trial;
- (2) the witnesses should be competent to testify and their testimony is to be given

⁵ Because defendant did not raise any compulsory process or confrontation claim below, these issues are not preserved. Thus, we review the issues for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor.

Here, however, none of the offenses charged arose from the theft of the van, which apparently occurred while defendant was incarcerated for an unrelated offense. Because defendant was not charged with stealing the van, the van's owner was not defendant's accuser and the Confrontation Clause did not compel his testimony. Accordingly, there was no error.

C. Validity of the Complaint and the Lower Courts' Jurisdiction

Defendant avers that because there were no affidavits attached to the complaint, the magistrate abused his discretion in issuing a warrant for his arrest and, accordingly, both the district court and the circuit court failed to acquire jurisdiction over him.⁶

MCL 764.1a allows a warrant to be issued on a sworn complaint averring sufficient facts to support a finding of probable cause that a crime was committed and that the defendant committed it. An affidavit is permitted, but is not required. Here, the complaint was duly subscribed and sworn before a magistrate, and averred facts supporting a finding of probable cause. Therefore, the warrant was properly issued. Because defendant's jurisdictional argument is based on his claim that the warrant was invalid, it too cannot succeed.

D. Effective Assistance of Counsel

Defendant claims that the court should conduct a new trial because defense counsel was ineffective.⁷

1. Failure to Call Witnesses

⁶ We generally review questions of law de novo. *People v Hawthorne*, 474 Mich 174, 179; 713 NW2d 724 (2006). But because defendant did not challenge the issuance of a warrant in the trial court, or challenge either the district court's or circuit court's jurisdiction over him, these issues are not preserved. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

⁷ Because defendant did not raise an ineffective assistance of counsel claim in the trial court, review of this issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy. *Id.* at 312, 314. Defendant must show that he was prejudiced by counsel's deficient performance. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Defendant argues that his attorney was ineffective for failing to call the gas station attendant and his female friend as witnesses.⁸ As discussed above, there is no basis in the record to conclude that either of these potential witnesses could have provided material testimony favorable to defendant. Thus, defendant has not established that counsel's failure to call either witness was objectively unreasonable, or that he was prejudiced by their absence.

2. Challenging the Admissibility of Evidence

We also reject defendant's claim that defense counsel was ineffective for failing to challenge the prosecution's evidence. Defendant does not specify what evidence counsel should have challenged, or on what basis. The only item of physical evidence that was introduced by the prosecutor was the rifle. Because defendant was charged with possessing that weapon, it was clearly relevant under MRE 402. Defendant has not articulated any reasonable basis for excluding the rifle from evidence.

Defendant complains that the van, the rifle, and the bullets were not tested for fingerprints. However, the failure to test for fingerprints affected only the weight of the prosecutor's evidence, not its admissibility. To the extent defendant suggests that counsel should have requested that these items be tested for fingerprints, such a decision was a matter of trial strategy. Considering that the absence of fingerprints would not have provided a basis for excluding the evidence, and that testing could have yielded damaging evidence, defendant has not overcome the presumption of sound strategy.

Defendant also complains that he was not tested for gunshot residue. However, there was no indication that the rifle had been recently fired. Further, defendant was charged only with possessory crimes, not for crimes involving the discharge of a firearm. Thus, there was no reason to test him, and a negative gunshot residue test would not have exculpated him of the possessory crimes charged.

Defendant lastly argues that defense counsel was ineffective for allegedly agreeing to exclude the van from evidence, and for waiving the van owner's testimony. Defendant fails to explain how introducing the van into evidence would have been helpful to his case. Further, as discussed previously, defendant was not charged with stealing the van, so the van owner's testimony was not relevant.

For these reasons, there is no merit to defendant's claim that defense counsel was ineffective for failing to challenge evidence at trial.

⁸ "Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving him of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

3. Failure to Investigate

Defendant complains that defense counsel was ineffective for failing to properly investigate the case.

Failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Here, however, defendant fails to explain how defense counsel's investigation was deficient, or what additional information, if any, defense counsel could have discovered if she had conducted a more thorough investigation. Thus, there is no basis for concluding that defense counsel's investigation was deficient or prejudicial.⁹

E. Reimbursement Order

Defendant also argues that the trial court's order requiring him to reimburse the county for the cost of his court-appointed attorney is void due to extrinsic fraud, and also constitutes a deprivation of his property without due process of law, because he did not receive the benefit of defense counsel's assistance, given that counsel was ineffective. As discussed previously, however, defendant has failed to show that counsel was ineffective. Accordingly, there is no foundation for defendant's fraud argument.

With regard to defendant's due process claim, procedural due process requires notice and an opportunity to be heard. *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009). In this case, defendant's presentence investigation report recommended that he be ordered to pay costs and attorney fees. Therefore, defendant was on notice that these issues would be considered at sentencing. He was also provided with an opportunity to be heard on these matters at sentencing, but failed to object. In addition, MCL 769.11 provides a procedure for a prison inmate to challenge an order of remittance if the amount of remittance would impose a manifest hardship on him or his family. Thus, there was no due process violation.

F. Jury Waiver

Defendant challenges his jury waiver. He does not argue that the waiver was not knowingly and understandingly made, but rather argues that the constitutional right to trial by jury can never be waived as a matter of law and, therefore, the trial court erred in allowing it. We disagree. A statute allowing a criminal defendant to waive his constitutional right to a trial by jury, see MCL 763.3, does not violate the constitutional provision for a jury trial. *People v Henderson*, 246 Mich 481, 482-487; 224 NW 628 (1929). Thus, there is no merit to this issue.

⁹ To the extent defendant argues that the cumulative effect of several individual errors denied him a fair trial, because he has failed to establish an error on any single issue, he is not entitled to a new trial under a cumulative error theory. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998), overruled on other grounds by *People v Miller*, 482 Mich 540, 561; 759 NW2d 850 (2008); *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984).

Affirmed in part and remanded for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Peter D. O'Connell

/s/ Brian K. Zahra