STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2011
v	No. 296406 Wayne Circuit Court
HOWARD LEON TRIMMER, Defendant-Appellant.	LC No. 09-018981-FH

Before: SAAD, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals his bench trial convictions of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to two years' probation for the carrying a concealed weapon conviction, two years' probation for the felon in possession conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that he was denied the effective assistance of counsel.[1] To prevail on this claim, a defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Mesik*, 285 Mich App 535, 542-543; 775 NW2d 857 (2009). A defendant must meet a heavy burden to overcome the

[1] This claim presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error, and its constitutional determinations de novo. *Id.* Because defendant has not established a testimonial record at a *Ginther* hearing, review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

presumption that counsel employed effective trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The record does not support defendant's claim of ineffective assistance of counsel. Defendant complains that counsel should have moved to suppress the gun on the ground that it was the fruit of an unreasonable search and seizure. The United States Constitution and the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Jenkins*, 472 Mich 26, 3; 691 NW2d 759 (2005). A "seizure" occurs within the meaning of the Fourth Amendment if, in view of all the circumstances surrounding an encounter with the police, a reasonable person would have believed that the person was not free to leave. *People v Armendarez*, 188 Mich App 61, 69; 468 NW2d 893 (1991). Michigan courts have placed police-citizen encounters into three tiers or categories. *People v Shabaz*, 424 Mich 42, 56-58; 378 NW2d 451 (1985). The first tier consists of an officer asking a person questions in a public place. *Id.* at 56. Officers do not violate the Fourth Amendment by merely approaching an individual, identifying themselves as police officers, and putting questions to the individual. *Id.* If there is no detention, there is no seizure within the meaning of the Fourth Amendment. *Id.* The second is an investigatory stop, which is limited to a brief, nonintrusive detention and which requires specific and articulable facts sufficient to give rise to a reasonable suspicion that the person detained has committed or is committing a crime. *People v Bloxson*, 205 Mich App 236, 241; 517 NW2d 563 (1994). The third tier is an arrest, which requires probable cause to believe that the person detained has committed or is committing a crime. *Id.*

This case initially presented a second tier encounter. The investigatory stop was reasonable because Sergeant Andrew White had a reasonable suspicion that defendant was going to commit a crime. Specifically, Sergeant White believed defendant was "casing" cars because he saw defendant peering into various car windows for several minutes in a high crime area. In light of this suspicion, Sergeant White sent his arrest team to stop and investigate defendant.

Because the investigatory stop was reasonable, we must determine if the subsequent frisk of defendant was also reasonable. An officer may conduct a frisk, a form of limited weapons search, when he has reason to believe that the person suspected of a crime is presently armed and dangerous. See *Terry v Ohio*, 392 US 1, 27; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Parham*, 147 Mich App 358, 360; 382 NW2d 786 (1985). Here, defendant voluntarily told the officers that he had a gun in his backpack and this clearly gave Officer Leo Roads reason to believe that defendant was armed and dangerous. In fact, Officer Roads was obligated to frisk defendant to protect himself, the arrest team, and the community.[2] Also, it is obvious that the

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[2] In *Terry*, United States Supreme Court stated:

> [W]e cannot blind ourselves of the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed

frisk was not limited to defendant's person, but rather, extended to defendant's backpack, where defendant stated he was carrying the gun.[3] On the basis of this evidence, both the stop and frisk of defendant were reasonable and a motion to suppress on this basis by defense counsel would have been futile.

Moreover, the officers had probable cause to arrest defendant. An officer may arrest a defendant without a warrant if a felony or misdemeanor was committed in their presence. *People v Gray*, 23 Mich App 139, 141; 178 NW2d 172 (1970). Upon retrieving the gun from defendant's backpack and verifying defendant did not have a concealed weapons permit, the officers had probable cause to arrest defendant for carrying a concealed weapon without the required permit.

In light of the foregoing evidence, defense counsel's performance was not deficient for failing to move to suppress the gun on ground that it was the fruit of an unreasonable search and seizure. Defense counsel was not required to argue a frivolous or meritless motion. *People v Tullie*, 141 Mich App 156, 158; 366 NW2d 224 (1985).

Further, defendant maintains that he was denied the effective assistance of counsel because defense counsel failed to adequately investigate the case. Failure to mount a reasonable investigation may constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Defendant claims that his counsel met with him only once to discuss his case, for a very brief time while defendant was incarcerated. However, this Court's review is limited to the record, and defendant's claim is simply unsupported by the record. Nonetheless, as evidenced by the cross-examinations of the police officers, defense counsel had knowledge of the facts of the case and the applicable law. We also reject defendant's assertion that further investigation would have revealed that defendant was arrested without probable cause. As discussed, there was probable cause to arrest defendant for carrying a concealed weapon, and the gun was retrieved following a valid stop and frisk. Accordingly, we cannot conclude that defense counsel was deficient for failure to adequately investigate.

Defendant also avers that defense counsel failed to object to the reopening of proofs to allow the prosecutor to offer into evidence the gun found by the police officers. Relevant considerations for reopening proofs are whether the moving party would take any undue advantage and whether the nonmoving party can show surprise or prejudice and defendant has not made this showing. *People v Herndon*, 246 Mich App 371, 420; 633 NW2d 376 (2001). Further, defendant has failed to demonstrate, or even argue, that, had defense counsel objected, the objection would have been successful. Here, the trial court had discretion to allow the

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> and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. [*Terry*, 392 US at 24.]

[3] The Supreme Court, in *Illinois v Wardlow*, 528 US 119, 121-122; 120 S Ct 673; 145 L Ed 2d 570 (2000), held that a pat-down of an opaque bag held by a defendant in a high crime area was a reasonable frisk and not an infringement of the defendant's fourth amendment to rights.

prosecutor to reopen the proofs because there was no undue advantage for the prosecution (there was oral testimony from the officer that defendant was in possession of the gun) and defendant was not surprised or prejudiced by the admission of the gun into evidence. We hold that there was no reasonable basis to object and defendant cannot establish a claim of ineffective assistance of counsel.

Defendant also requests a remand for an evidentiary hearing to determine whether the police officers had probable cause to "stop him." Although defendant failed to request an evidentiary hearing before the trial court, this Court may grant a motion to remand for this purpose if the defendant can identify an issue for appeal that requires further development of the factual record for appellate consideration. MCR 7.211(C)(1)(a)(ii). Such a motion must be supported by an affidavit or other offer of proof. MCR 7.211(C)(1)(a)(ii). This Court has the discretion to determine whether a remand is appropriate and may consider whether the moving party has shown that the issue is meritorious. *People v Hernandez*, 443 Mich 1, 14-15; 503 NW2d 629 (1993), abrogated on other grounds *People v Mitchell*, 454 Mich 145 (1997). Here, defendant has not filed a motion to remand with this Court and has not presented evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing would support his claim. See MCR 7.211(C)(1)(a)(ii). Moreover, we hold that remand is unwarranted because, as explained, the officers needed only reasonable suspicion to stop defendant and the testimony at trial established that the police had reasonable suspicion to stop and frisk defendant. Therefore, a remand on this basis is improper.

Defendant argues that the trial court abused its discretion when it granted an adjournment, *sua sponte*, and reopened the proofs to admit the gun into evidence. We disagree. Because defendant did not preserve the issue by objecting before the trial judge, it was not preserved, and review is limited to plain error affecting the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Defendant was required to show that an error occurred, the error was plain, and the plain error affected the defendant's rights, i.e., caused prejudice that must have affected the outcome of the proceedings. *Id.* Here, defendant has failed to show that an error occurred. Decisions regarding whether to adjourn or continue proceedings are within the discretion of the court. *People v Snider*, 239 Mich App 393, 421-422; 608 NW2d 502 (2000). A decision about whether to reopen proofs is also within the discretion of the court. *Herndon*, 246 Mich App at 419. To establish error, defendant must show that the trial court abused its discretion in granting an adjournment and reopening the proofs. An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The trial court did not abuse its discretion when it adjourned the case. It is well-settled that the granting of an adjournment rests within the sound discretion of the trial court, and a defendant must show prejudice as a result of the trial court's abuse of discretion. *Snider*, 239 Mich App at 421-422. Here, defendant was not prejudiced by the trial court's *sua sponte* adjournment because the one-day adjournment simply allowed for admission into evidence of the

gun that evidence showed defendant possessed. This admission was cumulative evidence, and defendant was not prejudiced by the adjournment.[4] See *People v Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984).

Defendant also claims that the trial court denied him a fair trial because of the trial judge's comments when it granted an adjournment. This issue was not stated in the statement of questions presented section of defendant's brief; therefore, pursuant to court rule and case law, this issue is not properly before this Court and we need not address it. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

[4] For the same reasons, the trial court did not abuse its discretion when it reopened the proofs to admit the gun into evidence.