STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2011
v	No. 299497 Oakland Circuit Court
WILLY FRANCIS GARCIA, Defendant-Appellant.	LC No. 2010-230782-FH

Before: M.J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), possession of marijuana, MCL 333.7403(2)(d), operating while intoxicated (OWI), MCL 257.625, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender to 8 to 40 years in prison for the CCW and felon in possession convictions, 3-40 years in prison on the possession of cocaine conviction, 154 days on the possession of marijuana conviction, 93 days on the OWI conviction and 2 years in prison on the felony firearm convictions. We affirm.

I. FACTS

On February 4, 2010, at around 1:30 a.m., defendant, who was intoxicated, drove out of the parking lot of a bar. He severely damaged the car he was driving when he drove into another car's lane and side-swiped that vehicle. Defendant was sitting in the driver's seat revving his engine when police arrived.

Officer Bryan Wood testified that he ordered defendant to turn off the engine of the car and open the door. As soon as defendant opened the door, Officer Wood could smell a strong odor of both alcohol and marijuana. Defendant had red glassy eyes and his speech was slurred. Officer Wood ordered defendant out of the car and instructed him to keep his hands on the car. Defendant ignored the commands and continued to reach into his right front pocket.

Officer Wood testified that he pulled defendant's hand away from defendant's pocket three times and continued to order defendant to place his hands on the car. Officer Wood patted down defendant and felt the handle of a handgun in his right front pocket. Officer Wood

handcuffed defendant and recovered a fully loaded five shot .38 caliber Smith and Wesson revolver.

A search of defendant's person revealed a "toot" straw (common paraphernalia to ingest cocaine) and $540.00. Defendant was then placed in the back of a patrol car. A search of the vehicle revealed a gun case matching the gun found on defendant's person, a digital scale, two baggies of marijuana (2 ounces .94 ounces), three prescription pill bottles, one corner tear containing three pills (one Xanax pill and two unknown pills), and eight additional Xanax pills. The marijuana was field tested which yielded a positive result. A search of the trunk revealed, another "toot" straw, a cocaine grinder with cocaine, five rounds of .38 caliber ammunition, a scale, a bottle of inositol (commonly used as a cutting agent for cocaine), a mirror, and a razor blade. The cocaine was field tested yielding positive results for cocaine. Also in the car were a large breathing machine, and several other prescription pill bottles with defendant's name on them. Defendant submitted to a breath test, which revealed his blood alcohol content (BAC) to be .21.

II. SEARCH OF DEFENDANT'S VEHICLE

Defendant argues that the search of his vehicle without a warrant violated his Fourth Amendment rights, and that any evidence obtained from that search should have been inadmissible. We disagree.

Defendant did not challenge the search of the vehicle at trial; therefore, this issue is unpreserved. Because this issue is unpreserved, this Court's review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). This Court reviews constitutional issues de novo. *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000).

"[T]he basic rule [is] that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v Gant*, 556 US 332; 129 S Ct 1710, 1716; 173 L Ed 2d 485 (2009) (citation and internal quotation marks omitted). The judicially created exclusionary rule requires that evidence seized in an unconstitutional search must be suppressed at trial. *United States v Leon*, 468 US 897, 906; 104 S Ct 3405; 82 L Ed 2d 677 (1984); *People v Mungo*, 288 Mich App 167, 176; 792 NW2d 763 (2010). "The exclusionary rule ... generally bars the introduction into evidence of materials seized and observations made during an unconstitutional search." *People v Hawkins*, 468 Mich 488, 498–499; 668 NW2d 602 (2003). "Additionally, the exclusionary rule prohibits the introduction into evidence of materials and testimony that are the products or indirect results of an illegal search, the so-called 'fruit of the poisonous tree' doctrine." *People v Stevens*, 460 Mich 626, 634; 597 NW2d 53 (1999). Application of the exclusionary rule "has been restricted to 'those instances where its remedial objectives are thought most efficaciously served.'" *People v Reese*, 281 Mich App 290, 295; 761 NW2d 405 (2008) (citation omitted).

In *Gant*, the Supreme Court concluded that officers may only search a vehicle incident to arrest if the "arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id*. at

1723. If those conditions do not apply, a vehicle search will be considered unreasonable without a warrant or the application of another exception to the warrant requirement. *Id.* at 1724.

Here, defendant was outside the vehicle and handcuffed in the backseat of the police car when the vehicle search took place, thus he was clearly not within reaching distance of the passenger compartment. However, the *Gant* Court also stated, "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." See, *e.g., Atwater v Lago Vista*, 532 US 318, 324, 121 S Ct 1536, 149 L Ed 2d 549 (2001); *Knowles v Iowa*, 525 US 113, 118, 119 S Ct 484, 142 L Ed 2d 492 (1998). "But in others . . . the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Gant*, 129 S Ct at 1719.

Here, defendant did not merely commit a traffic offense. This is a case wherein the offense of the arrest supplied a basis for searching defendant's vehicle. Defendant was clearly intoxicated, and smelled of both alcohol and marijuana, police could not be certain which of the substances had caused defendant's obvious impairment and searching the vehicle for marijuana, alcohol, or other drugs could lead to further evidence of the crime of OWI. Additionally, defendant was also a felon in possession of a firearm. A vehicle search was reasonable to gather further evidence that the weapon belonged to defendant. Therefore, we conclude that the search in this case was a proper search wherein the offenses of the arrest (OWI, felon in possession, CCW), were an appropriate basis for searching the vehicle.

Furthermore, the *Gant* Court noted that other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, the Court noted, "if there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v Ross*, 456 US 798, 820-821, 102 S Ct 2157, 72 L Ed 2d 572 (1982), authorizes a search of any area of the vehicle in which the evidence might be found." *Gant*, 129 S Ct at 1721. Our Supreme Court has held that "the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle...." *People v Kazmierczak*, 461 Mich 411, 426; 605 NW2d 667 (2000). In this case, Officer Wood testified that he smelled a strong odor of marijuana before defendant opened the car door, and well before he conducted the vehicle search. Further, Officer Wood testified that he has been trained to identify the sight and smell of marijuana and has smelled marijuana thousands of times before in the course of his duties. Therefore, the smell of marijuana was itself a proper justification for a full search of the vehicle, consistent with searching for marijuana. Defendant has failed to establish that his Fourth Amendment right to be free from unreasonable search and seizure was violated, and reversal on this ground is not warranted.

III. DEFENDANT'S SENTENCE

Defendant also argues that the trial court erred in departing upward from the sentencing guidelines when it sentenced him. We disagree.

We review for clear error the trial court's reasons for imposing an upward departure, but consider de novo whether the reasons are objective and verifiable. We review for an abuse of

discretion the court's view that substantial and compelling reasons justify a departure. We also review for an abuse of discretion the court's ruling that a particular sentence is proportionate to the crime and offender. "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

Michigan's sentencing guidelines generally require a sentencing court to impose a minimum sentence within the appropriate sentence range determined by the points assigned to the defendant. MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). However, the sentencing guidelines scheme allows for departure from the recommended range, so long as the trial court can provide substantial and compelling reasons for the departure on the record. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). The substantial and compelling reasons that a trial court relies on to support a departure must be based on objective and verifiable factors that are capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Even when a trial court provides substantial and compelling reasons to support a departure from the sentencing guidelines, the rule of proportionality must still be satisfied. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Finally, the trial court may not rely on factors that have already been accounted for in the sentencing guidelines to support a departure from the recommended minimum range unless the court finds that the factors have been given inadequate or disproportionate weight in the guidelines. MCL 769.34(3)(b); *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

The trial court in this case found three factors to warrant the four year departure. First, the scoring of the prior record variable did not account for all of defendant's prior convictions. Second, defendant had served multiple prison and parole sentences and had an inability to conform with the parole system. Third, he was only off parole for nine months when he committed the instant offense. The court also specifically noted that these three facts were independent factors and each warranted the departure. See *People v Johnigan*, 265 Mich App 463, 469; 696 NW2d 724 (2005)("[w]e may uphold a sentence that departs from the guidelines where some of the reasons given are substantial and compelling while others are not, provided that we are able to determine that the trial court would have departed to the same extent on the basis of the permissible factors alone").

We conclude that the fact that the Prior Record Variable (PRV) score did not take into consideration all of defendant's prior offenses was objective and verifiable, keenly or irresistibly grabbed the court's attention, and was of considerable worth in deciding the length of a sentence. *Babcock*, 469 Mich at 257-258, 272. A trial court may render a proportionate sentence above the highest minimum for someone in the same offense variable [OV] level because the Legislature did not contemplate a defendant with such a high PRV. See *People v Solmonson*, 261 Mich App 657, 669-670; 683 NW2d 761 (2004)(defendant did not dispute that his criminal history was objective and verifiable or the trial court's implicit finding that his criminal history had been given inadequate or disproportionate weight in scoring the guidelines); MCL 769.34(3)(b). See also *Smith*, 482 Mich at 308-309 (a trial court may render a proportionate judgment above the highest minimum for someone in the same PRV level because "the Legislature did not contemplate a defendant with such a high OV score.").

Defendant's total PRV score was 120 points, but the sentencing grids for the PRVs maxed out at 75 points – his total PRV score exceeded the maximum PRV score by 45 points. Moreover, as the prosecutor noted, three additional felonies were not even counted in the scoring of the PRVs because PRV 2 maxed out at 4 prior low severity felonies. The trial court was not clearly erroneous in finding that defendant's prior criminal history was given inadequate weight in the scoring of the guidelines. Even when a departure is warranted, a trial court must justify why it chose the particular degree of departure. *Smith*, 482 Mich at 318. The trial court expressly acknowledged that it was required to impose a sentence that was proportional to the offense and the offender. It gave valid reasons for a departure, and noted that defendant's total PRV score was well in excess of the maximum necessary for placement in the highest PRV level of severity. The court explained its position, concluding that the imposed sentence would be more proportionate than one within the guidelines given defendant's criminal history.

The trial court's decision to impose an eight year minimum sentence also did not fall outside the principled range of outcomes. *Babcock*, 469 Mich at 273-274. The defendant has an extensive criminal history that began in New York in 1971. The defendant has nine prior felony convictions and seven prior misdemeanor convictions. He has served five prison sentences. He has been paroled numerous times only to commit new crimes and be returned to prison. We conclude that the trial court supported its upward departure with substantial and compelling reasons based on objective and verifiable factors.

Affirmed.

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello