STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2012
V	No. 302310
JACOB ANTONIO CORONADO, Defendant-Appellant.	Saginaw Circuit Court LC No. 09-032816-FH

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant appeals of right his jury convictions of and sentences for third-degree fleeing and eluding, MCL 750.479a(3), resisting and obstructing a police officer, MCL 750.81d(1), driving with a suspended license, second offense, MCL 257.904(3)(b), and operating a vehicle while intoxicated (OUIL), MCL 257.625(1)(a). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 58 to 180 months for fleeing and eluding and 16 to 180 months for resisting and obstructing, and to jail terms of 12 months for driving with a suspended license and 93 days for OUIL. We affirm defendant's convictions and sentences, but remand this case to the trial court for correction of a clerical error in defendant's judgment of sentence.

This case arises from a police chase. On the night of April 28, 2009, defendant drove approximately 20 miles per hour over the posted speed limit while under the influence of alcohol. Defendant failed to pull over for the pursuing police officer. Eventually, defendant stopped after attempting to rid his vehicle of a mostly empty bottle of liquor. Once stopped, however, defendant refused the officer's order to exit his vehicle. The officer forcefully dragged defendant out of the vehicle after unsuccessfully attempting to use his taser.

Defendant first argues that his intoxication on the night of the chase was involuntary because he was pathologically intoxicated, and that counsel's failure to have him evaluated for the purpose of presenting an insanity defense deprived him of the effective assistance of counsel..0

Because the trial court did not hold a *Ginther*[1] hearing, our review of defendant's claim is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. The right to counsel is the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). "To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). Further, a defendant must show that "the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). A defendant bears the burden of overcoming the presumption that counsel rendered effective assistance. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). We do not substitute our judgment for that of trial counsel regarding matters of trial strategy, even if that strategy was ultimately unsuccessful. *Id*. at 715.

Insanity is an affirmative defense to a criminal prosecution if the defendant can show that because of his or her mental illness or mental retardation, he or she "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). However, "[a]n individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances." MCL 768.21a(2).

Involuntary intoxication may be used as the basis for an insanity defense in certain circumstances. *People v Caulley*, 197 Mich App 177, 189-190; 494 NW2d 853 (1992). The *Caulley* Court defined involuntary intoxication as "'intoxication that is not self-induced and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant.'" *Id*. at 187, quoting *People v Low*, 732 P2d 622, 627 (Colo, 1987). This Court has characterized involuntary intoxication as a type of temporary insanity. *People v Wilkins*, 184 Mich App 443, 448-449; 459 NW2d 57 (1990).

Pathological intoxication is a form of involuntary intoxication. LaFave, Criminal Law (2d ed), § 4.10(f), p 394. Pathological intoxication occurs when a defendant knowingly consumes an intoxicant, but the amount of the intoxicant was "grossly excessive in degree." *Id*. "[T]he intoxication is involuntary only if the defendant was unaware that he is susceptible to an atypical reaction to the substance taken. The mere fact the defendant is an alcoholic or addict is not sufficient to put his intoxicated or drugged condition into the involuntary category." *Id*.

Defendant was not entitled to an evaluation for a temporary insanity defense for several reasons. First, no Michigan authority has recognized pathological intoxication as a valid

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defense, and we decline the invitation to even consider doing so in this case. MCL 768.21a(2). Second, no evidence suggested that defendant did not "knowingly" consume alcohol or that he was unaware of alcohol's intoxicating nature. Third, no evidence suggested that defendant suffered an "atypical" reaction to the amount of alcohol he consumed. Finally, defendant has not provided any facts beyond a history of substance abuse to support his claim that he suffers from pathological intoxication. As a result, a motion for a psychological evaluation very likely would have been futile, and defense counsel cannot be deemed ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Next, defendant argues that the trial court erroneously denied his motion for a directed verdict with respect to the resisting and obstructing charge. We review de novo a decision on a motion for a directed verdict. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *Id*. A trial court is not permitted to weigh the credibility of witnesses in deciding a motion for a directed verdict. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Circumstantial evidence and reasonable inferences may prove the elements of a crime and can support a decision to deny a motion for a directed verdict. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

To establish the offense of resisting and obstructing a police officer, the prosecution was required to establish that: "(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties." *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010); MCL 750.81d(1). "'Obstruct' includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7)(a).

A rational trier of fact could have found-as did this jury-that the prosecutor proved both elements of the crime beyond a reasonable doubt. First, the officer testified that defendant "physically resisted" his order to get out of the vehicle, and a reasonable jury could have credited the officer's testimony. Second, the evidence established that defendant drove approximately 20 miles per hour over the speed limit, the officer drove a patrol car and activated his emergency lights and siren, and the officer approached defendant's vehicle in full uniform. Consequently, a reasonable jury could have found that defendant knew or had reason to know the officer was in fact a police officer performing his law-enforcement duties during a traffic stop.[2]

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[2] In a one sentence argument, defendant erroneously argues that his convictions for fleeing and eluding and resisting and obstructing violated constitutional prohibitions on double jeopardy. "To determine whether a defendant has been subjected to multiple punishments for the 'same offense,' we must first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed." *People v Garland*, 286 Mich App 1, 4; 777 NW2d 732 (2009). The Legislature expressed its clear intent that fleeing and eluding should be punished

Defendant next argues that the trial court erroneously refused to strike the laboratory report for the blood-alcohol test results because a chain of custody had not been established for the blood vials. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007).

A prosecutor is not required to establish a perfect chain of custody. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). Instead, it is only necessary to establish that the evidence is what its proponent claims it to be with a "reasonable degree of certainty." *Id*. at 131. Once a prosecutor has established the chain of custody with a reasonable degree of certainty, "any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility." *Id*. at 130-131. Breaks or gaps in the chain of custody do not render evidence inadmissible if a proper foundation has been established. *Id*. at 133.

In *People v Cords*, 75 Mich App 415; 254 NW2d 911 (1977), this Court established a test regarding the foundation for admission of blood-test results:

> [T]he party seeking introduction must show (1) that the blood was timely taken (2) from a particular identified body (3) by an authorized licensed physician, medical technologist, or registered nurse designated by a licensed physician, (4) that the instruments were sterile (5) that the blood taken was properly preserved or kept (6) and labeled and (7) if transported or sent, the method and procedures used therein, (8) the method and procedures used in conducting the test, and (9) that the identity of the person or persons under whose supervision the tests were conducted be established. [*Id*. at 427 (quotations omitted).]

This test was "designed to insure that the blood tested was in fact that of the accused and to prevent the admission of test results obtained from an unreliable blood sample." *Id*. at 428.

The phlebotomist and the forensic scientist testified about the blood draw and blood test procedures, respectively. The officer testified that he personally sealed the blood vials in the kit for later testing. No direct testimony established that the blood vials were sent to the laboratory, but this can be established through reasonable inferences from other testimony. The forensic scientist testified that the blood-test kit she received was consistent with other blood-test kits. The kit was received through first-class mail and did not show any sign of tampering. It is reasonable to infer that the kit was properly sent to the laboratory for testing. Moreover, the information on the blood vials matched the information on the accompanying documents. This

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separately from resisting and obstructing a police officer. The fleeing and eluding statute, MCL 750.479a(8), states that "a conviction under this section does not prohibit a conviction and sentence under any other applicable provision for conduct arising out of the same transaction." The resisting and obstructing statute, MCL 750.81d(5), states that "[t]his section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section."

evidence provides further support for a finding that the blood removed from defendant was the blood in fact tested by the forensic scientist.

Because the prosecutor had established a chain of custody with a reasonable degree of certainty, the gap in the chain of custody was a matter of weight rather than of admissibility. The trial court did not abuse its discretion by admitting the evidence.

Next, we review for plain error defendant's unpreserved argument that the trial court violated his "constitutional rights" by failing to consider all of the mitigating factors before imposing sentence. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). However, a trial court may only depart below the guidelines for "substantial and compelling reasons." *People v Nunez*, 242 Mich App 610, 617; 619 NW2d 550 (2000). A downward deviation from the guidelines only appropriate in "exceptional cases." *Id*. Here, no facts support a downward departure. Defendant had been previously convicted of numerous crimes, several of which involved violence, drugs, and resisting law enforcement. The guidelines were enacted by the Legislature to consider such repeated disregard for the law. See *People v Lowe*, 484 Mich 718, 730-731; 773 NW2d 1 (2009). Defendant cannot establish any error, much less plain error, by the trial court's imposition of a sentence within the guidelines.

Defendant raises several additional arguments relating to the trial court's sentences, none of which have any merit. First, defendant challenges the fact that the trial court did not articulate its reasons for imposing its sentences, but a trial court is not required to articulate reasons for imposing a particular sentence when the sentence is within the guidelines. *Nunez*, 242 Mich App at 618.

Second, defendant claims that the length of his sentences violated federal and state constitutional prohibitions on cruel and unusual punishment. However, sentences within the guidelines are not cruel and unusual. *People v DiVietri*, 206 Mich App 61, 63-64; 520 NW2d 643 (1994); see also *People v Broden*, 428 Mich 343, 354; 408 NW2d 789 (1987) ("Sentences falling within the recommended range are presumptively not excessively severe or unfairly disparate[.]"). Furthermore, sentences within the guidelines are presumptively proportionate. *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995).

Third, defendant claims that the trial court imposed sentence on the basis of facts not proven beyond a reasonable doubt, as required by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), but *Blakely* is inapplicable to sentences imposed by Michigan courts. *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011).

Fourth, defendant claims that his history of substance abuse is a "mitigating factor" that entitles him to a reduced sentence. However, defendant has cited no Michigan authority to support his claim that excessive drug or alcohol use is, or should be, a mitigating factor that mandates a downward departure. Defendant also claims that the trial court relied on inaccurate information when imposing sentence, but does not identify what information was inaccurate. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

Finally, defendant argues that the trial court erroneously refused to grant him proper credit for time served in jail. Under MCL 769.11b, a defendant is entitled to credit for time spent in jail before sentence is imposed:

> 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.

A defendant is not entitled to credit for time served while in jail for an unrelated offense. *People v Idziak*, 484 Mich 549, 560; 773 NW2d 616 (2009). Thus, as in this case, when "the defendant has served time not as a result of his inability to post bond for the offense for which he seeks credit, but because of his incarceration for another offense, [MCL 769.11b] is simply not applicable." *Id*. at 561 (quotation omitted).[3]

We previously noted that defendant's judgment of sentence contains a clerical error. Defendant is entitled to credit for 216 days served with respect to his convictions of fleeing and eluding and resisting and obstructing. The judgment of sentence reflects a credit of only 16 days for the conviction of resisting and obstructing. We remand this case to the trial court for correction of this error, and direct that the trial court forward a copy of the corrected judgment of sentence to the Department of Corrections.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray

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[3] Defendant also suggests that the failure to grant credit for time served violates his federal and state constitutional rights relating to double jeopardy, due process, and equal protection. Our Supreme Court has rejected these claims. *Idziak*, 484 Mich at 569-574. Defendant also contends that he should be credited for 223 days served rather than the 216 days for which the trial court granted him credit. This claim is without merit, as defendant's calculation fails to take into account a seven-day period during which he was free on bond.