STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2013
v	No. 304523 Saginaw Circuit Court
PETER KINGYATTA DENNIS, Defendant-Appellant.	LC No. 09-032710-FH

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of third-degree fleeing and eluding a police officer, MCL 750.479a(3). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to between 30 months and seven years in prison, with credit for 119 days served. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

On April 12, 2009, Saginaw Police Department Patrol Officer Bradley Holp saw a black Yamaha motorcycle with an expired license plate tab. After running a LIEN check, Officer Holp learned that defendant, who was one of the registered owners of the motorcycle, had a suspended driver's license. Officer Holp testified that he had a clear view of the motorcycle driver's face and he was later able to identify defendant as the driver. Officer Holp decided to make a traffic stop on the basis of defendant's suspended license. Officer Holp turned on his overhead lights, got out of the vehicle, and began to approach the motorcycle, but defendant sped away from the scene. The officer pursued defendant for eight to 10 minutes, covering a distance of several miles. He also radioed central dispatch, and another nearby officer, Matthew Carpus, joined the pursuit. Defendant reached speeds of 45 to 50 miles per hour on residential streets, and eventually reached a speed of at least 75 miles per hour. Officer Holp lost sight of the motorcycle after defendant ran a red light and a stop sign.

Nearly two years later, Officer Holp assisted in another traffic stop. He asked the passenger to get out of the vehicle and recognized defendant as the driver of the motorcycle that fled the scene in 2009. Officer Holp asked defendant, "Do you remember me? I was the one in a chase one time," to which defendant replied, "Yes, I do," or "Yeah, I do." Defendant was ultimately arrested for the 2009 incident and, as noted, the jury convicted defendant of third-degree fleeing and eluding a police officer, MCL 750.479a(3).

II. MOTION TO SUPPRESS

Defendant argues that the court erred by denying his motion to suppress statements he made to police when he was arrested. "We review a trial court's factual findings in a ruling on a motion to suppress for clear error." *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). "To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *Id*.

Under both the United States and Michigan Constitutions, criminal defendants have a right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. In *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 691 (1966), the Supreme Court established procedural safeguards to protect this right, which require that "the police must advise a suspect before custodial interrogation that the suspect has the right to remain silent, that anything the suspect says may be used against him, and that the suspect has a right to the presence of retained or, if indigent, appointed counsel during questioning." *People v Dennis*, 464 Mich 567, 572-573; 628 NW2d 502 (2001). Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 US at 444.

As discussed, Officer Holp questioned defendant during a routine traffic stop. "[A] motorist detained for a routine traffic stop or investigative stop is ordinarily not in custody within the meaning of *Miranda*." *People v Steele*, 292 Mich App 308, 317; 806 NW2d 753 (2011). Defendant was the passenger in a vehicle stopped for speeding. Officer Holp was on the scene as backup and was one of the two officers involved in the chase in 2009. Officer Holp testified that he asked defendant to step out of the vehicle and defendant complied. He further testified that defendant was not handcuffed or detained in any manner, and that he was only kept at the scene so that officers could verify his identity and determine whether there were outstanding warrants against him. Officer Holp recalled that he asked defendant whether he remembered him from the earlier incident, and defendant indicated affirmatively that he did. Officer Holp did not question defendant any further.

Given the brief interaction during a routine traffic stop at which time the only detention of defendant was for purposes of determining his identity and the existence of any potential outstanding warrants, defendant was not in custody for *Miranda* purposes when he made the incriminating statement. Therefore, the trial court correctly denied defendant's motion to suppress his statement.

III. SENTENCE

A. OV 9 SCORE

Defendant argues that the trial court erred in giving him a score of 10 points for offense variable (OV) 9. Defendant did not object to the scoring of OV 9 during sentencing. Therefore, the issue has not been properly preserved for appellate review. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995). We review unpreserved sentencing issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130

(1999). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

OV 9 is scored at 10 points if "2 to 9 victims . . . were placed in danger of physical injury or death." MCL 777.39(1)(c). Here, two police officers testified that they were involved in a high-speed chase in which defendant reached speeds in excess of 75 miles per hour, ran a red light, ran a stop sign, and nearly caused an accident at one point. The officers were pursing defendant in two separate vehicles. From this evidence, the trial court correctly scored OV 9 at 10 points.[1]

Defendant further argues that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) should apply, and that he needed to admit to the facts supporting the score for OV 9, or the jury needed to find those facts. However, our Supreme Court has consistently ruled that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. See *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007).

B. ALLEGED MITIGATING EVIDENCE

Defendant maintains that he is entitled to resentencing because the trial court clearly erred by failing to consider mitigating evidence. This issue is not properly preserved for appellate review, so our review is again for plain error affecting substantial rights. *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). At defendant's sentencing hearing, the trial court stated:

> In determining the sentence to be imposed in this matter the Court has considered the Presentence Report Information, as well as the nature and circumstance of the offense in this case; in particular, the sentence guidelines, your extensive criminal record, and your probation status at the time . . . of the offense. Therefore, it is the sentence of this Court that you will be committed to the Michigan Department of Corrections, to be placed in a state prison on the charge of fleeing and eluding to a minimum of 30 months, and a maximum term of seven years.

Defendant admits that Michigan's statutory sentencing scheme does not require courts to consider mitigating evidence when imposing sentences. Nonetheless, he argues that this Court

[1] Defendant asserts that the Court could review this issue as a claim of ineffective assistance of counsel. However, he offers no argument about why the Court could or should do that, nor does he offer an analysis of the claim. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). And in any event, because the trial court correctly scored OV 9, counsel was not ineffective for failing to raise a challenge to the score. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

should follow federal law, which requires that courts consider mitigating evidence. However, this Court has held that any federal requirement to consider all mitigating factors does not apply to our indeterminate sentencing guidelines, and that a trial court may exercise its discretion in addressing possible mitigating factors. *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011).

Further, defendant's proffered evidence of "mitigating" circumstances is unavailing. Defendant argues that he has strong family support, which he implies will help his rehabilitation. However, given defendant's age (34) and lengthy prior record, which includes four felonies and 21 misdemeanors, the positive effect of this family support is unconvincing.

Defendant also argues that his history of alcohol and drug abuse creates an inference that he has a serious mental defect or disease justifying a downward departure from the sentencing guidelines. However, without a diagnosis by a trained professional, it would be speculative for a court to decide whether substance abuse shows a serious mental defect or disease.

Echoing his assertion that the record shows he has a serious mental defect or disease, defendant argues that "the court did not have accurate and complete information . . . when it sentenced him." Defendant asserts that the trial court "should have conducted an assessment . . . of the defendant's rehabilitative potential through intensive alcohol, drug, and psychiatric treatment."[2] MCR 6.425(A)(1)(e) provides that a PSIR need only provide in writing "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report." There is no requirement that the PSIR contain an assessment of defendant's rehabilitative potential if treatment is provided for identified substance abuse and psychiatric disorders. Here, the PSIR contains the requisite description of defendant's substance abuse and psychological history. Thus, we hold there is no merit to defendant's assertion that he was sentenced based on "inaccurate information."

Moreover, defendant's history of alcohol and drug use as set forth in his PSIR actually undermines his argument. He reported that he had not used either THC or cocaine since 2003 and 2004, respectively. Defendant supplied clean urine samples while serving a probation sentence from 2006 to 2010, and this offense occurred in 2009. He further reported that his use of alcohol was "occasional," and that he has never received treatment for the use of illegal drugs or alcohol. This evidence calls into question any assertion that defendant suffers from a chronic mental disease or defect related to drug and alcohol use. And prior periodic drug use does not represent a substantial and compelling reason to depart downward in sentencing.[3]

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[2] Defendant cites MCR 6.425(A)(5), but we presume he means to cite MCR 6.425(A)(1)(e), as the language on which he relies was relettered pursuant to an amendment effective January 1, 2011.

[3] Defendant again argues that the Court could alternatively review this under an ineffective assistance of counsel framework, and again provides no argument to support this position. See *Mitcham*, 355 Mich at 203. Regardless, because he failed to show that the court erred, counsel cannot be deemed to have provided ineffective representation. *Fike*, 228 Mich App at 182.

C. EIGHTH AMENDMENT

Defendant claims that his sentence amounts to cruel and unusual punishment in violation of the Eighth Amendment. US Const, Am VIII. However, he bases this argument on his claim that the trial court failed to consider mitigating evidence. As discussed, this argument is without merit. Further, defendant's *Blakely* argument fails for the reasons stated above. See, e.g., *McCuller*, 479 at 683.

Defendant also cites the Michigan Constitution, arguing that his sentence amounts to cruel or unusual punishment pursuant to Const 1963, art 1, § 16. This argument also fails for the reasons discussed above. Further, "a sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (internal citation omitted).[4] The trial court considered defendant's extensive criminal record and probation status, as well as the PSIR, sentencing guidelines, and the nature and circumstances of the offense in reaching a sentence with a minimum term that fell in the middle of the guidelines range. Accordingly, defendant is not entitled to resentencing.

III. ADMISSION OF EVIDENCE

Defendant avers that the trial court improperly admitted the testimony of Officer Holp, who was involved in both the high speed motorcycle chase and the traffic stop which led to defendant's arrest. Defendant maintains that he never admitted to Officer Holp that he was involved in the motorcycle chase and that Officer Holp committed perjury when he testified to the contrary. We review this unpreserved assertion for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763.

Defendant bases his argument on his claim that the prosecutor failed to correct allegedly perjurious testimony by Officer Holp on a separate matter. Defendant contends that, at trial, Officer Holp denied that "defendant gave him a false name or another name" during the traffic stop.[5] Defendant asserts that this was a lie because he received a false information citation on January 19, 2011. The citation states that defendant "[g]ave name of Christian Smith." However, the citation identifies both police officers as the citing officer, and the "complainant's

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[4] A punishment that "passes muster under the state constitution, . . . necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618-619 n 2; 619 NW2d 550 (2000).

[5] The officer testified that when he initially approached the vehicle in which defendant was a passenger, he asked defendant for his identification. When asked by the prosecutor if defendant produced identification, the officer responded, "I don't recall. I don't believe so, no." When asked by defense counsel on cross-examination if defendant first told the officer "he was someone else," Holp responded, "I don't recall, no." On redirect, the prosecutor asked whether Holp would have remembered if defendant had given a false name, the officer responded, "Yes."

signature" is illegible. Therefore, it is not clear from the citation which officer issued it. This does not establish that Officer Holp gave false testimony at trial.

On the same matter, defendant complains that the prosecutor never gave him a copy of the citation, the police investigation report, or the dispatch records from the incident, which he claims would have supported his argument that Officer Holp perjured himself. However, even if true, no possible prejudice could stem from this failure because, obviously, defendant would have been aware of the false information citation he received. Further, defendant's argument is entirely speculative that, if the jury had the opportunity to contrast Officer Holp's testimony about defendant's identification and the false information citation, it would have been more likely to discredit Officer Holp's testimony on other matters. Thus, defendant is not entitled to relief on this issue.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Douglas B. Shapiro