S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 12, 2018
v WINSTON GERMAINE EVANS, Defendant-Appellant.	No. 337831 Genesee Circuit Court LC No. 15-038239-FH

Before: SERVITTO, P.J., and MARKEY and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon ("CCW"), MCL 750.227, and possession of a firearm during the commission of a felony ("felony-firearm"), second offense, MCL 750.227b. The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to concurrent terms of 1 to 10 years' imprisonment for the felon in possession of a firearm conviction, and 1 to 10 years' imprisonment for the CCW conviction, to be served consecutive to a term of five years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions but remand for resentencing of defendant's felony-firearm and CCW convictions.

On September 17, 2015, City of Burton police officers were dispatched to a party store after receiving a report of an altercation at the store. Upon arriving at the store, Officer Douglas McLeod noticed defendant standing in the parking lot near a vehicle. When defendant saw Officer McLeod and his partner, he made a movement that indicated he was attempting to hide something near his midsection, and then he walked quickly into the store. Officer McLeod followed him into the store, intending to perform an investigatory stop. While attempting to catch up with defendant, Officer McLeod saw defendant pull a black handgun out of his pants and discard it on a display shelf in the store. Defendant was arrested.

Prior to trial, defendant moved to suppress all physical evidence obtained and any oral statements he may have made, claiming that they were the product of a warrantless, unlawful seizure. Defendant asserted that the officers had no reasonable, articulable suspicion to conduct an investigatory stop of him and no probable cause to seize him. Defendant thus argued that the

Fourth Amendment and the exclusionary rule required suppression of all evidence obtained. The trial court denied the motion. The matter proceeded to trial and defendant was found guilty.

I. DENIAL OF MOTION TO SUPPRESS

On appeal, defendant first argues that the trial court's decision to deny his motion to suppress evidence constituted clear error because he was subjected to an unlawful *Terry*[1] stop. We disagree.

This Court reviews a trial court's decision on a motion to suppress de novo. *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011). All factual findings related to the motion to suppress are reviewed for clear error. *Id*. A factual finding is clearly erroneous if it "leaves the Court with a definite and firm conviction that the trial court made a mistake." *Id*.

"[T]he Fourth Amendment permits a police officer to make a brief investigative stop (a "*Terry* stop") and to detain a person if the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Steele*, 292 Mich App at 314. Whether a police officer has a reasonable suspicion is a determination that is made on a case-by-case basis and is based on an examination of the totality of the circumstances surrounding the stop. *Id*. "An officer's conclusion must be drawn from reasonable inferences based on the facts in light of his training and experience." *Id*. at 315.

In denying defendant's motion, the trial court took into account Officer McLeod's testimony from defendant's preliminary examination, as well as the parties' submitted briefs concerning defendant's motion to suppress evidence. At the preliminary examination, Officer McLeod testified that upon arriving at the grocery store, he observed defendant leaning into the driver's side door of an SUV. Officer McLeod further testified that, based on his training and experience, individuals who loitered in front of convenience stores and grocery stores in that area were often selling drugs or carrying weapons, and he had made multiple arrests in similar situations for narcotics and firearms violations. Officer McLeod stated that he saw defendant stand up from where he had been leaning into the window of the SUV and reach toward his waist "as if maybe he was grabbing something." Defendant "demonstrated a type of [behavior] that [Officer McLeod] observed in the past on numerous arrests . . . [for] drugs and guns." Officer McLeod believed that defendant might be engaged in an ongoing crime, and his decision to approach defendant was based on his training and experience, as well as what he had observed. Officer McLeod testified that defendant had been acting suspiciously in the parking lot and walked away from the car and into the store as soon as he saw Officer McLeod coming toward him.

Officer McLeod was able to demonstrate that he had a reasonable, articulable suspicion that defendant was engaged in a crime. Officer McLeod, however, never made a *Terry* stop. Officer McLeod followed defendant into the store and attempted to close the gap between them so that he could stop defendant and speak to him. Before Officer McLeod could stop defendant,

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[1] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

defendant pulled a "black object that appeared to be a gun" out of the waistband of his pants and placed it on a metal shelf. Defendant was not stopped or seized prior to the point at which Officer McLeod saw defendant drop the gun on a shelf in the store. Once Officer McLeod saw that defendant had what looked to be a gun, he bypassed the *Terry* stop altogether and attempted to place defendant under arrest. Thus, an investigatory *Terry* stop did not occur.

Because Officer McLeod arrested defendant, this Court must determine whether probable cause existed to do so. " 'Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' " *People v Maggit*, 319 Mich App 675, 682; 903 NW2d 868 (2017) (citation omitted). In order to find that an officer had probable cause to arrest, this Court must "make an objective inquiry based on the facts and circumstances of the case . . . ." *Id*. at 682-683.

Based on the preliminary examination testimony that was before the trial court during the hearing on defendant's motion to suppress evidence, we conclude it is evident that Officer McLeod's decision to arrest defendant was supported by probable cause. Officer McLeod testified that he saw defendant "made a quick jerk motion with his head and, again, with his hands, reaching into the shelves." Defendant was never outside of Officer McLeod's line of sight and nothing obstructed Officer McLeod's vision as he watched defendant pull the gun out of the front of his pants. Officer McLeod then "heard a clang, which was metal upon metal, a metal shelf and a metal gun . . . ." At that point, having followed defendant into the store and watched him place a gun on the shelf, Officer McLeod had probable cause to arrest defendant. Since no *Terry* stop was conducted, and because Officer McLeod had probable cause to arrest defendant, defendant's argument that he was subjected to an illegal search fails.

Furthermore, the gun was in plain view on a shelf and was not hidden on defendant's person when he was arrested. Since the gun was not found on defendant's person, its seizure was not the result of a search.

An officer may "seize items in plain view if the officer is lawfully in the position to have that view and the evidence is obviously incriminatory." *People v Galloway*, 259 Mich App 634, 639; 675 NW2d 883 (2003). This Court has held that a law enforcement officer's entry into a commercial establishment that is open to the public is not a violation of an individual's reasonable expectation of privacy. *Peterson Novelties*, *Inc*, *v City of Berkley*, 259 Mich App 1, 23, 672 NW2d 351 (2003). Officer McLeod was lawfully able to enter the grocery store, which was open to the public. Additionally, he watched defendant pull the gun out and put it on the display shelf. Once the gun was on the shelf, it was in plain view in a place that was open to the public. Thus, its seizure was not a violation of defendant's Fourth Amendment rights. *Galloway*, 259 Mich App at 639. The trial court did not err by denying defendant's motion to suppress evidence.

II. CONSECUTIVE SENTENCING

Defendant next argues that he is entitled to resentencing because the trial court erred by ordering that his CCW sentence be served consecutive to his sentence for felony-firearm. We agree and note that the prosecution also concedes that defendant is correct on this issue.

"To preserve a sentencing issue for appeal, a defendant must raise the issue at sentencing, in a proper motion for resentencing, or in a proper motion for remand filed in the court of appeals." *People v Clark (On Remand)*, 315 Mich App 219, 223; 888 NW2d 309 (2016). Because defendant did not object to the imposition of consecutive sentencing and did not move for resentencing or to remand, the issue is not preserved for review. We review this issue, then, for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings, but reversal is only warranted if the plain error leads to the "conviction of an actually innocent defendant," or seriously affects the "fairness, integrity, or public reputation," of the judicial proceeding. *Id*. at 763-764.

At sentencing, the trial court stated:

> Felony[-]firearm second [offense] carries a mandatory five year sentence with—which would be consecutive to anything else that would be imposed.
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> As to counts one and two, it will be the sentence of the Court that you be committed to the jurisdiction of the Michigan Department of—I'm sorry, yeah, counts one and two, that you be committed to the jurisdiction of the Michigan Department of Corrections for a period of not less than 12 months nor more than 120 months. There is no credit against either of those as well as they are consecutive to the felony[-]firearm charge.

Defendant's sentence for CCW cannot be served consecutively to his sentence for felony-firearm because CCW is not a predicate felony for the felony-firearm offense. *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994); See MCL 750.227b(1). "[A] defendant is not guilty of felony-firearm if the underlying felony is the carrying of a concealed weapon." *Id*. at 207. Our Supreme Court has stated:

> From the plain language of the felony-firearm statute [MCL 750.227b], it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony . . . . It is evident that the . . . language [of MCL 750.227b refers back to the predicate offense . . . i.e., the offense during which the defendant possessed a firearm. No language in the statute permits consecutive sentencing with convictions other than the predicate offense. [*People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000).]

This Court has also stated that "[b]ecause there is no statute mandating that a sentence for a CCW conviction run consecutively to a sentence for a felony-firearm conviction, the sentence should run concurrently." *People v McCrady*, 213 Mich App 474, 486; 540 NW2d 718 (1995).

As a result, defendant's sentence for CCW cannot run consecutively to his sentence for felony-firearm. It does not appear from the record that the trial court misspoke, but rather, that it misunderstood the law regarding consecutive sentencing for felony-firearm and CCW offenses. Accordingly, defendant has properly demonstrated that the trial court committed plain error that prejudiced him by ordering that his CCW sentence must run consecutively to his felony-firearm sentence. Defendant is entitled to resentencing to concurrent sentences. *Id*. at 477.

We affirm defendant's convictions but remand for further sentencing proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Peter D. O'Connell