STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY WAYNE ROBINSON,

Defendant-Appellant.

UNPUBLISHED
April 13, 2023

No. 357242
St. Clair Circuit Court
LC No. 19-002497-FH

Before: CAVANAGH, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of possession of methamphetamine, MCL 333.7403(2)(b)(*i*), felon in possession of a firearm (felon-in-possession), MCL 750.224f, possession of less than 25 grams of heroin and fentanyl, MCL 333.7403(2)(a)(*v*), possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*), resisting and obstructing a police officer, MCL 750.81d(1), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of nine to 20 years for the possession of methamphetamine conviction, two to five years for the felon-in-possession conviction, four to eight years for the possession of cocaine and possession of heroin and fentanyl convictions, and 16 to 24 months for the resisting and obstructing conviction, all to be served consecutively to the statutory two-year term of imprisonment for the felony-firearm conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Deputies from the St. Clair County Sheriff's Office searched defendant's residence pursuant to a search warrant. The search warrant affidavit stated that a credible and reliable confidential informant had told a member of the Drug Task Force that defendant was "selling illegal controlled substances" out of his residence. Further, the warrant affidavit stated that members of the Drug Task Force had arranged a "controlled buy" in which the confidential informant had purchased controlled substances at a "pre-determined meet location" from an individual the informant identified as defendant.

During the search of defendant's residence, the deputies found 14 grams of methamphetamine, 0.7 grams of cocaine, and 1.4 grams of a heroin and fentanyl mix. A firearm was also recovered during the search. Defendant was present during the search and attempted to flee from the deputies on foot while they were escorting him to the police cruiser. After being advised of his rights, defendant voluntarily told a deputy at the county jail that he "came into a situation where he was making money simply by holding drugs."

Before trial, in March 2020, defendant filed a motion for a *Franks*[1] hearing. The motion stated that the search warrant affidavit "contained deliberate falsehoods and/or had a reckless disregard for the truth," and defendant thus sought a *Franks* hearing to challenge the veracity of the warrant. At the motion hearing, defendant stated that he was not prepared to proceed, because he had not prepared an affidavit in support of his challenge to the search warrant's validity. Defendant stated that he was waiting to receive information regarding GPS records of defendant's movements before the search in order to support his motion. However, the trial court reminded defendant that he was not entitled to a *Franks* hearing unless he provided an affidavit asserting that the specific police officer who signed the warrant affidavit made a statement with deliberate falsity or reckless disregard for the truth. The trial court adjourned the motion hearing to provide defendant additional time to submit an affidavit in support of his motion. A second hearing was later held, but defendant still had not submitted an affidavit in support of his motion. The trial court again adjourned defendant's motion hearing.

In November 2020, and despite the trial court's adjournments of his motion, defendant filed a new motion to suppress evidence; like defendant's initial motion to suppress, this new motion also included a demand for an evidentiary hearing to challenge the validity of the warrant affidavit under *Franks*. The second motion asserted that the "search warrant lacked probable cause" and that "selected portions of the affidavit contained and/or included claims events [sic] which were a deliberate falsehood or of reckless disregard for the truth." Defendant argued that the search warrant was therefore invalid and that "all evidence must be suppressed." However, the second motion again did not include any affidavit or offer of proof to support the allegation that any part of the warrant affidavit was deliberately or recklessly false.

At a motion hearing held in December 2020, defendant acknowledged he had not yet filed an affidavit in support of his motion to suppress. The trial court confirmed that it had not received any affidavits from defendant to challenge the validity of the warrant affidavit. The trial court again reminded defendant that he must provide "an affidavit in support of [his] contention" and "meet the certain standards before [he is] even entitled to a hearing." It then again adjourned the motion hearing, stating that it was giving defendant a final opportunity to adequately support his motion.

In February 2021, defendant appeared at a hearing that took place five days before the scheduled trial date. Defendant stated that he wanted to proceed with the requested *Franks*

[1] *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). A *Franks* hearing is an evidentiary hearing based upon a challenge to the validity of a search warrant's affidavit. *Id.* at 171.

hearing. However, defendant still had not provided the trial court with an affidavit in support of his motion. The trial court denied defendant's motion to suppress and deemed the motion abandoned, noting that it was "the eve of trial" and that defendant had had months to make a preliminary showing to challenge the validity of the search warrant affidavit.

At trial, defendant testified that he was addicted to methamphetamine and that he sold cocaine and heroin for his drug dealer in order to obtain methamphetamine; he also stated that he had attempted to flee at the time of his arrest because he was high on methamphetamine. A jury convicted defendant as described. At the close of the trial, the prosecution advised the trial court that it intended, at the time of defendant's sentencing, to seek a repeat-drug-offender enhancement penalty under MCL 333.7413(2).

At the subsequent sentencing hearing, the minimum sentencing guidelines range for defendant's possession of methamphetamine conviction (the sentencing offense) was 58 to 114 months. Defendant requested that the trial court impose a minimum prison term of five years (60 months) for that conviction. Defendant argued that this sentence would be appropriate considering the facts of the case and his substance abuse issues. The prosecution argued that the trial court should impose a minimum prison term of nine years (108 months), given defendant's criminal history and failure to satisfy conditions of parole that had been imposed for similar offenses. Defendant then expressed remorse and apologized to the trial court. The trial court noted that, during the time that defendant was incarcerated for a previous drug conviction, he had been found to have committed 60 acts of misconduct and to have started a fire inside the jail. Further, defendant had a history of continued criminal activity while on parole. The trial court therefore determined that defendant was not likely to be rehabilitated. The trial court sentenced defendant to a prison term of nine to 20 years (108 to 240 months) for the possession of methamphetamine conviction, and imposed the other sentences as described. This appeal followed.

In November 2021, defendant filed a motion to remand with this Court, seeking to expand the record and for an evidentiary hearing before the trial court. Specifically, defendant argued that Joshua Sparling, the assistant prosecuting attorney (APA) who had tried his case, had had an undisclosed conflict of interest concerning defendant. This Court granted defendant's motion and remanded the case to the trial court to conduct an evidentiary hearing limited to the issue raised in defendant's motion.[2]

Defendant subsequently filed a motion for resentencing in the trial court. Defendant argued that he was entitled to resentencing because APA Sparling had a conflict of interest that prejudiced defendant. The prosecution responded to defendant's motion and argued that APA Sparling had no personal bias against defendant, had appropriately informed the trial court of his intent to seek a sentencing enhancement, and had requested a minimum sentence within the recommended guidelines range. At the subsequently-held evidentiary hearing, APA Sparling testified that, after defendant's jury trial but before his sentencing, defendant had been called to testify as a witness for the prosecution at a preliminary examination in two unrelated cases. Sergeant Scott Francisco

[2] See *People v Robinson*, unpublished order of the Court of Appeals, entered January 12, 2022 (Docket No. 357242).

testified that defendant had wanted to make a deal in his own case in exchange for testifying at the preliminary examination, and that Sergeant Francisco had communicated this to APA Sparling. Sergeant Francisco further testified that APA Sparling was not interested in making a deal with defendant, and that defendant had subsequently provided information to the sheriff's office. Defendant later met with APA Sparling and a member of the sheriff's office and told them that he did not wish to testify at the preliminary examination. The prosecution nonetheless called defendant as a preliminary examination witness under subpoena.

After the close of the evidentiary hearing, defendant argued that APA Sparling had a conflict of interest because he was the prosecutor in both defendant's case and the cases in which defendant was called to testify as the prosecution's witness. Additionally, APA Sparling did not disclose to the trial court in this case his contact with defendant regarding the unrelated cases, and defendant was therefore entitled to resentencing.

The trial court denied defendant's motion for resentencing after the evidentiary hearing. The trial court stated that, in making its sentencing determination, it "considered and relied upon the evidence presented at trial" and the presentence investigation report, which recommended that the trial court impose a sentence of nine to 20 years for the possession of methamphetamine conviction. Additionally, the trial court noted that APA Sparling did not request that the trial court impose a minimum sentence above the minimum sentencing guidelines range, and that APA Sparling had also advised the trial court that the prosecution would be seeking sentencing enhancement well before APA Sparling spoke to defendant about testifying at the unrelated preliminary examination hearing.

II. MOTION TO SUPPRESS/*FRANKS* HEARING

Defendant argues that the trial court erred by declining to hold a *Franks* evidentiary hearing and by ruling that defendant's motion to suppress was abandoned. We disagree.

We review de novo the trial court's application of the law and ultimate decision on a motion to suppress. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). We review for clear error a trial court's factual findings at a suppression hearing. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999); *People v Simmons*, 316 Mich App 322, 325; 894 NW2d 86 (2016) (quotation marks and citation omitted). We review for an abuse of discretion a trial court's decision not to hold a *Franks* hearing. *People v Martin*, 271 Mich App 280, 309; 721 NW2d 815 (2006). We review "the facts supporting the denial of the evidentiary hearing for clear error and review the application of the law de novo." *Id.* An abuse of discretion occurs when the trial court "selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Dixon-Bey*, 321 Mich App 490, 496; 909 NW2d 458 (2017) (citation omitted). "A trial court has committed clear error when this Court is definitely and firmly convinced that it made a mistake." *Kalin v Fleming*, 322 Mich App 97, 100; 910 NW2d 707 (2017).

Both the United States and Michigan Constitutions guarantee a right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Michigan Supreme Court has held that "the Michigan Constitution 'is to be construed to provide the same protection as that secured by the Fourth Amendment, absent [a] "compelling reason" to impose a different interpretation.' " *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011) (citations

omitted). Searches and seizures, under both constitutions, must "be conducted reasonably, and in most cases that requires issuance of a warrant supported by probable cause, in order for the results to be admissible." *People v Toohey*, 438 Mich 265, 270; 475 NW2d 16 (1991) (citation omitted).

"[I]f false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause." *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992). However, affidavits that support a search warrant are presumed to be valid. See *Martin*, 271 Mich App at 311. A defendant is entitled to a *Franks* hearing to challenge the validity of a search warrant if he "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *Id*. (quotation marks and citation omitted). The challenge to the validity of the warrant must be "more than conclusory and must be supported by more than a mere desire to cross-examine." *Id*. (quotation marks and citation omitted).

In this case, while defendant filed a motion to suppress and a demand for an evidentiary hearing under *Franks*, defendant repeatedly failed to make a preliminary showing that the search warrant affidavit contained any statements that were knowingly or intentionally false, or that were made with reckless disregard for the truth. Defendant filed his motion to suppress but failed to include any supporting affidavit. Defendant's motion did not state which specific portions of the warrant affidavit were allegedly false and did not state how any allegedly false statements in the warrant affidavit were necessary for a finding of probable cause. Defendant failed to include any supporting argument with his motion or any offer of proof for his assertions. Defendant's conclusory statement that the search warrant "included claim[ed] events which were a deliberate falsehood or of reckless disregard for the truth," was insufficient to make a preliminary showing of falsity. *Martin*, 271 Mich App at 311. On appeal, defendant now belatedly attempts to identify specific statements in the warrant affidavit that were allegedly made with deliberate falsity. However, none of these specific statements were identified in defendant's motion to suppress. Without such a preliminary showing that any falsities in the search warrant existed, the warrant was properly presumed to be valid. *Id*.

The record shows that the trial court granted multiple adjournments to allow defendant additional time to support his motion. At the plea hearing held five days before defendant's trial, defendant once again asked the trial court to adjourn the hearing on his motion to suppress, yet he still had not provided the trial court with an affidavit in support of his motion. Because the request was made "on the eve of trial" and defendant had had months to submit an offer of proof, the trial court properly denied defendant's motion and considered it abandoned. *Hyde*, 285 Mich App at 436; *Martin*, 271 Mich App at 311.

III. SENTENCING

Defendant also argues that his sentence for methamphetamine possession was unreasonable and disproportionate, and constituted cruel and unusual punishment. We disagree.

Defendant contends that *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), requires this Court to review any sentence imposed by the trial court for reasonableness. Defendant

is correct that *Lockridge* held that the sentencing guidelines are no longer mandatory and are advisory only. See *Lockridge*, 498 Mich at 391. However, defendant is incorrect that he is entitled to a reasonableness review of his sentence in this case.

Defendant's minimum sentence was within the range recommended by the sentencing guidelines. "A sentence that *departs from the applicable guidelines range* will be reviewed by an appellate court for reasonableness." *Id*. at 392 (emphasis added). By contrast, for sentences within the recommended minimum sentencing guidelines range, "the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016); see also MCL 769.34(10) ("If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."). "*Lockridge* did not alter or diminish MCL 769.34(10)." *Id.* n 1; see also *People v Anderson*, 322 Mich App 622, 635-637; 912 NW2d 607 (2018).

In this case, defendant does not allege any errors in scoring or that the trial court relied on inaccurate information during sentencing. The trial court made its sentencing decision based on the evidence presented at trial and the recommendation contained in the presentence investigation report. Therefore, because defendant does not allege a scoring error and the trial court did not rely on inaccurate information in scoring, defendant's sentence is not subject to review for reasonableness.

Further, a "sentence within the guidelines range is presumptively proportionate." *People v Posey*, 334 Mich App 338, 358; 964 NW2d 862 (2020). "A defendant can only overcome that presumption by presenting unusual circumstances that would render a presumptively proportionate sentence disproportionate." *Id*. Defendant argues that his age and need for treatment are circumstances that render his within-guidelines-sentence disproportionate. However, neither defendant's age (38) nor his addiction to controlled substances is a particularly unusual circumstance, much less one that renders a within-guidelines sentence disproportionate. *Id*.

Defendant also argues that the assistant prosecutor's failure to disclose an alleged conflict of interest also was an unusual circumstance rendering his within-guidelines-sentence disproportionate . Defendant does not expand on this argument or articulate in his brief the reasons supporting his position. To the extent defendant argues that the sentence imposed was influenced by APA Sparling's alleged undisclosed conflict of interest, defendant had not supported this argument factually or legally.

APA Starling prosecuted defendant for weapons and drug offenses, and defendant was subsequently convicted on those charges. Even *before* defendant testified at an unrelated preliminary examination, APA Starling advised the trial court that he intended to seek a repeat-drug-offender enhancement penalty. At sentencing, APA Starling requested a sentence within the recommended sentencing guidelines range and argued that the trial court should impose the sentence recommended by the PSIR. And defendant has not challenged the trial court's finding that even "[h]ad the Court known of [APA Sparling's] brief contact with Defendant during the unrelated . . . case . . . that information would have made no difference in the sentence this Court ultimately imposed." There is no evidentiary or legal basis for defendant's conflict-of-interest

claim, and it presents no unusual circumstance that might overcome the presumption of proportionality. *Posey*, 334 Mich App at 358.

Defendant also argues that his sentence violates the Eighth Amendment to the United States Constitution, and Article 1, § 16 of Michigan's 1963 Constitution. We disagree. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." US Const, Am VIII. Similarly, the Michigan Constitution provides, "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." Const 1963, art 1, § 16. Further, "[t]he Michigan Constitution prohibits cruel or unusual punishment . . . whereas the United States Constitution prohibits cruel and unusual punishment." *People v Burkett*, 337 Mich App 631, 636; 976 NW2d 864 (2021) (quotation marks and citation omitted). Therefore, "[i]f a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id*. (quotation marks and citation omitted).

Defendant argues that the alleged disproportionality of his sentence constitutes cruel and/or unusual punishment. However, as noted, defendant has failed to overcome the presumption that his within-guidelines sentence was proportionate, and "a proportionate sentence is not cruel or unusual." *People v McFarlane*, 325 Mich App 507, 538; 926 NW2d 339 (2018) (quotation marks and citation omitted). Moreover, defendant's reliance on *Solem v Helm*, 463 US 277; 103 S Ct 3001; 77 L Ed 2d 637 (1983), overruled by *Harmelin v Michigan*, 501 US 957; 111 S Ct 2680; 115 L Ed 2d 836 (1991), is misplaced. *Solem* held that sentences reviewed under the Eighth Amendment must be proportionate to the crimes committed. See *Solem*, 463 US at 291. However, this holding in *Solem* was explicitly overruled in *Harmelin*. The Supreme Court in *Harmelin* stated, "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee." *Harmelin*, 501 US at 965. "[T]he drafters of the [English] Declaration of Rights [of 1689] did not explicitly prohibit 'disproportionate' or 'excessive' punishments. Instead, they prohibited punishments that were 'cruell and unusuall.' " *Id*. at 967 (using the spelling from the Declaration of Rights of 1689). The *Harmelin* Court went on to note that, while all disproportionate punishments may be cruel, they are not always unusual. See *id*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Mark T. Boonstra
/s/ Michael J. Riordan