STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2013
v	No. 305907 Genesee Circuit Court
KEITH DEVON TURNER, Defendant-Appellant.	LC No. 10-026909-FH

Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant, Keith Devon Turner, appeals as of right his bench trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), possession with intent to deliver less than 5 kilograms of marijuana, MCL 333.7401(2)(d)(*iii*), felon in possession, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm) (second offense), MCL 750.227b. We affirm.

This case arises from an incident that occurred on April 19, 2010, in Flint Township, Michigan. Michigan State Trooper Scott Nichols heard over a radio dispatch that there was suspected drug activity in the Clover Tree Apartment Complex and, being nearby, he went to investigate. As Trooper Nichols entered the complex's parking lot, he observed a Grand Am parked in the lot with three people inside. He also saw a woman walking down the sidewalk, talking on her cell phone and assumed that the woman was the person who had called 911 about the suspected drug activity. The woman made eye contact with Trooper Nichols and pointed in the general direction of the car.

Trooper Nichols observed that the Grand Am's engine was not running, and he approached the vehicle and spoke with the driver, Edward Johnson. Trooper Nichols told Johnson that he had received a call about suspected drug activity and asked Johnson what he was doing there. According to Trooper Nichols, Johnson either responded that he was dropping off a child to an apartment or responded that he was picking up a child from an apartment. When Trooper Nichols asked Johnson to identify which apartment was involved, he was unable to do so, and no child came to the car while Trooper Nichols was in the area.

At some point, Johnson exited the car. Trooper Nichols asked Johnson if there were any guns in the car. Trooper Nichols described Johnson's response as follows:

> First [Johnson] goes, mmmm. I said, do you have any guns in the car. He goes, mmmm. He's like smiles [sic], said, okay, let me ask you again, do you have any guns in the car. And he kinda looked at me and said I don't know.

Trooper Nichols then told Johnson to have a seat in the Grand Am, and he called for backup. The other officers who arrived started to identify the other two individuals in the car. During this process, one of the officers detected the odor of marijuana from the vehicle, and they learned that the passenger in the rear seat had an outstanding arrest warrant.

Defendant, who was sitting in the front passenger seat, was removed from the car and patted down by Officer Brett Cassidy. Officer Cassidy explained that even though defendant was not under arrest at the time, he conducted the pat down for officer safety. Officer Cassidy found a handgun tucked in defendant's waistband. As a result of this recovery, defendant was arrested, handcuffed, and searched more thoroughly. Officer Cassidy then found some cocaine and marijuana in defendant's pocket.

Before trial, defendant moved to suppress evidence of the gun and drugs. He argued that they were the fruit of an illegal search and seizure. However, the trial court disagreed and denied his motion.

Defendant first argues that there was not reasonable suspicion to search and seize defendant, so his motion to suppress should have been granted. We disagree.

This Court reviews de novo a trial court's decision on a motion to suppress evidence. *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009). This Court also reviews de novo "whether a search was supported by the constitutional standard of reasonable suspicion." *People v Dillon*, 296 Mich App 506, 508; ___ NW2d ___ (2012), citing *People v Bloxsom*, 205 Mich App 236, 245; 517 NW2d 563 (1994); see also *United States v Arvizu*, 534 US 266, 275; 122 S Ct 744; 151 L Ed 2d 740 (2002). The trial court's factual findings are reviewed for clear error. *People v Waclawski*, 286 Mich App 634, 693; 780 NW2d 321 (2009). These findings will only be disturbed if this Court is left with "a definite and firm conviction that a mistake was made." *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008).

Under both the United States Constitution and Michigan Constitution, an individual has the right to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1 § 11; *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). Generally, the exclusionary rule precludes the admission of evidence that was seized during an unlawful search. *People v Gonzalez*, 256 Mich App 212, 232; 663 NW2d 499 (2003). A "seizure," for purposes of the Fourth Amendment, only occurs if, "in view of all the circumstances, a reasonable person would have believed that he was not free to leave." *Jenkins*, 472 Mich at 32. Thus, not every encounter between a police officer and a citizen is a seizure. *Id.* at 33. "When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized." *Id*. In addition, asking a citizen for identification is not, in and of itself, a seizure that implicates the Fourth Amendment. *Id*.

A police officer may conduct a brief investigative stop, or *Terry*[1] stop, if he "has a reasonable, articulable suspicion that criminal activity is afoot." *People v Steele*, 292 Mich App 308, 314; 806 NW2d 753 (2011). To determine if an officer had reasonable suspicion, the trial court should consider whether "the facts known to the officer at the time of the stop would warrant an officer of reasonable precaution to suspect criminal activity." *Id.* This determination is made case-by-case and under the totality of the circumstances. *Id.* The trial court should give deference to the "experience of law enforcement officers and their assessments of criminal modes and patterns." *Id.* at 315. An officer's subjective intent is irrelevant in determining whether a stop was supported by reasonable, articulable suspicion of unlawful activity. *Dillon*, 296 Mich App at 509. In addition, a search or seizure must be justified at its inception. *People v Williams*, 472 Mich 308, 314; 696 NW2d 636 (2005).

We first determine when defendant was "seized." Trooper Nichols testified that he approached the Grand Am and spoke with the driver. Trooper Nichols asked Johnson some questions and he responded voluntarily. No seizure occurred at this point because this is the type of "voluntary cooperation" and "noncoercive questioning" contemplated in *Jenkins*, 472 Mich at 33. But later, when Trooper Nichols told Johnson to return to his vehicle to "have a seat" and several other police officers arrived, a reasonable person in defendant's position would not have believed he was free to leave. *Id.* at 32. Clearly, Johnson was not free to leave because Trooper Nichols made it clear to Johnson from his instructions to "have a seat" in the Grand Am that the encounter was not over. The instructions to Johnson, coupled with the subsequent arrival of at least six other officers to the scene, in at least three different vehicles, would have indicated to defendant and the other vehicle occupants that they were not free to drive or walk away. After the officers arrived, they surrounded the Grand Am and outnumbered the occupants at least two to one, such that Trooper Nichols acknowledged that he could not approach the car at that time because there were "too many people" around it. In summary, we conclude that defendant and the other occupants became seized for Fourth Amendment purposes when Johnson was ordered to return to the vehicle.

We next determine whether there was reasonable, articulable suspicion to seize defendant. Based on the totality of the circumstances, Trooper Nichols had reasonable suspicion that criminal activity was afoot when he told Johnson to return to the Grand Am and have a seat. Trooper Nichols was responding to a 911 call reporting drug activity in the apartment complex and saw a woman on a cell phone point in the general direction of the car with the three men sitting in it with the engine off. When Johnson exited the vehicle, his explanation to Trooper Nichols about why he was in the area did not appear credible or consistent with other observable facts. Then, in response to Trooper Nichols's questions whether there were guns in the car, Johnson did not respond right away, smiled, and then said he did not know. Trooper Nichols explained at the suppression hearing why he called for backup:

> For officer safety. I mean, there's three – three people in the car. [I had only] one person in my car, just myself, . . . so I wanted to get other units out

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

there to secure the scene, figure out what's going on. I – by his response and by just the way he was acting, I assumed that there were guns in the car.

Deference is given to a police officer's experience when determining if there is reasonable, articulable suspicion of criminal activity. *Steele*, 292 Mich App at 315. Given the circumstances with which he was presented, an officer of reasonable precaution in Trooper Nichols's position would have suspected that criminal activity was afoot and would have been justified in conducting a *Terry* stop to investigate further.

Defendant next claims that the trial court abused its discretion in denying his request for new appointed counsel without inquiring into his claim that the attorney-client relationship with his existing attorney had broken down.[2] We disagree. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

"An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced." *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). A trial court must appoint new counsel for a defendant only when the defendant has shown good cause and substitution would not "unreasonably disrupt the judicial process." *Id*. "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id.* "When a defendant asserts that the defendant's assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record." *Id.*, citing *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973). However, contrary to defendant's assertion on appeal, the court's failure to inquire into such a claim does not automatically require reversal. *Ginther*, 390 Mich at 442.

The trial court did not abuse its discretion when it refused to appoint a fourth attorney for defendant to replace Harrell Milhouse, defendant's third court-appointed attorney. On the first day of trial, defendant waived his right to a jury trial in the morning. But when the parties reconvened in the afternoon for the start of the bench trial, Milhouse informed the court that he was just notified that defendant no longer wanted him as his attorney. Milhouse said he was leaving it up to the court's discretion on how to proceed. The court responded that it would not appoint a new attorney because such a request right when the trial was to begin was untimely. Further, Milhouse was defendant's third lawyer, and the court was not willing to delay the trial for another two months for a new attorney to prepare.

[2] Within this argument in his standard 4 brief, defendant also claims that his trial attorney and his previously appointed attorneys were ineffective. However, the issue of ineffective assistance was never listed in defendant's statement of the questions presented as required by MCR 7.215(C)(5). As a result, defendant has abandoned any ineffective assistance of counsel claim on appeal. *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008).

The record reveals that the reason for defendant's desire to have a new attorney was because defendant did not agree with his attorney's planned argument related to a motion for reconsideration of the trial court's decision to not suppress the evidence. Defendant claimed that Milhouse's argument contained "a lot of falsities" and instead wanted his argument on this issue presented to the court. Therefore, the solitary issue of disagreement pertained to how the motion for reconsideration would be argued – it had nothing to do with trial strategy or tactics. Accordingly, because any disagreement was not related to "a fundamental trial tactic," *Bauder*, 269 Mich App at 193, the trial court did not abuse its discretion in denying the request for new counsel. Moreover, the single disagreement was addressed by the trial court and resolved in defendant's favor when it allowed defendant's argument to be presented by having Milhouse read the motion/statement that defendant drafted.

Second, even if the disagreement could be construed as a disagreement over a fundamental trial tactic, substitution nonetheless is only warranted when it would not "unreasonably disrupt the judicial process." *Id.* After waiving his right to a jury trial in the morning (with his attorney present), defendant asked for substitution of counsel when the parties met in the afternoon for the start of the bench trial. Defendant had already been granted two requests for substitution; Milhouse was his third court-appointed attorney. Defendant's first attorney, Michael D. Perkins, withdrew at defendant's request and with court permission because the attorney/client relationship had deteriorated to the point where it was no longer effective. Defendant told the court that he did not believe Perkins was pursuing his best interests. Perkins discussed defendant's lack of faith in his legal knowledge and abilities. The court was concerned about the delay in appointing a new attorney, but granted the request for appointment of a new attorney after defendant accepted that his trial may have to be adjourned.

Erwin Meiers was then appointed as defendant's attorney. At a pretrial hearing on January 18, 2011, defendant expressed his dissatisfaction with Meiers. Defendant told the court:

> Mr. Meiers told me directly that he would make sure I get sent to prison soon. That is not the type of representation I would like to have for this case, or any other case. I do not want my attorney telling me that he's gonna make sure I get sent to prison.
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> * * *
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> You [Meiers] brought case laws [sic] that you planned to use against me. And you said you'll make sure I get sent to prison soon.

On the date that defendant's trial was set to begin, Meiers informed the court that defendant said he was fired. Defendant had refused to dress for trial. Meiers requested permission to withdraw as defendant's counsel. Defendant asserted that Meiers was not acting in his best interests and that Meiers had not done anything to help him. The court allowed Meiers to withdraw.

On the record before us, the trial court could properly conclude there was no good cause to grant defendant's request for new counsel and that granting the request would unreasonably disrupt the judicial process. First, the record supports the conclusion that defendant bore at least some responsibility for his repeated problems in breakdowns in his attorney-client relationships.

"'A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel.'" *Traylor*, 245 Mich App at 462, quoting *People v Meyers (On Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983). Second, permitting defendant to once again delay the beginning of trial by granting his last minute request to discharge his third court-appointed attorney and obtain a fourth would have further delayed his trial and unreasonably disrupted the judicial process. The trial court did not abuse its discretion in denying defendant's request.

Finally, defendant contends in his standard 4 brief that his due process rights were violated because the prosecution knowingly allowed false testimony to be used against him. We disagree. Because defendant did not raise this issue below, it is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant must show that the error was clear or obvious and that it was outcome determinative. See *id*.

Consistent with a defendant's due process right to fundamental fairness, a prosecutor may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). However, knowledge of false testimony is not imputed to a prosecutor simply because it conflicts with another statement. *Id.* at 278-279. Similarly, showing that the prosecutor presented witnesses with contradictory stories is insufficient to establish knowledge of false testimony by the prosecutor. See *United States v Sherlock*, 962 F2d 1349, 1364 (CA 9, 1992).

First, defendant has not shown that Trooper Nichols testified untruthfully. Kimberly Pope testified that she called 911 to complain about her neighbor smoking marijuana. Trooper Nichols testified that he heard a dispatch that there was "drug activity" at the Clover Tree Apartment Complex. It is possible that the dispatch heard by Trooper Nichols was more generalized than the actual complaint. Defendant did not present any evidence regarding what the dispatcher said; thus, the only evidence of the contents of the radio communication came from Trooper Nichols's testimony. Pope also testified that she was told that Trooper Nichols had not been dispatched in response to her call. Trooper Nichols explained that he listens to dispatches for several police jurisdictions and was only a block away from the Clover Tree Apartment Complex, so he responded. Given the speed with which Trooper Nichols arrived at the complex and the fact that he is a state trooper and not a Flint Township police officer, it was not unreasonable for the 911 operator to assume he was not responding to Pope's call, even if he was. Finally, Johnson testified that he did not see defendant searched because Trooper Nichols was escorting him to the police car at the time. Defendant argues that this necessarily means that Trooper Nichols could not see the search either and was lying about seeing the gun pulled from defendant's waistband. However, the fact that Johnson did not see defendant searched does not mean it was impossible for Trooper Nichols to see Officer Cassidy recover a gun from defendant.

Regardless, none of this allegedly false testimony affected the outcome of the trial. The totality of the circumstances provided reasonable suspicion to search and seize defendant, particularly Johnson's behavior when Trooper Nichols asked him if there were guns in the car. It also does not matter if Trooper Nichols saw the gun pulled from defendant's waistband – Officer Cassidy testified at trial that he was the one who patted defendant down and found the gun tucked in his waistband. Moreover, defendant has presented no evidence that the prosecution

was aware of any allegedly false testimony given by Trooper Nichols. Therefore, there was no plain error affecting defendant's substantial rights.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher