

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

No. 53938

Application for  
Delayed Appeal

-v-

ROBERT EDWARD STOCKFORD,  
Defendant-Appellant.

TO: Judges  
FROM: David Jordon  
DATE: January 30, 1981; for submission February 10, 1981.

COMMISSIONERS REPORT

FACTS:

Defendant was convicted after a jury trial of armed robbery in violation of MCL 750.529; MSA 28.797 on June 14, 1973. Saginaw County Circuit Judge Fred J. Bochard sentenced the defendant to life imprisonment on September 4, 1973.

Defendant took an appeal from the said conviction and sentence and a motion for new trial was denied January 14, 1975. That application for delayed appeal was denied by this Court by order of July 18, 1975 (No. 24396). A request of the Supreme Court for appointed appellate counsel and application in pro per for leave to appeal was denied by order of February 25, 1976.

The only facts relating to defendant-appellant's conviction have to do with pretrial, preindictment and pre-arrest photographic identity procedures, concerning which there is no trial court record. Said issues were not raised in any prior application for delayed appeal before this Court.

Three persons who were present at the robbery on December 2, 1972, were shown a group of photographs, one of which was of defendant-appellant. There is nothing in any of the facts or arguments in either brief before this Court which indicates that there was anything particularly suggestive about the photographic show-up. There was a subsequent lineup, and no factual allegations concerning the conduct of the lineup are made in this appeal. Of the three eyewitnesses, two identified defendant in the photographic show-up, while it is not clear what happened as to the third. One of the witnesses who identified the defendant in the photographic show-up picked some else out at the subsequent lineup. The other two eyewitnesses picked out the defendant. All witnesses identified the defendant at trial.

Significant testimony at trial was set forth on the record as to the police view of defendant at the time of the photo ID. His picture was included, based on a hunch related to his having robbed the same business five years before. Defense counsel, during the trial and in closing arguments, allegedly argued the inconsistencies and uncertainties of the various witnesses' attempts at identifying defendant.

ISSUES:

Defendant-appellant raises the following issues on appeal:

"I. THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN POLICE CONDUCTED A PHOTOGRAPHIC IDENTIFICATION IN THE ABSENCE OF COUNSEL.

"II. THE DEFENDANT-APPELLANT HAS BEEN DENIED A FAIR REVIEW OF HIS TRIAL BY INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL."

FINDINGS:

This writer believes that the photo show-up herein took place in the "pre-custody, pre-questioning, mere suspicion phase" where there is no requirement for counsel. People v Lee, 391 Mich 618, 625 (1974). Appellate counsel's arguments seem empty as to this issue. With respect to the suggestiveness of the photographic display, this writer notes that it is alleged in the people's answer herein that defendant-appellant moved the Saginaw County Circuit Court for an evidentiary hearing on said issue on August 19, 1976. Apparently, nothing resulted therefrom. Without such an evidentiary record, this Court ought not to act. People v Reynolds, 93 Mich App 516 (1979). If this application for delayed appeal is denied, nothing would stop defendant from requesting such a hearing on the suggestiveness issue.

This writer cannot conceive that the ineffective assistance of counsel arguments are meritorious. It appears that as a matter of trial tactics, defense counsel chose to attack the infirmity of the eyewitness identification rather than challenge its appropriateness. This is most likely because there is no bar under Lee to the use of the said evidence in the trial. Clearly, the independent basis for testimony was established, since all persons who identified defendant claimed to have seen him at

the time of the robbery. They were employees and victims. Inasmuch as any issue appears frivolous with respect to this appeal, the claim of ineffective assistance of prior appellate counsel is likewise without merit. People v Oster (on resubmission), 97 Mich App 122, 141 (1980).

RECOMMENDATION:

It is recommended that this application for delayed appeal be denied for lack of merit in the grounds presented.

bjb