#12.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

No. 56964
Motion to Withdraw
(guilty plea)

JOSEPH ARTHUR HOBSON,

Defendant-Appellant.

_____/

TO: Judges
FROM: Tim Sanderson
DATE: December 18, 1981; for submission January 5, 1982

COMMISSIONER'S REPORT

FACTS:

Muskegon attorney Jack M. Grimm seeks leave of this Court to withdraw as appointed appellate counsel from defendant's plea-based conviction of receiving or concealing stolen property with the value in excess of $100, contrary to MCL 750.535; MSA 28.803, for the reasons:

"3. The transcript of the plea and sentence have been carefully read and studied by counsel and the records and files of the Muskegon County Circuit Court with regard to this case have been read and reviewed by counsel.

"4. After careful consideration of all the matters contained in this appeal, appointed counsel has concluded that this appeal is wholly frivolous and without merit, and that no meritorious issues are present for appeal. Counsel has considered all other matters which reasonably can be considered as a proper basis for appeal.

"5. Counsel has made inquiry of the appellant as to the grounds on which he bases his appeal. The Appellant has not responded to such inquiries. Counsel has, therefore, concluded that the appeal is without merit." (Motion, ¶¶ 3-5).

It should be noted that the pleadings submitted are signed by attorney Leslie C. Bowen for attorney Grimm. The signature of attorney Bowen appears under the firm name of Vender, Ploeg, Mullally, & Grimm.*

Although the Clerk's Office has no record of sending defendant the standard Anders letter, the motion to withdraw has been filed in substantial compliance with the practice of this Court adopted from Anders v California, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967).

*Additionally, in the brief in support Attorney Bowen indicates that the request to withdraw is made on behalf of Attorney Grimm.

On March 6, 1981, defendant was sentenced by Muskegon County Circuit Court Judge James M. Graves, Jr. to a term of 2-1/2 to 5 years imprisonment with 7 days credit. Defendant timely filed a request for appointment of appellate counsel on March 17, 1981. Attorney Denis B. Potuznik, who it should be noted was trial counsel, Edward C. Wilson or attorney Grimm were appointed as appellate counsel. A claim of appeal was thereafter timely filed by attorney Grimm on April 3, 1981. The motion to withdraw followed on October 14, 1981. A proof of mailing indicates that the motion, affidavit in support, brief in support and notice of hearing were served by mail upon the Muskegon County Circuit Court, the Muskegon County Prosecutor and defendant. The Clerk's Office has no record of sending the standard Anders letter to defendant. As of this writing, no answer has been filed by defendant. However, it is submitted that the possible omission by the Clerk's Office in failing to send defendant the standard Anders letter advising him he has 50 days to respond and so forth is harmless error since the proposed order in the customary fashion will provide defendant yet another 30 days in which to respond to the order of this Court. Therefore, defendant has not been prejudiced by any omission of the Clerk's Office and the case should not be delayed for another 50 days in order to wait for a response from defendant which may or may not be forthcoming.

The brief in support of the motion to withdraw states the issues to be:

ISSUES:

I. "DID THE TRIAL COURT COMPLY WITH MICHIGAN GCR 785 IN ACCEPTING THE APPELLANT'S GUILTY PLEA?"

II. "DID THE TRIAL COURT COMPLY WITH MICHIGAN GCR 785 IN SENTENCING THE APPELLANT?"

Restated, the issue before the Court is:

SHOULD THE MOTION TO WITHDRAW BE GRANTED BECAUSE THE COURT FINDS AFTER A FULL EXAMINATION OF ALL THE PROCEEDINGS THAT THE APPEAL IS WHOLLY FRIVOLOUS, AND SHOULD DEFENDANT'S CONVICTION BE AFFIRMED?

FINDINGS:

Despite the lack of a record by the Clerk's Office showing the standard Anders letter was sent to defendant discussed, supra, and several problems discussed, infra, none of the problems rise to non-frivolous issue status. Therefore, it is recommended that the motion to withdraw be granted, that defendant's conviction be affirmed and that the order be stayed for 30 days in the customary fashion to provide defendant with an opportunity to respond, defendant having filed no response as of this writing.

DISCUSSION:

In a complaint and warrant dated December 1, 1980, defendant was charged with breaking and entering an occupied dwelling with intent to commit a larceny contrary to MCL 750.110; MSA 28.305. The charge was a felony with a maximum term of imprisonment of 15 years.

It appears from the return to circuit court that a preliminary examination was held and defendant was bound over for trial in circuit court as charged.

No transcript of the preliminary examination appears in the lower court file nor appears to have been ordered.

A guilty plea does not waive a claim pertaining to the sufficiency of evidence to support a bind-over at a preliminary examination. People v Alvin Johnson, 396 Mich 424 (1976). Therefore, given the standard that this Court reviews all of the proceedings below in an Anders situation, ordinarily a copy of the preliminary examination transcript would be necessary in order to complete an Anders review.

However, under the circumstances of this case, it is submitted that a copy of the preliminary examination is not necessary to complete an Anders review.

The failure to move at the trial court level for dismissal on the basis that insufficient evidence was presented

at the preliminary examination waives any error in this regard. See, e.g., People v McIntyre, 74 Mich App 661 (1977). In the present case, there is no indication in the lower court file that defendant so moved. Consequently, any error pertaining to the sufficiency of evidence at the preliminary examination has been waived and the preliminary examination transcript is not necessary.

Further, any claim of ineffective assistance of counsel for failure to move for dismissal on the basis of the sufficiency of the evidence to support a bind-over following the preliminary examination, would be dependent upon a preliminary examination transcript. However, even if counsel had been successful in arguing for dismissal on the basis of insufficient evidence, this would not have necessarily resulted in the charges against defendant being dismissed or of defendant being released for the reason that the circuit court could have either dismissed the charges or sent the case back to the examining magistrate for further preliminary examination. See, e.g., People v Miller, 62 Mich App 495 (1975).

Moreover, even dismissal by the examining magistrate would not have barred a subsequent arrest of defendant, examination and trial on the charge because defendant would not have been placed in jeopardy. People v Laslo, 78 Mich App 257 (1977).

Finally, and perhaps most important, defendant did not plead guilty to the breaking and entering charge upon which he was bound over for trial. Pursuant to a plea agreement, defendant subsequently pled guilty to an added count of receiving and concealing stolen property with a value in excess of $100. Receiving and concealing stolen property is not a lesser included offense of breaking and entering. People v Rood, 83 Mich App 350 (1978). Therefore, it appears that defendant's preliminary examination on the breaking and entering charge is totally irrelevant to the charge to which defendant subsequently pled guilty, i.e., receiving and concealing stolen property.

Therefore, since any error pertaining to the sufficiency of the evidence at the preliminary examination was waived and inasmuch as a successful argument in this regard below would not necessarily have resulted in defendant being discharged, and since the preliminary examination was not related to the charge to which defendant pled guilty, it is submitted that a preliminary examination transcript is not necessary for an Anders review.

On January 23, 1981, defendant, while represented by counsel, appeared before Muskegon County Circuit Judge James M. Graves, Jr. and entered a plea of guilty to an added count of receiving or concealing stolen property. Although not filed until approximately one week following the plea, the added count specifically charged that defendant " * * * did buy, receive, or aid in the concealment of certain stolen, embezzled or converted property, to-wit: stereo equipment and colored television set, knowing the same to have been stolen, embezzled or converted, said property being of a value in excess of $100 * * *."

The added count raises the question of whether the information was properly amended and whether defendant was entitled to a preliminary examination on the added count. Although an accused cannot be informed against until a judicial determination upon the preliminary examination that a crime has been committed and there is probable cause to believe defendant guilty, and while a defendant may not be tried for an offense different from that for which he was examined or waived examination, it has been stated that where defendant fails before pleading to object to an information charging an offense distinct from that which he was examined upon the complaint, defendant will be deemed to have waived the defect. People v Norman, 9 Mich App 647 (1968).

Here, as indicated, the added count of receiving and concealing stolen property was distinct from the charged offense of breaking and entering. However, defendant waived any defect to the added charge by pleading guilty to it.

Turning to the guilty plea proceedings, Judge Graves imparted more advice than required by the court rule governing guilty pleas. None of the additional advice could be construed as prejudicial to defendant and therefore need not be detailed.

With respect to the requirements of the guilty plea court rule, Judge Graves elicited an understanding plea. GCR 1963, 785.7(1). Judge Graves advised defendant of the name of the offense to which he was pleading, i.e., receiving and concealing stolen property over $100. Defendant indicated he understood the charge. (Tr, 3-4). Later, Judge Graves again advised defendant of the name of the offense to which he was pleading. (Tr, 7).

Concerning the maximum possible prison sentence, Judge Graves correctly advised defendant of the maximum prison sentence of 5 years imprisonment. Defendant indicated he understood. (Tr, 4). Later in the proceedings, Judge Graves advised defendant again of the 5 year maximum possible prison sentence. (Tr, 7).

Judge Graves correctly advised defendant that there was no mandatory minimum sentence which by statute the court had to impose. Defendant indicated he understood. (Tr, 4). Again later in the proceedings, Judge Graves advised defendant that the charge to which he (defendant) was pleading did not require a mandatory minimum sentence by statute. (Tr, 7).

Judge Graves correctly advised defendant of the probation, parole and habitual offender ramifications of the plea. (Tr, 7). Since the plea was not to murder, armed robbery or treason, the court did not and by the terms of the guilty plea rule, need not, have advised defendant that he could not be placed on probation. Finally, Judge Graves ascertained that defendant knew what waiving a right was and that waiving the

right to trial meant that defendant was giving up the right to trial and would have no trial at all. Defendant indicated he understood. (Tr, 6). With respect to the rights and incidents of trial waived by a guilty plea, Judge Graves advised defendant virtually verbatim of those rights set forth in GCR 1963, 785.7(1)(g)(i)-(x), among other advice required by the guilty plea rule, and defendant indicated he understood that by pleading guilty he was giving up all of these rights. (Tr, 7-8). The fact that Judge Graves grouped these rights does not affect the validity of the plea. Guilty Plea Cases, 395 Mich 96, 115 (1975). The record amply satisifies the test on appeal of whether the defendant was informed of such constitutional rights and incidents of trial as to reasonably warrant the conclusion he understood what a trial was and that by pleading guilty he was knowingly and voluntarily giving up his right to a trial and the rights and incidents of trial. Guilty Plea Cases, 395 Mich, supra, p 122.

The plea was voluntary. GCR 1963, 785.7(2). At the beginning of the plea proceedings, the plea agreement was discussed. (Tr, 2-3). Later, as required by the rule, Judge Graves asked the prosecutor whether there was a plea agreement. (Tr, 8). The assistant prosecutor stated the only plea agreement was that the people had added a second count and agreed to dismiss the original breaking and entering charge if a plea was made and accepted to the receiving and concealing stolen property charge. As further required by the rule, Judge Graves confirmed the terms of the agreement with defense counsel and confirmed the terms of the agreement with defendant after restating the agreement. (Tr, 9). Defendant also indicated there were no other terms of the agreement of which he was aware. (Tr, 9-10). It should be noted that the plea agreement was fulfilled, since defendant's plea to the receiving and concealing stolen property charge was accepted, and pursuant to a motion by

the prosecution, Judge Graves entered an order on January 30, 1981 which nolle prossed the breaking and entering count. In accordance with subsection (c) of GCR 1963, 785.7(2) governing a voluntary plea, Judge Graves asked defendant whether anyone promised him anything beyond what was in the plea agreement to "get" him to plead guilty, and defendant responded in the negative; asked defendant whether anyone had threatened him in order to "get" him to plead guilty, and defendant responded in the negative, and asked defendant whether it was his own free choice to plead guilty, and defendant responded in the affirmative. (Tr, 10).

The plea was accurate. GCR 1963, 785.7(3). In a colloquy between the court and defendant, the incident giving rise to the charge was described as follows:

"THE COURT: Sir, could you please tell me in your own words what happened on November 28, 1980, in the City of Muskegon Heights, which would lead you to plead guilty to Count Two, receiving and concealing stolen property over $100? Tell me what happened, please.

"THE DEFENDANT: It was around 8:00 o'clock and I believe I just got out of work and went home. And Jeff Jones called and said that he had broken into this house and stole a lot of stuff, and he told me to come over. My intention was to try and buy some of this stuff, and I never got around to it. He picked up a gun in the house, and that's what made me get in the position of it.

"THE COURT: What did you possess that was stolen?

"THE DEFENDANT: I helped him sell the gun.

"THE COURT: You assisted him in the sale of the gun?

"THE DEFENDANT: Yes.

"THE COURT: Did you know the gun was stolen?

"THE DEFENDANT: Yeah--because he had showed me--I walked down the alley, and he showed me what house they got into.

"THE COURT: How did you assist him in the sale of the gun? What did you do?

"THE DEFENDANT: Jeff Jones, he called somebody and he said he is fixing to sell some of the stuff. First he was trying to sell the gun to me for $20 because I had $20 on me. I helped him talk to the person to try to sell it. That's what I did. I got in the car and I talked to him. I didn't really--I had possession of the gun. I was there when the stuff was there.

"THE COURT: You did try to assist Jeff Jones in the selling of the gun?

"THE DEFENDANT: I helped him.

"THE COURT: Did you talk to a third party to try and get a third party to buy the gun?

"THE DEFENDANT: Third party?

"MR. POTUZNIK: The person you didn't know that bought the gun.

"THE DEFENDANT: Oh, yeah.

"THE COURT: Was that gun worth over $100?

"THE DEFENDANT: I believe so.

"MR. POTUZNIK: We don't contest that, Your Honor." (Tr, 10-12)

The standard for determining whether a factual basis existed for a guilty plea is not high. A factual basis for acceptance of a guilty plea exists if an inculpatory inference can be reasonably drawn by a jury from the facts admitted by defendant even if an exculpatory inference can also be drawn and defendant states the latter to be the correct inference. Guilty Plea Cases, supra, p 130.

From the colloquy set forth above, a jury could reasonably infer that defendant was guilty of receiving and concealing property with the value in excess of $100. See, e.g., CJI 26:1:01.

A problem, however, arises because defendant was charged with the receiving or concealing of stereo equipment and a color television set and not a gun. However, no non-frivolous issue is perceived. In the first place, the failure of defendant to object to the information before trial waived any alleged error. People v Green, 14 Mich App 250 (1968). Second, the general rule is that a trial court may allow the amendment of an information at any time before, during or after trial. Further, this Court will not reverse such a decision unless it finds that the defendant was prejudiced in his defense or that a failure of justice resulted. People v Mahoney, 97 Mich App 192 (1980). Here, nothing would have prevented the prosecution

from moving to amend the information to charge the receiving or concealing of a gun rather than stereo equipment and a color television. Had the trial court granted such motion, defendant would not have been prejudiced in his defense nor would a failure of justice resulted. For all practical purposes, it is immaterial what the specific property was, i.e., whether a gun or other property, provided the other elements of the crime are present such as was the case here.

Judge Graves made the required additional inquiries and statements. GCR 1963, 785.7(4). The court asked both the assistant prosecutor and defense counsel whether it had complied with subrule 785.7(1)-(3) and obtained affirmative responses. (Tr, 12). The rule further requires that the court state whether it has agreed upon the possibility of a plea or possible sentence with the prosecutor or defendant or anyone acting in the interest of either, and if so, that to which the court has agreed. The court stated that it had not participated in any plea negotiations nor participated in any possible sentence negotiations with the prosecutor, defendant or defense counsel or anyone acting in the interests or on behalf of the prosecutor or defendant, and further asked defendant whether he understood the court was not committed to any particular sentence. Defendant indicated that was his understanding. (Tr, 12-13). Moreover, that the court agreed upon the possibility of a plea is evidenced by the subsequent acceptance of the plea.

As indicated, the plea was accepted, the court stating that it was convinced the plea was understanding, voluntary and accurate. GCR 1963, 785.7(5).

On March 6, 1981, defendant appeared before Judge Graves for sentencing. GCR 1963, 785.8 governs sentencing, and by its terms, the requirements of the rule are mandatory and failure to comply requires resentencing.

The first requirement is presence of defendant's lawyer unless affirmatively waived by defendant. In the present case, counsel for defendant was present at sentencing.

The second requirement is that the trial court give defendant and his counsel a reasonable opportunity to advise the court of any circumstances they believed it should consider in imposing sentence.

Judge Graves asked both the assistant prosecutor and defense counsel whether they had anything to say before sentence was imposed. Each had nothing further to say. (Tr, 3). The trial court also inquired of defendant specifically and separately whether he had anything to say before sentence was imposed as required by People v Berry, 409 Mich 774 (1980). Defendant made a short statement to the effect that he was going to school eight hours a day and if sentenced, he would like to continue getting his GED. (Tr, 3). The court asked defendant whether there was anything further, and defendant indicated there was not. (Tr, 3).

The third requirement at sentencing is that the court state the minimum and maximum sentences imposed by the court together with any credit for time served for which defendant may be entitled. Judge Graves imposed a minimum sentence of 2-1/2 years and a maximum sentence of 5 years with 7 days credit for time served prior to sentencing. (Tr, 4). Whether or not the time for credit is accurate cannot be determined from the lower court file. Apparently defendant was arrested on or about December 1, 1980. Bond was posted in district court December 3, 1980. The bond was filed in circuit court on December 12, 1980. Thus, it appears that credit for time in jail would range from 3 days to 12 days. In any event, defendant does not complain that the credit was improper and only amounts to a few days one way or the other.

The sentence imposed by Judge Graves was within the statutory perameter and did not violate the Tanner rule.

Judge Graves adequately advised defendant of his appellate rights, which defendant has exercised. (Tr, 4). GCR 1963, 785.11.

Finally, as required by GCR 1963, 785.12, the sentencing court permitted defendant's attorney and the prosecution to examine the presentence report and provided both parties an opportunity at the time of sentence to explain or controvert any factual representations in the presentence report. Neither counsel had any corrections or changes to be made in the report. (Tr, 2-3).

Having found no non-frivolous errors, a proposed order is attached for consideration by the Court which grants the motion to withdraw, affirms defendant's conviction, and since defendant has yet to file an answer, stays the order for a period of 30 days in the customary fashion in order to provide defendant with an additional opportunity to respond.

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