

SPECIAL PANEL

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

No. 58373

-v-

MIKE WOTRING, a/k/a BARRY MICHAEL  
WOTRING, a/k/a BARRY M. WOTRING,  
Defendant-Appellant.

Delayed Application  
for Leave to Appeal  
Motion to Waive Fees

TO: Judges Burns, RB, Burns, TM and Walsh  
FROM: Marilyn Morris Wanger  
DATE: December 30, 1981; for submission January 19, 1982.

COMMISSIONER'S REPORT

FACTS:

Defendant, acting in pro per, has filed a delayed application for leave to appeal and motion to waive fees. This report is being directed to this panel because it has twice before denied defendant's application for further appellate review.

According to defendant's statement of facts, on May 1, 1975, he was jury-convicted of assault with intent to commit murder and armed robbery, as charged, in the Lenawee County Circuit Court. The prosecuting attorney for that county filed a supplemental information charging defendant as an habitual offender and on June 5, 1975, Lenawee County Circuit Judge Rex B. Martin sentenced defendant to a term of 60 to 100 years in prison.

Defendant appealed of right to this Court and his court-appointed counsel made several arguments for reversal. In an unpublished per curiam opinion dated February 4, 1977, a panel of this Court composed of Judges T.M.Burns, Quinn and Cavanagh affirmed the conviction. See No. 25075.

Defendant then made a written request for appointment of counsel to the Supreme Court, but that request was denied on July 7, 1977, the Supreme Court finding no adequate basis for granting the request after considering it and the lower court records.

Thereafter, defendant filed a delayed application for leave to appeal in this Court, which application was given No. 78-862. Nine issues were stated for review and Commissioner Allan Falk prepared a report on those issues. He recommended that the delayed application for leave to appeal be denied and

WERE DEFENDANT'S GUILTY PLEA TO THE SUPPLEMENTAL INFORMATION WAS INDUCED AND INVOLUNTARY BECAUSE THE PLEA-TAKING COURT DID NOT COMPLY WITH GCR 1963, 785.7 OR WITH THE HABITUAL OFFENDER ACT, MCLA 769.13; MSA 28.1085?"

DISCUSSION:

Defendant's first argument is that the trial court committed reversible error in its jury instruction when it advised that "the law presumes every person to intend the usual consequences which follow the use and means employed and the manner in which they are employed, but when it is not justified or excused". Defendant concedes that there was no objection to that instruction, and that his defense at trial was not based on intent but was rather based on his denial of knowledge and participation in the crimes. Further, defendant states that his codefendant, who was placed on the stand as a witness called by the people and who previously had confessed to the charged crimes, testified that he did not know or remember who was with him on the night that the crimes were committed.

The people have answered and state in ¶¶ 14 and 15, that defendant presented this same issue to the Michigan Supreme Court in a supplemental brief filed on or about March 25, 1980, and that the Supreme Court denied defendant's delayed application for leave to appeal on June 4, 1980, because the Court was not persuaded that the questions presented should be reviewed by the Court. Further, the people cite and rely upon People v Wright, 408 Mich 1 (1980) for the position that any error in the challenged instruction was harmless beyond a reasonable doubt because the defense was predicated on the fact that defendant was not the person who shot the victim and did not participate in any way in the alleged crimes, and so intent was not a disputed issue in the case.

The landmark case with regard to this issue is United States Supreme Court decision in Sandstrom v Montana, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979). In that case, the question presented was whether, in a case in which intent is an element of the crime charged, the jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts", violated the Fourteenth Amendment's requirement that

Appeals. It thus seems clear that the Wright case is authority only for application of the Sandstrom decision to cases in which the issue has been raised and which were pending at the time of the Sandstrom decision. The Wright case does not purport to apply Sandstrom retroactively to the cases, such as the present one, where the issue was not raised and it was not pending on appeal at the time of the Sandstrom decision.

Further support for the view that the Sandstrom case has retroactive application only to cases pending in which the issue had been raised at the time of that decision is found in People v Gray, 423 NYS2d 66 (1979), which specifically held that the Sandstrom case only applied only to pending cases.

However, even if the Sandstrom decision should be held to have retroactive application, under the Michigan Supreme Court's ruling in the Wright case, no reversal is mandated in the present case because any error was harmless. In the Wright opinion, the Michigan Supreme Court found that under the harmless error standard for determining the prejudicial effect of constitutionally invalid instructions, it must carefully scrutinize the evidence adduced in each case (footnote 7) and when it did so, it found harmless error as to defendant Wright because the evidence against him was "substantial", but found the instruction not harmless error as to defendant Perez because his involvement was tenuous. Both men had been convicted of delivery of heroin and conspiracy to deliver heroin, but Perez had argued that he was a victim of circumstance and that he just happened to walk into the home in question for a completely innocent purpose at a time when the police were running an undercover investigation. During the entire time that the codefendants were under surveillance, nobody had ever seen Perez or was his name mentioned in any conversation. By contrast, the Michigan Supreme Court pointed out that the prosecution's case against defendant Wright was particularly strong and was based essentially on the credibility of the prosecution's chief witness. The defense was predicated mainly on Wright's denial that he had said and done the things attributed to him. Under these circumstances, the Michigan Supreme Court said that if a jury believed the testimony of the prosecution witnesses, Wright's conviction reasonably followed, and it concluded that the case against him was

of copies of the transcripts of defendant's two prior guilty plea convictions and they show clearly that he was advised of his right to counsel by the court, even if he could not afford counsel, and that defendant waived that right on the record. Therefore, there is no merit in this part of defendant's argument, because there is no error in a counselless plea where a defendant has been fully advised of his right to appointed counsel and he has waived it on the record.

Defendant also claims that there was reversible error in this case because the trial court, in taking his plea of guilty to the supplemental information charging him as an habitual offender, did not comply with GCR 1963, 785.7. However, defendant's reliance on People v Stevens, 88 Mich App 421 (1979), lv den 408 Mich 948 (1980), in support of that argument is misplaced. In that case, this Court held that the rule announced in that opinion was to be given prospective application only. The Supreme Court denied an application for leave to appeal. The Stevens case was decided after defendant's conviction in the present case and therefore is of no assistance to him, as is pointed out in the people's answer.

RECOMMENDATION:

It is recommended that the delayed application for leave to appeal be denied for lack of merit in the grounds presented and that the motion to waive fees be granted.

bjb