

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLE EDWARD FLUELLEN,

Defendant-Appellant.

UNPUBLISHED

June 14, 1996

No. 181733

LC No. 94-003359

Before: Murphy, P.J., and Reilly , and C.W. Simon, Jr.*, JJ

PER CURIAM.

Defendant was convicted following a bench trial of armed robbery, MCL 750.529; MSA 28.797 and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to prison terms of two years for the felony-firearm consecutive to a term of six to fifteen years for the armed robbery conviction. He appeals as of right, and we affirm.

Defendant first contends that the conviction was against the great weight of the evidence. To preserve this issue for appeal, a party must file a motion for a new trial in the trial court. *DeGroot v Barber*, 198 Mich App 48, 54; 497 NW2d 530 (1993); *People v Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988). Defendant filed a motion for a new trial, resentencing and *Ginther*¹ hearing on February 21, 1995, two months after the claim of appeal was filed in this Court and after the trial court no longer had jurisdiction in the case. MCR 7.208(A)(B)(1). Therefore, defendant's motion was untimely and failed to preserve this issue for review. Moreover, the lower court record indicates that the motion was "heard & denied" by the trial court on March 10, 1995. No transcript of the hearing has been provided to this Court. A court's decision on a motion for a new trial is reviewed by this Court for an abuse of discretion, *People v Herbert*, 444 Mich 466, 477; 511 NW2d 674 (1993). Without a transcript of the hearing, we are unable to determine whether the court abused its discretion. Therefore, defendant has abandoned this issue on appeal. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next contends that he was denied effective assistance of counsel because counsel failed to make a pre-trial motion to suppress the complainant's identification of defendant. This issue was also raised in the motion filed February 21, 1995. Again, without the transcript of the hearing, it is impossible for us to ascertain the basis of court's ruling with respect to the request for the *Ginther* hearing. In any event, considering the grounds suggested by appellate defense counsel for suppression of the identification, we are not persuaded that defendant was prejudiced by counsel's failure to make the motion. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Defendant finally contends that the court imposed a sentence that was unduly harsh and in violation of the principle of proportionality, and that the court imposed a sentence for an offense for which defendant was not convicted. The sentence was within the guidelines range of twenty-four to seventy-two months and therefore, was presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has failed to overcome the presumption. We find no abuse of discretion. Furthermore, the court's remarks do not support defendant's argument that he was sentenced for an offense for which he was not convicted.

Affirmed.

/s/ William B. Murphy
/s/ Maureen Pulte Reilly
/s/ Charles W. Simon

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).