STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC JOHN MELOTIK,

Defendant-Appellant.

UNPUBLISHED
August 23, 1996

No. 173864
LC No. 93-DA593

Before: White, P.J., and Fitgerald, and E. M. Thomas,*JJ.

PER CURIAM.

Plaintiff appeals by leave granted the circuit court's order affirming the district court's order dismissing the case. We affirm.

I

Defendant was charged with two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and two counts of felony-firearm, MCL 750.227b; MSA 28.424(2). The circuit court suppressed defendant's post-arrest statements at a hearing on September 17, 1993 and granted defendant's motion to dismiss on September 29, 1993. These rulings are not challenged in this appeal. The complaint and warrant were reissued. The district court held an evidentiary hearing on November 5, 1993 to determine whether inculpatory statements made by defendant during his arraignment on the original complaint are admissible, concluding they are not.

The arraignment on the original complaint occurred at about 5:10 p.m. on April 26, 1993, before a magistrate. The magistrate advised defendant of the charges against him and of his rights. The magistrate asked defendant whether he had retained counsel and defendant replied affirmatively, that he had retained Dennis Powers. The magistrate stated, "[h]e's not available to be here with you at this time, then, for the – this first appearance?" Defendant responded "no." The magistrate asked "But you have retained him?" and defendant answered "Yes, I have."

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

The special assistant prosecutor then asked for a million dollar bond stating that defendant was a continuing threat to the community and had confessed to all the crimes charged, and that there was a great risk of flight. The magistrate asked defendant if he had anything further to say, and defendant made the following inculpatory statement:

> Just that I -- I cooperated with police, and I didn't resist arrest at all. I did not intend to hurt anybody when I fired the shots, and I was not aiming at windows. It was just an accident that I hit the windows on the bus.

At the evidentiary hearing before the district court, attorney Dennis Powers testified that defendant's parents had retained him, and that he spoke to defendant at the Milford Police Department at approximately noon on the same day. Powers testified that he told defendant that he would appear with defendant at the arraignment, but in case there was a slip-up, defendant should let the court know that he had an attorney named Dennis Powers, and that normally the court would stop the proceedings in order to contact him.

Powers inquired when the arraignment was to be held by calling both the police and the court that day. Neither knew when the arraignment would be. Powers called the court clerk as late as 3:30 p.m. that day and was told that no paperwork had come in and that the court would close at 4:30 that day. Powers told the court clerk that he would wait in his office for a call regarding the arraignment until 6:00 p.m. that evening, and did so. Powers was never notified of the arraignment, which was held that afternoon at about 5:10 p.m. On cross-examination, Powers testified that after he requested to see defendant, the police had him wait until Police Chief Daly came in, that he and Chief Daly then "kibitzed," and that Daly knew that Powers was representing defendant. Chief Daly testified that he talked with Powers, but denied Powers told him that he was defendant's attorney.

The district court suppressed defendant's inculpatory statement as violative of his Sixth Amendment right to counsel. The district court stated that the proceedings should have stopped when the magistrate discovered that defendant had retained an attorney and that defendant's counsel should have been notified of the arraignment. An order dismissing the charges against defendant was entered.

Plaintiff appealed to the circuit court and a hearing was held on March 9, 1994. The circuit court affirmed the district court's dismissal of charges, stating:

> . . . I think the case turns on the fact that he had retained counsel. I would like to make, if you don't mind, a bit of a formal record, because I assume it's going to go up.
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> The defendant's parents secured counsel for him and Mr. Powers went to the Milford Jail to see his client. He spent an hour and a half there. Prior to seeing his client, defense counsel spoke to the Police Chief there. Counsel inquired about the arraignment, but there was no paper work. Counsel told his client if they brought him up for arraignment not to say anything, tell them who his counsel was and the arraignment would stop until his counsel got there.

And his attorney then went to a motion in another court, returned to his office at 3:30. He called the court, they told him there was no paper work yet and the court closed at 4:30. Counsel was in his office from that time until 6:00 p.m. and after six, the father called, wanting to know why the attorney hadn't been present at the arraignment.

And the problem was, was at the arraignment the defendant told the court who his counsel was and he answered the judge's questions and after the prosecutor talked about what a dangerous young man this defendant was, which I agree with, the judge asked the defendant if he had anything to say and then the defendant made an inculpatory statement.

What's even more interesting, is that the arraignment was held at 5:10 according to defense counsel, and the Magistrate was called back in after he went home and the defense counsel was not notified, however the media was. And the media was there in full force and a special prosecutor had been assigned to the case.

So I think that those particular facts are kind of critical when we talk about what happened at this arraignment and whether or not the fact that the defendant made inculpatory statements without the presence of counsel.

There were a lot of errors in this particular case and even though I agree that the fact is, is that most arraignments are not a critical stage, and that a magistrate soliciting neutral information would be held -- the Edwards standard would apply.

However, what we have here is a critical stage and the reason that it's a critical stage is because there was an attorney of record. That attorney of record made inquiry as to when the arraignment was. That attorney of record requested to be present at the arraignment. The attorney of record was not present at the arraignment. The defendant indicated who his attorney was and then there was an inculpatory statement as a result of an inquiry made.

And the fact that he was represented by counsel and counsel was not there makes it critical. And the fact that he made an inculpatory statement which would subject him to those type of dangerous [sic] inherent in those statements, makes it a critical stage.

And so, it is correct, an arraignment in most situations is not a critical stage of the proceedings. In this particular case it was and therefore, I would not overrule the opinion of the lower court.

An order affirming the district court's dismissal of charges against defendant was entered. This Court granted the prosecution leave to appeal.

II

In *People v Bender*, ___ Mich ___(Docket No. 102520, issued 7/23/96), the Supreme Court considered the issue whether a suspect's waiver of his rights to remain silent and to counsel is valid when the police fail to inform him, before he gives a statement, that a specific, retained attorney is immediately available to consult with him. The Court announced a rule requiring the police to inform a suspect that a retained attorney is immediately available to consult with him, and holding that failure to so inform him before he confesses precludes a knowing and intelligent waiver of his rights to remain silent and to counsel. Slip op at 1, 2 (opinion of Brickley, C.J.). The Court's rationale is instructive here:

> This case rather clearly implicates both the right to counsel (Const 1963, art 1, § 20) and the right against self-incrimination (Const 1963, art 1, § 17). I conclude that rather than interpreting these provisions, it would be more appropriate to approach the law enforcement practices that are at the core of this case in the same manner as the United States Supreme Court approached the constitutional interpretation task in Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966); namely by announcing a phrophylactic rule.
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> The right to counsel and the right to be free of compulsory self-incrimination are part of the bedrock of constitutional civil liberties that have been zealously protected and in some cases expanded over the years. Given the focus and protection that these particular constitutional provisions have received, it is difficult to accept and constitutionally justify a rule of law that accepts that law enforcement investigators, as part of a custodial interrogation, can conceal from suspects that counsel has been made available to them and is at their disposal. If it is deemed important that the accused be informed that he is entitled to counsel, it is certainly important that he be informed that he has counsel.
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> I agree that we invite much mischief if we afford police officers "engaged in the often competitive enterprise of ferreting out crime" the discretion to decide when a suspect can and cannot see an attorney who has been retained for the suspect's benefit. [Brickley, C.J., concurring, at 1-3.]

We recognize that *Bender* involved suspects who were unaware that counsel had been retained for them, while in the instant case, defendant had met with his retained counsel prior to being arraigned later that day. Nonetheless, defendant's retained counsel had made every effort to learn the time of the arraignment by calling the police department and the court, but to no avail. During defendant's arraignment that afternoon, counsel was sitting in his office waiting for a call informing him of the time of arraignment. There was evidence that the police and the court were both aware of the existence of retained counsel, counsel's desire to be present at the arraignment, and counsel's request for the necessary information regarding the time of the arraignment. There is no evidence before us of a valid waiver of defendant's right to counsel. Rather, defendant's family retained an attorney with whom

defendant spoke, and defendant informed the magistrate that he had retained counsel. Nonetheless, defendant was denied access to his retained counsel by the police and court's failure to notify him, as he had requested several times, of the time of defendant's arraignment. Under these circumstances, we cannot conclude that the circuit court erred in affirming the district court's dismissal of the charges.

Affirmed.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Edward M. Thomas