

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY FRAZIER MILES,

Defendant-Appellant.

UNPUBLISHED
October 15, 1996

No. 180242
LC No. 92-006734

Before: Reilly, P.J., and White, and P.D. Schaefer,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to rob while armed, MCL 750.89; MSA 28.284, assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of eighteen to forty years of imprisonment for his assault convictions to be served after he completes a two year prison term for his felony-firearm conviction. Defendant was given credit for sixteen days served. We affirm.

On May 11, 1992, at 12:25 a.m., the victim in this case was shot twice and beaten by two men who attempted to rob him. The victim testified that as he was standing by a phone booth, defendant and another person approached. Defendant had a chrome silver revolver and told the victim to give defendant everything the victim had or defendant was going to kill him. The victim unzipped his jacket as though he were going to comply, but instead he grabbed the gun held by defendant. A struggle lasting fifteen to twenty minutes ensued between defendant and the two men. After the second man pulled the victim away from defendant, defendant shot the victim twice. Defendant approached the victim as he sat in the street, threatened to kill him, pointed the gun at his head and pulled the trigger. The gun did not fire. The struggle continued, and defendant hit the victim in the head with the gun, breaking it. The struggle ended when a friend of the victim fired a gun in the air, and the victim went into a store.

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

Defendant argues that there was insufficient evidence presented at trial to establish that he was the perpetrator of the crimes. We disagree. The victim identified defendant as his assailant at a pretrial photographic identification procedure, a corporeal lineup, and at trial. Discrepancies between the victim's testimony at trial, at the preliminary examination, and the descriptions of the assailants that the victim provided to the police, went to the victim's credibility, which is an issue to be resolved by the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). Furthermore, defendant has failed to preserve his argument that his conviction was against the great weight of the evidence by moving for a new trial in the trial court. *People v Hughey*, 186 Mich App 585, 594; 464 NW2d 914 (1990).

Defendant next contends that he was denied the effective assistance of counsel by trial counsel's failure to move to suppress identification testimony on the ground that the photo identification was conducted while defendant was in custody. Because defendant failed to preserve this issue by moving for a new trial or evidentiary hearing, review is barred unless the deficiency is apparent on the record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). Subject to certain exceptions, identification by photograph should not be used "when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup." *People v Kurylczyk*, 443 Mich 289, 298 n 8; 505 NW2d 528 (1993). The record in this case does not substantiate defendant's claim that he was in custody on May 20, 1992, the date the photographic identification was made. An arrest warrant was issued on May 22, and a corporeal lineup and defendant's arraignment occurred on May 28, 1992. Although the possibility exists that defendant may have been in custody while the police were investigating the case and preparing the warrant, defendant has not established that this is the case. Accordingly, he has failed to establish the facts necessary to support his contention that his counsel made a serious error by failing to challenge the photographic array. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Moreover, the jury heard evidence concerning the corporeal lineup and the complainant identified defendant in court. Even if the photographic array could have been successfully challenged, we are not persuaded that defendant has established that he was prejudiced, e.g. that there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 314-327. In summary, defendant has not established either prong of the ineffective assistance of counsel test set forth in *Pickens*.

We also reject defendant's contention that the trial court erred by determining that there was an independent basis for the in-court identification by the complainant. An independent basis for an in-court identification need only be shown when the pretrial identification procedure is impermissibly suggestive or otherwise improper, *Kurylczyk, supra*, at 303. Because defendant does not challenge the suggestiveness of the corporeal lineup on appeal and has not established that the photographic array was improper, we conclude that the trial court did not clearly err by admitting the in-court identification testimony. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Defendant's remaining issues on appeal relate to his sentencing. Defendant initially contends that he should be resentenced because he did not meet with the probation department during the preparation of the presentence investigation report. We disagree. The report prepared for defendant's

August 30, 1994, sentencing incorporated the contents of a prior report prepared for defendant's original sentencing date of February 14, 1994. Defendant was interviewed during the preparation of the original report. Because a supplemental report updating the information contained in the initial report was prepared and defendant does not challenge the contents of the report, we conclude that the failure to re-interview him before sentencing does not necessitate resentencing. *People v Young*, 183 Mich App 146, 147-148; 454 NW2d 182 (1990).

Defendant next argues that resentencing is required because he was not provided an opportunity to review the presentence report and the trial court did not inquire whether the information in the report was accurate. Contrary to defendant's assertion on appeal, he did not state at sentencing that he had not reviewed the report, but rather indicated that he had not been interviewed by the probation department. The statements of defense counsel clearly indicate that he had reviewed and discussed the report with defendant. Defendant, however, correctly notes that the trial court failed to comply with MCR 6.425(D)(2)(a) by not determining on the record if defendant had the opportunity to review the presentence report. Nevertheless, defendant and his counsel were provided an opportunity to raise any issues with respect to the report and explain to the court any circumstances that they believed should be considered in sentencing. These are the rights that the court rule is designed to protect. *People v Johnson*, 203 Mich App 579, 586; 513 NW2d 824 (1994). Because defendant does not challenge the accuracy of the report and the rights protected by the court rule were not infringed upon, we hold that the failure to comply with the court rule does not necessitate resentencing.

Defendant next contends that the trial court failed to adequately explain its reasons for imposing the sentence. We disagree. Because the sentence imposed was within the guidelines range, the trial court sufficiently articulated its reasons for the sentence when it referred to the guidelines, and resentencing is not required. *In re Dana Jenkins*, 438 Mich 364, 375-376; 475 NW2d 279 (1991).

Defendant's final challenge to his sentence is that the court refused to give defendant credit for time spent in custody before trial. The record does not demonstrate that defendant is entitled to recomputation of credit. Defendant was on escapee status at the time of the present offense and was taken into custody by the Department of Corrections after his arrest on May 27, 1992. Defendant's first trial was in December, 1992, and ended in a mistrial. On January 9, 1993, bond was posted for defendant. This bond was continued after the jury returned its verdict following the second trial. Defendant failed to appear for sentencing on February 14, 1994. He was arraigned on a capias on August 15, 1994, and was ultimately sentenced on August 30, 1994. Defendant was given credit for May 27, 1992, and from August 15, 1994 to August 30, 1994. The record does not indicate with certainty whether defendant was incarcerated from the time of his arrest until January 9, 1993. The record also does not indicate whether the incarceration occurred "because of being denied or unable to furnish bond for the offense" of which he was convicted, MCL 769.11b; MSA 28.1083(2), or because of the unrelated offense for which he was on escapee status. To the extent that the incarceration was for an unrelated offense, defendant was not entitled to credit. *People v Heim*, 206 Mich App 439, 442-443; 522 NW2d 675 (1994). Because defendant has not demonstrated that the trial court's computation was inaccurate, he is not entitled to relief on this basis. However, this opinion does not

preclude defendant from bringing a motion for correction of the sentence by the trial court under MCR 6.429(A) if the credit was erroneously calculated.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Helene N. White

/s/ Philip D. Schaefer