

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN ISIAH LEWIS,

Defendant-Appellant.

---

UNPUBLISHED  
October 18, 1996

No. 169008  
LC No. 92-059208-FH  
92-059235-FH  
92-059127-FH  
92-059199-FH

Before: Michael J. Kelly, P.J. and O'Connell and K.W. Schmidt,\* JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305, two counts of defrauding another by false pretenses, MCL 750.218; MSA 28.415, two counts of knowingly using a financial transaction device without the owner's consent, MCL 750.157Q; MSA 28.354(16), and being an habitual offender with a previous felony conviction, MCL 769.10; MSA 28.1082. Defendant was sentenced to 8 to 22 1/2 years for each of the breaking and entering convictions, 3 1/2 to 15 years for each of the false pretenses convictions, and one to six years in prison for the illegal use of a financial transaction conviction. We affirm defendant's convictions, vacate his sentences and remand for resentencing.

I.

Defendant claims that he is entitled to a new trial because the trial court is unable to provide a complete transcript of his pretrial *Walker*<sup>1</sup> hearing where he challenged the voluntariness of his confession. Defendant's argument is twofold.

First, defendant argues that the trial court erred by failing to hold an evidentiary hearing to settle the record. We disagree. There is no requirement which mandates such a hearing. This case was remanded, by this Court, on its own motion, to the trial court for settlement of the record pursuant to

---

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

MCR 7.210(B)(2). This rule requires defendant to take certain action to settle the record. Defendant did not follow his procedure. Therefore, any error in the procedure used to settle the record was caused by defendant, and defendant may not allow an error to pass and seek redress in this Court. *People v Buck*, 197 Mich App 404, 423; 496 NW 2d 321 (1992). If defendant is dissatisfied with the trial court's action, it is the result of his inaction. Under the circumstances, we find the trial court's good faith effort to settle the record sufficient to comply with our remand order.

Second, defendant argues that the unavailability of the portion of the *Walker* hearing has denied him his right to effectively appeal the trial court's ruling.

The unavailability of a transcript does not automatically entitle a defendant to a new trial. *People v Drake*, 64 Mich App 671, 678-679; 236 NW 2d 537 (1975). This Court "must determine whether the unavailability of those portions of the transcript so impedes the enjoyment of the defendant's constitutional right to an appeal that a new trial must be ordered." *People v Audison*, 126 Mich App 829, 834-835; 338 NW 2d 235 (1983). To justify a new trial, defendant must show that he was prejudiced by the unavailability of the transcript. *Drake, supra*, at 679-680. "If the surviving record is sufficient to allow evaluation of defendant's claims on appeal, defendant's right is satisfied; the sufficiency of the record depends upon 'the questions which must be asked of it.'" *Id.* at 835, quoting *People v Wilson (On Rehearing)*, 96 Mich App 792, 797; 293 NW 2d 710 (1980).

In this case, defendant has failed to show how his appeal has been prejudiced by the unavailable transcript. He asserts no error which may be contained therein. Defendant has not posed any questions which must be asked of the missing transcript. Therefore, defendant has not been denied an effective appeal.

## II.

Next, defendant claims that he was denied the effective assistance of counsel by his trial counsel's failure to request a transcript of the *Walker* hearing prior to trial.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688 (1994), cert den sub nom *People v Caruso*, 513 US \_\_; 115 S Ct 923; 130 L Ed 2d 802 (1995).

In this case, defendant argues that defendant's confession was the prosecution's main piece of evidence, and defense counsels' cross-examination of the interviewing officers was flawed because he did not have a transcript of the *Walker* hearing available from which he could impeach the officers' testimony.

Even assuming that by failing to request the transcript, his counsel's preparation fell below an objective standard of reasonableness, defendant has offered no proof that, if his counsel did have the

transcript available, there is a reasonable probability that the result of the proceedings would have been different. Therefore, defendant's claim must fail.

### III.

Last, defendant claims that he is entitled to be resentenced because the trial court took no action when defendant alleged several inaccuracies in the presentence investigation report (PSIR).

Defendant challenged the accuracy of information in the presentence investigation report. MCR 6.425(D)(3) provides that if any information in the report is challenged, the court must make a finding with respect to the challenge, or determine that a finding is unnecessary. The trial court must correct or delete the challenged information in the report. *Id.* This procedure was not followed in this case. When MCR 6.425(D)(3) is not followed, the proper remedy is a remand for a clarification as to whether the challenged information played a role in the sentencing decision. *People v Landis*, 197 Mich App 217, 219 (1992). If the court determines that the information entered into the sentencing decision, the defendant is to be resentenced, and if the information played no part in the decision, the defendant's sentence is affirmed and the challenged information is deleted from the PSIR. *Id.*

However, in this case, the sentencing judge is no longer on the circuit court bench. Therefore, a remand for clarification as to whether the challenged information played a role in the sentencing decision is not possible. Because there is a possibility that the PSIR contained inaccurate information and there is no way to determine whether the challenged information played a role in the sentencing decision, defendant must be resentenced.

Defendant's convictions are affirmed, and his sentence is vacated. We remand for resentencing. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Peter D. O'Connell

/s/ Kenneth W. Schmidt

<sup>1</sup> *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).