STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK CARL JONES,

Defendant-Appellant.

UNPUBLISHED
November 8, 1996

No. 175784
LC No. 92-000712

Before: Gribbs, P.J., and Young and W. J. Caprathe,* JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury 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). Defendant was sentenced to two years for the felony-firearm conviction, to be followed by eight to ten years' imprisonment for armed robbery. We affirm.

First, defendant argues that the trial court erred in denying his motion to dismiss because the prosecution violated the 180-day rule, MCL 780.131(1); MSA 28.969(1)(1). We disagree.

MCL 780.131(1); MSA 28.969(1)(1) provides:

> Whenever the department of corrections shall receive notice that there is pending in this state any untried warrant, indictment, information or complaint setting forth against any inmate of a penal institution of this state a criminal offense for which a prison sentence might be imposed upon conviction, such inmate shall be brought to trial within 180 days after the department of corrections shall cause to be delivered to the prosecuting attorney . . . written notice of the place of imprisonment of such inmate and a request for final disposition of such warrant, indictment, information or complaint.

Generally, the 180-day period commences either (1) when the prosecutor knows the charged person is incarcerated or detained and awaiting incarceration; or (2) when the Department of Corrections knows

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

or has reason to know that a criminal charge is pending against an incarcerated or detained defendant. MCR 6.004(D)(1).

The 180-day rule requires the prosecutor to make a good faith effort during, and following, the 180-day period to proceed to prepare the case against the inmate for trial. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). The prosecutor must justify any delay, *People v Wolak*, 153 Mich App 60, 64; 395 NW2d 240 (1986), and demonstrate that the case was diligently prosecuted. *People v Farmer*, 127 Mich App 472, 477-478; 339 NW2d 218 (1983); *People v Forrest*, 72 Mich App 266, 279; 249 NW2d 384 (1976). Any delay that is attributable to the defendant can negate a violation of the 180-day rule. *People v Crawford*, 161 Mich App 77, 83; 409 NW2d 729 (1987).

The 180-day period began to run on May 18, 1992, when a writ was issued to the Department of Corrections for defendant's arraignment in circuit court. We find that the prosecutor proceeded in good faith to bring defendant to trial within 180 days of this date. Although the case was reassigned to new judges on two occasions, seven of the delays were attributable to defendant. While defendant was not ultimately brought to trial until March 1994, we find no violation of the 180-day rule. Therefore, the trial court did not err in denying defendant's motion for dismissal.

Moreover, we find defendant's argument that the trial court acknowledged a violation of the 180-day rule by granting him personal bond pursuant to MCR 6.004(C) in lieu of dismissing the charges against him to be without merit. The trial court's action in this regard has no bearing on whether the prosecution made a good faith effort to bring defendant to trial.

Next, defendant asserts that his due process rights were violated by an impermissibly suggestive identification procedure used at his preliminary examination. We disagree.

We review the lower court's decision to admit identification evidence for clear error. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). Erroneously admitted identification testimony warrants reversal only when the error is not harmless beyond a reasonable doubt. *People v Winans*, 187 Mich App 294, 299; 466 NW2d 731 (1991). To find an improper admission of identification testimony harmless, it (1) must be "so offensive to the maintenance of a sound judicial system that it never can be regarded as harmless," and (2) must be harmless beyond a reasonable doubt. *Id.* First, as discussed below, the identification of a defendant at the preliminary examination out of a group of three men is not so offensive to the judicial system that it cannot be considered harmless. Moreover, in light of another witness' identification of defendant, we find that any error in the identification procedure to be harmless beyond a reasonable doubt.

However, we find that the identification of defendant by the witness at the preliminary examination was not improperly suggestive. At the preliminary examination, defendant moved to adjourn so that a line up could be held. The motion was denied. Defendant, a black man, was directed to join five other prisoners sitting in the jury box. Three of these prisoners were white men and two

were black men. The witness was asked to look around the courtroom and to indicate whether she saw the man who robbed her. She identified defendant.

We reject defendant's argument that the fact that the witness was told that defendant was sitting in the jury box with the other prisoners rendered the identification procedure impermissibly suggestive. See *People v Larry*, 162 Mich App 142, 155; 412 NW2d 674 (1987). We also do not agree with defendant's assertion that the racial composition of the men necessarily requires that we find the procedure impermissibly suggestive. In order to establish that physical discrepancies tainted an identification procedure, the defendant must show that the differences were apparent to the witness and substantially distinguished him from the other men in the jury box. *People v Kurylczyk*, 443 Mich 289, 312; 505 NW2d 528 (1993). Defendant has failed to establish that there were physical disparities between him and the other two black prisoners that substantially distinguished them and that were apparent to the identification witness. Further, there is no requirement as to the number of people that must be placed with a defendant for identification purposes, only that the procedure be fair and not impermissibly suggestive. Moreover, any height disparities between the black men in the group were substantially remedied by conducting the identification while they were seated. Defendant has failed to carry his burden of establishing that the identification procedure was impermissibly suggestive. *People v McElhaney*, 214 Mich App 269, 286; 545 NW2d 18 (1996).

Defendant argues that his convictions must be reversed the trial court erred in allowing the prosecution to introduce the preliminary examination testimony of a witness in lieu of her appearance at trial. We disagree.

Former testimony of a witness may be admitted at a later proceeding if that witness is unavailable to testify and the party against whom the testimony is being offered had an opportunity to cross-examine the witness at the time the testimony was given. MRE 804(b)(1). The witness is deemed unavailable for the later proceeding if she is absent from the proceeding and the party seeking to admit her statement used due diligence to procure the witness' attendance. MRE 804(a)(5). The burden is on the party seeking to admit the statement to demonstrate that a reasonable, good-faith effort was made to secure the presence of the witness at trial. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). While we review the admission of former testimony for an abuse of discretion, a finding that the proponent of the testimony exercised due diligence is a factual finding that will not be set aside absent clear error. *Id*.; MCR 2.613(C).

Here, the trial court's determination that the prosecution made a diligent, good faith effort to locate the witness was not without justification and was not error. At the preliminary examination, the prosecutor and detective instructed the witness to stay in touch with them. The detective contacted the witness by telephone shortly after the preliminary examination and although she had previously said she would probably be moving to New York, she made no further indications of possible unavailability.

For a period of three months prior to trial, the detective attempted to find the witness by a number of means; by the LIEN for her driver's license in Michigan and New York, by contacting people at her last known address and employment, and by contacting the post office seeking a

forwarding address. The trial court's finding of due diligence was based upon evidence of a reasonable good faith effort and the admission of the former testimony of the unavailable witness was not error. Furthermore, we note that other evidence (which included eye witness testimony of a fellow employee of the unavailable witness) was overwhelming.

Finally, defendant argues that the trial court erred by denying his motion to suppress evidence found by police in their search of his vehicle without a warrant because the stop of his vehicle was pretextual. We disagree. The trial court's decision following a suppression hearing will not be reversed unless it is clearly erroneous. *People v Massey*, 215 Mich 639, 641; 546 NW2d 711 (1996).

Where police officers have "'reasonable suspicion' that crime is afoot" they may make a valid investigatory stop. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). Reasonable suspicion, which is something less than probable cause, involves more than an "inchoate or unparticularized suspicion." *Id.* To justify a valid investigatory stop, the officer must have an objective manifestation based on the totality of the circumstances that the person stopped was or was about to be engaged in criminal activity; there must be a particularized and objective basis for the suspicion. *Id.* at 98-99.

An exception to the warrant requirement allows a full search of the entire passenger compartment of an automobile once police have made a lawful arrest of its occupant. *People v Catanzarite*, 211 Mich App 573, 581; 536 NW2d 510 (1995). Our Supreme Court has recently summarized the basis upon which a valid arrest may be made:

> an arresting officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." MCL 764.15; MSA 28.874. Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. [*People v Champion*, *supra* at 115.]

However, police officers may not use an arrest or stop as a pretext to search for evidence of a crime. *People v Haney*, 192 Mich App 207, 209; 480 NW2d 322 (1991). When, without the reasonable suspicion necessary to support a stop of a person, the officer uses a minor violation to stop and search, the stop is a mere pretext. *Id.*

The trial testimony reveals that, in response to a police bulletin, an officer positioned himself a short distance from the scene of the armed robbery and on a logical escape route. Within minutes of the incident, the officer spotted defendant, who matched the physical description given by the witnesses, traveling on the escape route toward a freeway. When the officer followed his vehicle, defendant looked furtively in his review mirror at the patrol car. The officer also indicated that defendant's vehicle had a broken tail light. Defendant was pulled over.

Defendant stopped his car and got out, putting his hand into his pocket as he walked toward the officers. The search of defendant revealed a large amount of money in his pocket. Defendant was

informed that he was a suspect in an armed robbery and placed in the patrol car. The officers looked through the windows of defendant's vehicle and saw a duffel bag and blue hooded sweatshirt. The officers had been told that the suspect was wearing a blue hooded sweatshirt. In the search of defendant's vehicle, the officers found a .38 caliber, five shot revolver under the sweatshirt. The gun matched the description of the weapon used in the robbery. Defendant was arrested.

We find that the trial court did not abuse its discretion in denying defendant's motion to suppress the evidence. Based on the information made available to the officer through the police bulletin and defendant's matching the description of the suspect, there existed a reasonable suspicion for the stop of defendant. Once the officers saw the hooded sweatshirt matching the description of that worn by the suspect, there existed additional support for a finding of probable cause to arrest defendant, and the search of defendant's vehicle immediately before his arrest was justified. *Champion*, *supra* at 115-116; *People v Arterberry*, 431 Mich 381, 383-384; 429 NW2d 574 (1988).

Affirmed.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe