

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD CUNNINGHAM,

Defendant-Appellant.

UNPUBLISHED

December 27, 1996

No. 186984

LC No. 94 011401

Before: Corrigan, P.J., and Sullivan* and T.G. Hicks,** JJ.

MEMORANDUM.

Defendant appeals by right his bench trial conviction of unlawfully driving away an automobile, MCL 750.413; MSA 28.645,¹ and his plea to being a habitual offender, fourth offense, MCL 769.12; MSA 28.1084. We affirm.

Defendant contends that the evidence against him was insufficient because witness Kline was not given the opportunity for a pre-trial identification and only identified defendant at trial. We disagree. That Kline did not identify defendant at a pretrial lineup did not make his later in-court identification of defendant inadmissible. *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995). Instead, Kline's identification of defendant was a credibility issue that properly was before the trier of fact. *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996); *Barclay, supra*.

In any event, Kline had an independent basis upon which to identify defendant. *People v Kurylczyk*, 443 Mich 289; 505 NW2d 528 (1993), *People v Kachar*, 400 Mich 78; 252 NW2d 807 (1977). Our Supreme Court in *Kachar, supra*, set forth factors that courts should use in determining whether an independent basis exists. Although Kline had not worked with defendant at the taxi company, Kline may have seen defendant before trial -- Kline's trial testimony was ambiguous on this point. Kline, however, twice had observed defendant driving the stolen cab. On the first occasion, Kline spoke with defendant. The length of time between Kline's identification and the trial was only five months. Kline had no earlier opportunity to identify defendant in a line-up, and did not identify another

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

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

person as the perpetrator. The facts of this case do not present an example of a “critical situation” where Kline’s perception or emotions would have been affected when he saw defendant driving the stolen cab. See *Kachar, supra* at 95-96. Under those circumstances, viewing the evidence in a light most favorable to the prosecution, *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994), sufficient evidence established Kline’s identification of defendant.

Affirmed.

/s/ Maura D. Corrigan

/s/ Joseph B. Sullivan

/s/ Timothy G. Hicks

¹ Defendant’s appellate counsel mistakenly referred to defendant’s conviction of receiving and concealing stolen property, MCL 750.535; MSA 28.803. The trial court, however, dismissed that charge.