STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL PHILLIPS,

Defendant-Appellant.

UNPUBLISHED
February 7, 1997

No. 185889
Recorder's Court
LC No. 94-008967

Before: Cavanagh, P.J., and Reilly, and C.D. Corwin,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life in prison without parole for the murder conviction and to the mandatory two-year sentence for the felony-firearm conviction. We affirm.

First, defendant argues that he was denied effective assistance of counsel because he was denied the opportunity to have retained counsel at the preliminary examination and because there was no opportunity for his appointed counsel to be prepared for the examination. MCR 6.005(E)(3) provides that "if the defendant wants to retain a lawyer and *has the financial ability to do so,* the court must allow the defendant a reasonable opportunity to retain one." (Emphasis added.) Defendant's statements to the court before the preliminary examination indicated that he did not have the financial ability to retain counsel at that time. Defendant also indicated that it would take "a couple of weeks" until "we get the other $5,000 together" before the attorney of his own choosing could take over his defense. An indefinite delay until defendant was able to obtain the necessary finances was outweighed by the public's interest in the prompt and efficient administration of justice. See *People v Krysztopaniec,* 170 Mich App 588, 598; 429 NW2d 828 (1988). Therefore, we conclude that defendant was not improperly denied the opportunity to retain counsel for the preliminary examination. We need not reach the merits of his argument that prejudice is presumed where a defendant is denied counsel of his choosing.

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

Upon a thorough review of the record, we also conclude that defendant has not demonstrated that defense counsel's performance fell below an objective standard of reasonableness, or that there is a reasonable probability that, but for counsel's alleged deficiencies in representing defendant at the preliminary examination, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Next, defendant argues that he was denied due process when this Court denied his motion for remand for an evidentiary hearing. We disagree. Remand under MCR 7.211(C)(1)(a) is discretionary. *People v Hernandez*, 443 Mich 1, 15; 503 NW2d 629 (1993). In this case, this Court denied defendant's motion because defendant failed to meet the threshold required under the court rule.[1] If defendant believes that this Court's determination was in error, he may appeal to the Supreme Court on that basis. However, we decline defendant's invitation to reexamine the correctness of this Court's prior ruling under the guise of assessing a due process claim.

Defendant further contends that he was denied due process and a fair trial when the magistrate denied defendant a continuance of the preliminary examination and the opportunity to retain counsel of his own choosing. We disagree. Consistent with our disposition of defendant's first issue on appeal, we conclude that the trial court did not abuse its discretion in refusing to delay the preliminary examination indefinitely until defendant was able to procure retained counsel of his own choosing.

Defendant also asserts that the trial court's refusal to allow defense counsel to question a police officer regarding the officer's method of questioning defendant's children denied defendant his right to due process and the opportunity to fully present his defense. We disagree. The trial court's ruling only precluded defense counsel from asking a police officer about statements contained in the preliminary complaint report regarding the version of events provided by defendant's two children who were witnesses. The court concluded that the report was inadmissible as hearsay. Matters which are observed and reported by police officers do not fall within an exception to the hearsay rule. MRE 803(8). The children's statements as set forth in the report presented the problem of hearsay within hearsay. Although defense counsel argued to the trial court that the report was not hearsay because it was being offered for the state of mind of the officer, we agree with the court that the officer's state of mind was irrelevant. Absent an abuse of discretion, we will not disturb a trial court's decision whether to admit evidence. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). We find no abuse of discretion in this case.

Finally, defendant argues that he was denied due process when the trial court denied his request for an *in camera* competency examination of the child witnesses and instead conducted a perfunctory inquiry in open court. We disagree. Every person is presumed competent to be a witness unless the court finds after questioning that the person "does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably." MRE 601. A child witness' competency to testify is governed by MCL 600.2163; MSA 27A.2163, which provides, in pertinent part:

> Whenever a child under the age of 10 years is produced as a witness, the court

> shall by an examination made by itself publicly, or separate and apart, ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify.

A court may conduct a competency examination of a child witness in chambers. *People v Washington,* 130 Mich App 579, 582; 344 NW2d 8 (1983). However, it is not error for a court to conduct a competency examination of a child witness in front of the jury. *People v Houghteling,* 183 Mich App 805, 809; 455 NW2d 440 (1991). Absent an abuse of discretion, we will not reverse a trial court's decision to permit a child witness to testify. *People v Coddington,* 188 Mich App 584, 597; 470 NW2d 478 (1991). We find no abuse of discretion in the trial court's manner of assessing the competency of the children nor in the decision to allow them to testify.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin

[1] This Court's order of December 21, 1995 states:

> The Court orders that the motion to remand is DENIED because defendant has failed to identify an issue sought to be reviewed on appeal and demonstrated by affidavit or an offer of proof that the facts to be established at a hearing, MCR 7.211(C)(1)(a)(ii); and defendant has failed to demonstrate that the issue should initially be decided by the trial court. MCR 7.211(C)(1)(a)(i).