

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN DARRYL FULBRIGHT,

Defendant-Appellant.

UNPUBLISHED

May 23, 1997

No. 190611

Oakland Circuit Court

LC No. 94-135938 FC

Before: Corrigan, C.J., and Young and M.J. Talbot*, JJ.

MEMORANDUM.

After a jury trial, defendant was convicted as charged of armed robbery, whereupon he pled guilty to being a fourth offender, receiving a sentence of only 5 to 20 years imprisonment. On this appeal of right, defendant contends that the victim was improperly allowed to identify defendant at trial after a suggestive field identification that, defendant asserts, occurred in violation of defendant's right to counsel. Although no motion for a *Wade-Gilbert* hearing, as required since *People v Childers*, 20 Mich App 639, 646; 174 NW2d 565 (1969), was filed by defendant in the trial court, he contends that under the plain error doctrine this Court should nonetheless reverse his conviction. This case is being decided without oral argument pursuant to MCR 7.214(E).

Inasmuch as the victim's face-to-face confrontation with the male robber was protracted and occurred during daylight hours, there is no evidence to indicate that the field identification, even if unduly suggestive, was such as to have irreparably tainted the subsequent in-court identification, which would appear to have been completely independent of this secondary confrontation. In any event, when defendant was detained for the field identification, the police had only a general description of the robbers and had not recovered the stolen kerosene heater from defendant's possession, and thus the police lacked the "very strong evidence" which would preclude a field identification without obtaining counsel for defendant. *People v Miller*, 208 Mich App 495, 502; 528 NW2d 819 (1995). *Miller* has been deprived of precedential force, 450 Mich 955; 547 NW2d 646 (1995). Even if it was wrongly decided, *Miller*, like the defendant at the bar, did not preserve the issue for appellate review. The

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

Michigan Supreme Court thus effectively held that defendant waived consideration of the issue on the merits.

Affirmed.

/s/ Maura D. Corrigan
/s/ Robert P. Young, Jr.
/s/ Michael J. Talbot