STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW R. MAGNUS,

Defendant-Appellant.

UNPUBLISHED
August 26, 1997

No. 191128
Lenawee Circuit Court
LC No. 95-6414-FC

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He appeals as of right and we affirm.

Defendant first argues that the trial court erred in denying his motion for a *Walker*[1] hearing, and in relying instead upon the findings of the district court judge on this issue. We acknowledge the tension between *People v Talley,* 410 Mich 378, 391; 301 NW2d 809 (1981), which held that a trial court may not rule on a defendant's motion to suppress based solely on the "cold record prepared at the preliminary examination," and MCR 6.110(D)(1), which provides that a party is not precluded from moving for and obtaining a determination in the trial court of a motion to admit or exclude evidence based on "a prior evidentiary hearing." Given that the court rule was adopted in 1989—well after *Talley* was issued—we must infer that the bright-line rule established in *Talley* has now been questioned by our Supreme Court. Moreover, on the facts of this case, we find no error. In moving to suppress the statements in the trial court, defense counsel filed a memorandum brief in which he conceded that the suppression hearing in the district court was "proper" and that he had "inadvertently . . . asked for a *Walker* hearing in the trial court, when in fact, defense counsel desires that this court review the District Court decision denying suppression of statements made by Defendant." Defendant was accorded the relief he sought. See *People v Futrell,* 125 Mich App 568, 571; 336 NW2d 834 (1983) (*Talley* hearing was unnecessary where there was a "sufficiently complete stipulation of facts" on which the trial court was able to decide the motion to suppress); *People v Armendarez,* 188 Mich

App 61; 468 NW2d 893 (1991) (same). Accordingly, on these facts, defendant has not established entitlement to appellate relief on this basis.

Defendant next argues that his police statement should have been suppressed because it was involuntary and given without *Miranda*[2] warnings. We disagree. The issue of whether a statement was made voluntarily is a question of law for the court's determination. *People v Jobson,* 205 Mich App 708, 710; 518 NW2d 526 (1994). In reviewing a trial court's findings, this Court reviews the entire record and makes an independent determination; however, this Court gives deference to the trial court's findings unless they are clearly erroneous. *Id.*

Miranda warnings need only be given in cases involving custodial interrogation. *People v Anderson,* 209 Mich App 527, 532; 531 NW2d 780 (1995). "Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody." *Id.* Because the record indicates that defendant was told that he was not under arrest and that he could leave at any time, that he was not handcuffed, and that he voluntarily agreed to speak with the investigating officers, we conclude, under the totality of the circumstances, that defendant was not in custody at the time he made the incriminating statement. See *People v Mayes,* 202 Mich App 181, 190; 508 NW2d 161 (1993). Accordingly, *Miranda* warnings were not required. Further, because defendant was not under custodial interrogation, we find no merit to his claim that the statement should have been suppressed because he requested an attorney. See *People Crusoe,* 433 Mich 666, 685; 449 NW2d 641 (1989).

Finally, defendant argues that he was denied a fair trial because the trial court's instructions regarding the lesser offenses of voluntary manslaughter and involuntary manslaughter were incomplete and incorrect. Given that defendant did not object below to the instructions given by the court, relief will be given on appeal only if necessary to avoid manifest injustice to the defendant. *People v. Van Dorsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993). We find no manifest injustice in this case. Although defendant is correct that the trial court's instructions regarding voluntary manslaughter were incomplete (i.e., omitting the element of adequate provocation), the court's instructions regarding involuntary manslaughter were consistent with the standard jury instruction. See CJI2d 16.11; *People v Fiedler,* 194 Mich App 682, 693; 487 NW2d 831 (1992). Nonetheless, given that defendant's theory at trial was that the shooting was committed in self-defense, an instruction on involuntary manslaughter was not supported by the evidence. In *People v Heflin,* 434 Mich 482; 456 NW2d 10 (1990), the Michigan Supreme Court considered whether the trial court's refusal to instruct on involuntary manslaughter was error where the defendant argued self-defense to the jury:

> In our opinion, a significant difference exists between requiring the plaintiff to prove a negative element and a situation in which the defendant concedes that he intentionally killed the victim, but argues that he had a legal justification for doing so. In the instant case, defendant could have required the prosecutor to prove that the defendant had the requisite mens rea for murder either by not conceding as much or arguing in the alternative. He chose not to do so. Rather, he chose to concede an element in order to proceed with his sole ground for defense. He cannot now seek reversal on the basis of

> the trial court's refusal to instruct the jury on an offense inconsistent with the evidence and defendant's theory of the case. Thus, the trial court properly refused to give the requested [involuntary manslaughter] instruction because the entire basis of defendant's defense consisted of self-defense. [*Id.* at 499 (opinion of Riley, C.J.).]

Moreover, because the jury convicted defendant of voluntary manslaughter, despite the fact that the court apparently omitted the element of provocation from the jury instruction on that offense, we conclude that any error was harmless.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] *Miranda v Arizona*, 484 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).