STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 29, 1997
v ANTHONY JAMES BRIGHT, Defendant-Appellant.	No. 187084 Macomb Circuit Court LC No. 94-000590-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ANTHONY JAMES BRIGHT, Defendant-Appellant.	No. 195467 Macomb Circuit Court LC Nos. 94-000516-FC; 94-000551-FC; 94-000726-FC; 94-000835-FC

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Defendant was charged with multiple counts and tried in two separate jury trials. Defendant appeals from the convictions resulting from both trials. The appeals have been consolidated for decision. We affirm in part, and reverse and remand in part.

In Docket No. 187084, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1) and MCL 750.529; MSA 28.797, assault with intent to rob while armed, MCL 750.89; MSA 28.284, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to mandatory life imprisonment without the possibility of parole and life imprisonment for the murder and conspiracy convictions, respectively and twenty to forty years' imprisonment for the

assault conviction. In addition, he received two terms of two years' consecutive imprisonment for the felony-firearm convictions.

In Docket No. 195467, defendant was convicted of one count of conspiracy to commit armed robbery, MCL 750.157a, MCL 529, six counts of armed robbery, MCL 750.529, and six counts of felony-firearm, MCL 750.227b. Defendant was sentenced to seven concurrent terms of twenty-five to fifty years' imprisonment for the robbery and conspiracy convictions, plus six terms of two years' imprisonment for the felony-firearm convictions, to be served concurrently to each other and consecutive to the other sentences.

I

Defendant first argues the trial court abused its discretion in refusing to appoint him new counsel in the murder case. We disagree.

A trial court's decision regarding the substitution of appointed counsel is within the trial court's discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). While an indigent defendant is guaranteed the right to counsel, he is not entitled to counsel of his choice simply by requesting his appointed counsel be replaced. *Id*. The appointment of substitute counsel at public expense is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Id*. Good cause exists where there is a legitimate difference of opinion between a defendant and his counsel regarding a fundamental trial tactic. *Id*.

In the murder case, defendant twice requested his appointed counsel be replaced. When defendant first moved for substitution of counsel, it was apparent he did not show good cause when his primary complaint involved his counsel's lack of preparation. At that time counsel did not have all necessary materials available to him and little time had passed since the criminal proceedings against defendant commenced.

In defendant's second request for a change of counsel, he again failed to establish good cause for the appointment of new counsel. Defendant claimed his counsel did not have a defense prepared and that they constantly argued. Defendant failed to explain what defense his counsel did not prepare for trial. Furthermore, defense counsel admitted he had personality differences with defendant, but he did not believe his ability to represent defendant was affected by these differences. From the record available, counsel performed all requested services for defendant, including filing motions defendant wanted the trial court to decide. Defendant failed to show there was a difference of opinion with his counsel regarding a fundamental trial tactic or that his counsel was unable to properly represent defendant.

While defendant also requested the trial be delayed so a new attorney his family was attempting to retain for him would have time to prepare, that attorney declined to represent defendant. The court was presented adequate information upon which to make its decision. An evidentiary hearing was not required. The trial court did not abuse its discretion in failing to appoint new counsel.

II

In both the murder and robbery cases, defendant moved to suppress evidence obtained as a result of a search of his family's home. During the search, the police located a .380 semiautomatic handgun that was linked to the murder of the victim in the first case and was also identified by the robbery victims as similar to the gun used in those crimes. The gun was found by the police in defendant's brothers' bedroom, hidden in a laundry hamper. Defendant argued the search warrant was not issued based upon probable cause. He also argued his arrest was not based upon probable cause. We disagree with both arguments.

The prosecutor first argues defendant lacked standing to challenge the seizure of the gun because the gun was found in a bedroom occupied by defendant's brothers, not by defendant. While this issue was not raised before the trial court, we will address the merits.

Standing to challenge a search is not automatic. A person must have a special interest in the area searched or the article seized in order to have standing. *People v Jordan*, 187 Mich App 582, 589; 468 NW2d 294 (1991). To establish standing, a defendant must demonstrate that, under the totality of the circumstances, there existed a legitimate personal expectation of privacy in the area or object searched. Further, the defendant must show his expectation is one society accepts as reasonable. *People v Lombardo*, 216 Mich App 500, 504-505; 549 NW2d 596 (1996). The defendant bears the burden of proving standing as a result of a personal expectation of privacy. *Id.*, p 505.

While the gun linked to these crimes was found in defendant's brothers' bedroom, there was no evidence this bedroom was restricted to only certain family members. There was no evidence that defendant did not have full access to all rooms in the family's flat. We therefore conclude that defendant has standing to challenge the search of his entire home, including his brothers' bedroom.

Defendant argues that the search warrant was not supported by probable cause and that it was error for the magistrate to issue the warrant. When reviewing a decision to issue a search warrant, the reviewing court must read the search warrant and the affidavit in a common-sense and realistic manner. Deference is afforded the magistrate's decision because of the preference for searches conducted pursuant to warrants. A reviewing court must insure there is a substantial basis for the magistrate's conclusion there is a fair probability contraband or evidence of a crime will be found in a particular place. *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995).

A search warrant may not be issued unless justified by probable cause. *People v Sloan*, 206 Mich App 484, 486; 522 NW2d 684 (1994). Probable cause to search must exist at the time a warrant is issued. *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992). Probable cause exists when a person of reasonable caution would be justified in concluding evidence of criminal conduct could be found in a stated place to be searched. *Id.*

Reading the affidavit as a whole and in a common-sense manner, we hold the police had probable cause to search defendant's home because both defendant and one of his brothers were

identified as suspects in a series of robberies. The police also received a tip that identified defendant as a suspect in the murder case. Surveillance of defendant verified he was acquainted with the other suspect in the shooting and that they lived next door to one another. Defendant also met the physical description of one of the suspects in the shooting. These facts, taken together, provided the police with probable cause to search defendant's home for evidence related to these crimes.

Defendant also argues the affidavit offered in support of the warrant contained false information. Apparently, the false information to which defendant refers is a statement in the affidavit that he was identified by a witness as a suspect in another robbery of a convenience store when his brother was eventually charged with that offense. The evidence at the evidentiary hearing was that the police were unaware the eyewitness' identification was inaccurate at the time the warrant was issued. Defendant therefore did not meet his burden in showing the affidavit contained intentionally or negligently false statements. *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Stumpf, supra*.

Defendant next argues there was no probable cause to arrest him immediately after the search of his family's residence. However, a police officer may arrest without a warrant if a felony has been committed and the officer has probable cause to believe that the person being arrested committed it. MCL 764.15(1)(c); MSA 28.874(1)(c). Probable cause to arrest exists if the facts available to the officer at the time of arrest would justify a fair-minded person of average intelligence to believe the suspected person has committed a felony. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); *People v Richardson*, 204 Mich App 71, 78-79; 514 NW2d 503 (1994).

The evidence, considered together, provided the police with probable cause to arrest defendant. As a result of the search of defendant's home, the police found defendant's jacket and the gun found in defendant's brother's bedroom matched the descriptions of items used in the homicide and robberies. This information also verified the tip the police received that defendant, along with his neighbor, was involved in the fatal shooting. Compare *People v Thomas*, 191 Mich App 576, 579-580; 478 NW2d 712 (1991).

III

Defendant next argues the trial court erred in admitting into evidence the statement he gave to police after he was taken into custody. The statement included an admission by defendant that he shot the victim in the murder case, but that the shooting was accidental. We find no error in the trial court's decision.

This Court decides if a defendant's statement was voluntary independent of the trial court's decision as a question of law. *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995), remanded for reconsideration on other grounds 453 Mich 973 (1996); *People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994). However, where there are disputed questions of fact regarding the credibility of the witnesses, this Court will defer to the trial court's findings based upon its superior ability to evaluate such matters. *People v Young, supra*.

Defendant concedes he voluntarily spoke with the police because he wanted to learn why he was being held. Nothing in the circumstances of the questioning discloses defendant was coerced into making a statement. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). In fact, at the evidentiary hearing, defendant did not challenge the voluntariness of his statement. Instead defendant denied making a statement admitting to accidentally shooting the victim. This is a different issue from the voluntariness of a statement. *People v Neal*, 182 Mich App 368, 371; 451 NW2d 639 (1990). Furthermore, the trial court found defendant did not assert his right to counsel during the interview. That finding is not clearly erroneous. MCR 2.613(C).

Defendant also argues his statement should be excluded because it was not recorded. However, this Court has previously held the traditional means for testing witnesses' recall of events, such as cross-examination and impeachment, are adequate to test statements made by defendants. *People v Eccles*, 141 Mich App 523, 524-525; 367 NW2d 355 (1984). This issue was not raised by defendant in the trial court. Without the benefit of a record, we are unable to determine whether recording defendant's statement would have been possible. We decline to accept defendant's invitation to adopt a standard requiring that custodial statements be recorded. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995).

IV

Defendant next argues he was improperly convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and one count of felony-firearm, MCL 750.227b; MSA 28.424(2), when the jury also convicted him of felony murder. We agree.

The prosecution's theory was defendant committed felony murder in the course of attempting to commit armed robbery. The prosecution separately charged defendant with assault with intent to rob while armed because the robbery was never completed. Defendant was also charged with two counts of felony-firearm for using a gun to commit the assault and the murder. The jury was instructed to consider the offense of attempted armed robbery to decide if defendant committed felony murder.

Under the state constitution, a defendant may not twice be placed in jeopardy for a single offense. Const 1963, art 1, § 15; *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Convictions and sentences for both felony murder and the underlying felony constitute multiple punishments for the underlying offense and thereby violate double jeopardy protections. *Minor, supra*.

On the facts of this case, there was only one predicate offense, assault with intent to rob while armed. Attempted armed robbery is a necessarily lesser included offense of assault with intent to rob while armed, *People v Bryan*, 92 Mich App 208, 225; 284 NW2d 765 (1979) see also *People v Patskan*, 387 Mich 701, 713-714; 199 NW2d 458 (1972), and was included within or subsumed by defendant's conviction for assault with intent to rob while armed. Accordingly, defendant could not be convicted of both assault with intent to rob while armed, the predicate felony and felony murder. Defendant's conviction for assault with intent to rob while armed, and the sentence imposed thereon, must be vacated. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996).

Likewise, the felony-firearm conviction dependent upon the assault conviction must also be vacated. *People v Passeno*, 195 Mich App 91, 97; 489 NW2d 152 (1992).

V

We reject defendant's contention the trial court abused its discretion in failing to appoint new counsel in the robbery case. *People v Mack, supra*. There was no evidence counsel was not adequately prepared for trial. While counsel was not familiar with all of the details from the first case, he was familiar with defendant's coconspirator's, prior testimony. Defendant's motion appears to have been nothing more than a delaying tactic. No error occurred

VI

Defendant next argues he was twice subject to prosecution and punishment, contrary to the Double Jeopardy Clause of both the state and federal constitutions, when he was tried on a count of conspiracy to commit armed robbery in both the murder case and the robbery case. He contends there was only one conspiracy and that it encompassed all crimes committed in both cases. We believe defendant has waived any claim of error.

Defendant's argument primarily addresses the protection against successive prosecutions. The double jeopardy clauses of both the federal and state constitutions protect a defendant from twice being placed in jeopardy for a single offense through successive prosecutions. US Const, Am V; 1963 Const, art 1, §15. The purpose of this protection is to avoid overreaching by the prosecution. *People v Spicer*, 216 Mich App 270, 272; 548 NW2d 245 (1996).

On the facts of these cases, defendant has waived his claim regarding a double jeopardy violation. Defendant failed to request joinder of all conspiracy charges in the murder case. In fact, defendant asked the trial court to exclude any evidence related to the robberies when the prosecution wanted to introduce the evidence of other crimes to show the entire conspiracy encompassed all crimes in both cases. Defendant's request to limit the evidence in the first case was essentially a request for the trial court to sever the conspiracy count into two separate charges so that the jury in the murder case would not hear evidence that defendant participated in four other armed robberies. Similarly, the jury in the robbery case did not hear evidence defendant was involved in shooting a robbery victim. The rule against successive prosecutions does not apply where a defendant requests separate trials on related offenses. *People v Webb*, 128 Mich App 721, 728; 341 NW2d 191 (1983), overruled in part by *People v Kelley*, 433 Mich 882; 446 N.W.2d 821(1989); *People v White*, 390 Mich 245, 258 n 8; 212 NW2d 222 (1973), overruled in part by *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984).

Furthermore, a claim of double jeopardy regarding successive prosecutions may be waived if not raised before or during trial. *People v Charles Johnson*, 62 Mich App 240, 243; 233 NW2d 246 (1975). Defendant was aware the robbery case was pending against him when he asked the trial court to limit the evidence in the murder case to only those acts in the conspiracy that involved the homicide.

Thus, defendant waived his right against successive prosecutions when he asked the court to limit the evidence in the first trial and he did not move to join all conspiracy charges into one count.

In addition, in light of his request to exclude evidence of the other robberies in the murder case, defendant agreed he could be tried on two factually separate conspiracies. Thus, defendant agreed the facts showed two separate conspiracies and may not now claim he was subject to more punishment than the Legislature intended. *People v Mezy*, 453 Mich 269, 277, 284-285; 551 NW2d 389 (1996) (Opinion of Weaver, J.); *People v Lugo*, *supra*.

VII

Finally, defendant argues there was a clerical error made in the judgment of sentence in one of the robbery cases. We agree.

Defendant was convicted in the second trial of one count of conspiracy to commit armed robbery. However, in the judgments of sentence prepared in both LC Nos. 94-000726-FC and 94-000835-FC, defendant is shown as being convicted of conspiracy to commit armed robbery in each case, for which he was sentenced to terms of twenty-five to fifty years' imprisonment. Because the trial court's judgment of sentence in LC No. 94-000726-FC does not accurately reflect the jury's verdict, the trial court is ordered to file an amended judgment of sentence reflecting defendant's conviction of two counts of armed robbery and two counts of felony-firearm. Defendant's conspiracy conviction should be reflected on the judgment of sentence in LC No. 94-000835-FC.

In Docket No. 187084, defendant's convictions and sentences for felony murder, conspiracy to commit armed robbery and one count of felony-firearm are affirmed. Defendant's convictions and sentences for assault with intent to rob while armed and one count of felony-firearm are vacated. Upon remand of the record, the trial court is ordered to prepare a new judgment of sentence deleting reference to the assault and one of the felony-firearm convictions and sentences.

In Docket No. 195467, defendant's sentences and convictions are affirmed. Upon remand of the lower court record, the trial court is ordered to prepare an amended judgment of sentence in LC No. 94-000726-FH deleting defendant's conviction and sentence for conspiracy.

We do not retain jurisdiction.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.