

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN WILLIAM VINCENT,

Defendant-Appellant.

UNPUBLISHED

December 2, 1997

No. 178009

Charlevoix Circuit Court

LC No. 93-031208

ON REMAND

Before: Reilly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant pleaded guilty, pursuant to a plea agreement, to armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant appealed as of right to this Court, raising the issue of the proportionality of his sentence and raising issues relating to his waiver from juvenile court. In an order denying a motion for remand, a panel of this Court struck issues I and II from defendant's brief because no application for leave to appeal was filed and granted with regard to those issues¹. In the order, the panel noted that appeal on those issues could "only be by application for leave to appeal." This panel subsequently issued a memorandum opinion affirming defendant's sentence. The Supreme Court, on defendant's application, remanded the case to this Court "for issuance of an opinion which further explains the court's conclusion regarding whether the defendant has an appeal of right in this case from the waiver decision of the probate court." We have concluded that defendant does not have an appeal of right in this case with regard to the issues of the probate court's waiver of jurisdiction. Accordingly, we concur with the prior decision of this Court striking Issues I and II of defendant's brief on appeal.

Following hearings in probate court, defendant was waived to circuit court. He appealed the probate court order to the circuit court, and while the appeal was still pending in circuit court, his guilty plea was taken and he was sentenced. Thereafter, the circuit court ruled on the appeal and upheld the probate court's decision waiving jurisdiction². In his appeal of right to this Court regarding his sentence, defendant raised issues relating to the probate court's waiver of jurisdiction. We properly declined to hear those issues.

Review of the probate court's order waiving jurisdiction is governed by the statutes and court rules pertaining to appeals. *People v Jackson*, 171 Mich App 191, 195; 429 NW2d 849 (1988). MCL 600.863; MSA 27A.863 provides:

(1) Except when prohibited by statute, a person aggrieved by an order, sentence, or judgment of the probate court . . . may appeal from that order, sentence, or judgment to the circuit court in the county in which the order, sentence, or judgment is rendered. An interlocutory appeal under this subsection shall be by application and not as a matter of right.

(2) *An appeal to the court of appeals from a judgment entered by the circuit court on an appeal from the probate court under subsection (1) shall be by application.* [emphasis added.]

MCR 7.203(A)(1)(a) provides:

(A) The court [of appeals] has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) A final judgment or final order of the circuit court, court of claims, and recorder's court, except a judgment or order of the circuit court or recorder's court

(a) on appeal from any other court or tribunal . . .

MCR 7.203(B)(2) states:

The court [of appeals] may grant leave to appeal from:

(2) a final judgment entered by the circuit court or the recorder's court on appeal from any other court. . .

Pursuant to statute and court rule, defendant was required to obtain a grant of leave to appeal from the circuit court's ruling, which upheld the probate court's waiver of jurisdiction. He did not do so.

We are mindful that this Court earlier made a contrary statement in dicta in *People v Mahone*, 75 Mich App 407, 411; 254 NW2d 907 (1977). In *Mahone*, the defendant never sought review before the circuit court and thus, this Court did not provide a remedy. However, in a footnote, this Court stated:

We note, however, that a defendant who does invoke circuit-court review of a waiver order may, upon his later conviction, raise anew the propriety of waiver in his appeal of right before this Court. . . . We read MCL 701.45a(3); MSA 27.3178(45.1)(3) . . . as requiring an appeal "by application" in cases where a juvenile seeks interlocutory appeal (prior to his trial as an adult) of a circuit court order affirming the decision to waive. [*Id.* at 411 n 2.]

MCL 701.45a(3); MSA 27.3178(45.1)(3), referred to above, was repealed by 1978 PA 543 § 1. The relevant portion was replaced by MCL 600.863; MSA 27A.863, which is quoted above. Although the language of the two statutes is similar, we do not find any authority that would allow us to read MCL 600.863; MSA 27A.863 as providing an exception to the rule that a party appealing a judgment of the circuit court on appeal from the probate court needs to file an application for leave. MCR 7.203 similarly does not provide for such an exception. We realize that in other cases, notably *People v Williams*, 111 Mich App 818; 314 NW2d 769 (1981) and *People v Schumacher*, 75 Mich App 505; 256 NW2d 39 (1977), the defendants raised the issue of the probate court's waiver of jurisdiction in their appeals as of right. However, we believe that jurisdiction in those cases was improper in light of the controlling statute and court rule, and we believe that hearing those claims as of right subverts the statutory scheme. See *People v Billington*, 116 Mich App 220, 230; 323 NW2d 343 (1982).

In addition, we note that the prosecutor did not need to seek a waiver by the probate court at all. Therefore, whether the probate court properly decided to waive defendant to circuit court is a non-issue. The circuit court had jurisdiction to hear and determine the armed robbery under the automatic waiver statute, MCL 600.606; MSA 27A.606. In *People v Veling*, 443 Mich 23, 27; 504 NW2d 456 (1993), the Court stated:

[W]e hold that the *circuit courts have jurisdiction* to sentence juveniles charged with enumerated offenses [those offenses listed in MCL 600.606; MSA 27A.606] but convicted of nonenumerated lesser included offenses and *to try and sentence juveniles charged with both enumerated and nonenumerated offenses arising out of the same criminal transaction*. [emphasis added.]

Defendant was not entitled to appeal as of right from the circuit court's order on his appeal from the probate court.

/s/ Maureen P. Reilly
/s/ Harold Hood
/s/ Roman S. Gribbs

¹ *People v Vincent*, unpublished order of the Court of Appeals, entered October 3, 1996 (Docket No. 178009).

² In making the plea bargain, defendant retained his right to continue his pending appeal to the circuit court from the probate court.