

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DETRICK HENDERSON,

Defendant-Appellant.

UNPUBLISHED

April 27, 1999

No. 203308

Recorder's Court

LC No. 96-006865

Before: Hood, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

The trial court convicted defendant, following a bench trial, of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant, a juvenile at the time, as an adult to fifteen to sixty years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant now appeals as of right. We affirm defendant's convictions, but we vacate his sentences and remand for further proceedings.

I. Basic Facts And Procedural History

In mid-August 1996, Larial Hill was shot and killed as he was walking with his aunt and two cousins on a street in Detroit. After the shooting, Hill's aunt pointed defendant out to police officer Julian Sage of the Detroit Police Department and Sage arrested defendant. At trial, several witnesses identified defendant as the shooter. In addition, an expert in forensic chemistry did a laboratory analysis on the gunshot residue test that had been performed on defendant and determined that defendant had gunshot residue on his hands at the time the test was administered.

During the trial and after a defense witness testified, but before the defense called another witness, defense counsel asked the trial court for a five-minute recess. The trial court stated that it would grant a twenty-minute break. Defense counsel then asked the trial court, "[y]our Honor, could there be an opportunity as we are drawing to a close of our case that I can talk with the defendant as well as his mother?" The trial court responded, "[w]hoa. Talk to the officers. They say no. They're too short in manpower." When the trial resumed, the defense called its witness to testify. After the

witness testified, the trial court recessed the trial from 12:00 p.m. until 3:18 p.m. to take up other unrelated matters. At 3:18 p.m. the trial court stated, “[l]et’s continue with the trial,” and defense counsel responded, “[y]our Honor, at this time we don’t wish to present any further witnesses, your Honor.”

After defendant’s conviction, he appeared before the trial court for sentencing. The trial court found that the offense was of an extremely serious nature. The trial court also stated that defendant continuously told different people different stories regarding his drug use. The trial court expressed its concern that there would not be enough time to rehabilitate defendant if he were sentenced as a juvenile and that the investigators’ reports did not state that defendant could be rehabilitated in five years. The trial court also stated that the background information that was provided to the investigator for the presentence investigation report was false.

The prosecutor concedes on appeal that the trial court “did not make factual findings [as] to each of the relevant criterion” under MCL 769.1(3); MSA 28.1072(3). Arguably, the trial court made findings on defendant’s character, the seriousness of the offense, that defendant is likely to be dangerous to the public if released at the age of twenty-one, and the best interest of the public welfare and the protection of society. The trial court, however, did not make factual findings as to whether the offense was part of a repetitive pattern which would lead to defendant not being amenable to treatment or that defendant was likely to disrupt the rehabilitation of other juveniles in a juvenile treatment program. The trial court also did not make factual findings regarding whether defendant is more likely to be rehabilitated by the services of the juvenile or adult programs and procedures.

II. Standard Of Review

A. Opportunity To Consult With Counsel

This Court reviews constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). Where an error is of constitutional dimension, “the prosecution bears the burden of establishing the error is harmless beyond a reasonable doubt.” *People v Levine*, 231 Mich App 213, 228; 585 NW2d 770 (1998).

B. Sentencing

“This Court reviews a trial court’s findings of fact under a ‘clearly erroneous’ standard, while the trial court’s ultimate decision to sentence defendant as an adult is reviewed for an abuse of discretion.” *People v Dilling*, 222 Mich App 44, 52; 564 NW2d 56 (1997).

III. Opportunity To Consult With Counsel

Defendant argues that the trial court denied him his right to assistance of counsel by refusing to allow counsel and defendant to consult during the mid-trial recess. We disagree.

The right to assistance of counsel is fundamental. US Const, Am VI; Const 1963, art 1. The United States Supreme Court stated in *Geders v United States*, 425 US 80; 96 S Ct 1330; 47 L Ed

2d 592 (1976), that a defendant's Sixth Amendment right to counsel was violated when a defendant, on the eve of his cross-examination, was forbidden from consulting with his attorney during the overnight recess. This Court has stated that "[t]he purpose of prohibiting an attorney and defendant from consulting during recesses is to deter impropriety. The fear is that testimony will be fabricated in light of the testimony already given." *People v Igaz*, 119 Mich App 172, 178; 326 NW2d 420 (1982), vacated on other grounds 418 Mich 893 (1983). This Court also stated that "under the present state of the law the balance must be struck in favor of preserving the right to counsel, even where a short recess is involved." *Id.* at 179.

Here, however, we are not confronted with a situation where the trial court denied defendant his right to consult with his attorney during the forty-eight minute recess. The request by defense counsel was to meet with defendant *and defendant's mother*. The trial court denied that request because there was a shortage of security personnel available. Defense counsel did not thereafter request to meet with defendant alone, and the trial court did not prohibit defense counsel from meeting with defendant alone. The trial court did not deny defendant his right to counsel during the short recess, but merely denied a meeting with defense counsel with defendant's mother present.

Further, we conclude that any error was harmless beyond a reasonable doubt. *Levine, supra*, 231 Mich App 228. Defendant had three witnesses testify on his behalf before the recess began. When the recess ended, forty-eight minutes later, defendant called an additional defense witness. After that witness testified, there was a three hour and eighteen minute break. Defendant does not argue that he was denied assistance of counsel during this break. Therefore, because defendant had ample opportunity to confer with his counsel during an extended break prior to resting his case, any error was harmless beyond a reasonable doubt.

IV. Sentencing

Defendant argues that the trial court failed to make sufficient findings of fact regarding the statutory elements to sentence defendant, a juvenile, as an adult. We agree.

MCL 769.1(3); MSA 28.1072(3), as in force at the time of the crimes of which defendant was convicted, provided:

A judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the juvenile and the public would be served by placing the juvenile on probation and committing the juvenile to a state institution or agency . . . , or by imposing any other sentence provided by law for an adult offender. The rules of evidence do not apply to a hearing under this subsection. In making this determination, the judge shall consider the following criteria giving each weight as appropriate to the circumstances:

(a) The prior record and character of the juvenile, his or her physical and mental maturity, and his or her pattern of living.

(b) The seriousness and the circumstances of the offense.

(c) Whether the offense is part of a repetitive pattern of offenses which would lead to 1 of the following determinations:

(i) The juvenile is not amenable to treatment.

(ii) That despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to disrupt the rehabilitation of other juveniles in the treatment program.

(d) Whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public if released at the age of 21.

(e) Whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.

(f) What is in the best interests of the public welfare and the protection of the public security.^[1]

This Court in *People v Hazzard*, 206 Mich App 658; 522 NW2d 910 (1994), found that although “the trial judge made a number of piecemeal findings that were potentially relevant to the statutory criteria, the trial court did not make complete, detailed findings with respect to each of the requisite factors as required under MCR 6.931(E)(3) and (4).” *Id.* at 660. This Court in *Hazzard* went on to find that it did not appear from that record that “the trial court attempted to weigh the relevant factors in any meaningful way at the sentencing hearing.” *Id.* at 661. Due to the trial court’s failure in *Hazzard* to make complete, detailed findings with respect to each of the requisite factors or to weigh those factors in a meaningful way, this Court found that the trial court’s decision to sentence defendant as an adult constituted an abuse of discretion. *Id.*

As noted above, arguably, here the trial court made findings on defendant’s character, the seriousness of the offense, that defendant is likely to be dangerous to the public if released at the age of twenty-one, and that sentencing defendant as an adult would be in the best interest of the public welfare and the protection of society. However, the trial court failed to make factual findings as to whether the offense was part of a repetitive pattern which would lead to defendant not being amenable to treatment or whether defendant was likely to disrupt the rehabilitation of other juveniles in a juvenile treatment program. The trial court also failed to make factual findings regarding whether defendant is more likely to be rehabilitated by the services and facilities of juvenile or adult programs and procedures.

Therefore, because the trial court failed to make specific and detailed findings of fact regarding each of the statutory factors, we vacate defendant’s sentences and remand for further proceedings to determine whether defendant should be sentenced as a juvenile or as an adult. *Hazzard, supra*, 206

Mich App 661. In light of our resolution of this issue we need not address defendant's remaining sentencing issues.

We affirm defendant's convictions, vacate his sentences, and remand for further proceedings to determine whether defendant should be sentenced as a juvenile or as an adult. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Donald E. Holbrook, Jr.

/s/ William C. Whitbeck

¹ Although MCL 769.1; MSA 28.1072 has been substantially revised, this is the version of section 3 in effect when the instant offenses were committed.