

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH LEON SHELBY,

Defendant-Appellant.

UNPUBLISHED

August 4, 2000

No. 214499

Wayne Circuit Court

Criminal Division

LC No. 94-005602

Before: Murphy, P.J., and Kelly and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of assault with intent to rob while unarmed, MCL 750.88; MSA 28.283, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

An endorsed *res gestae* witness, Andrea Stevenson, did not appear at defendant's trial. Asserting that due diligence had been exercised to secure the witness, the prosecution sought to introduce her preliminary examination testimony. The trial court granted the request, and relied on the testimony in finding defendant guilty.

Defendant appealed (Docket No. 188001), and another panel of this Court remanded the matter to the trial court for an evidentiary hearing. This Court ordered that if Stevenson could not be produced at the hearing, and if the prosecution could not establish that due diligence was exercised at the time of trial to produce her, defendant was to be granted a new trial.

On remand, the prosecution failed to produce Stevenson for the hearing. The officer in charge of the case at the time of the original trial testified as to his efforts to locate Stevenson at that time. The trial court found that at the time of trial, due diligence was exercised to produce Stevenson; therefore, a new trial was not warranted.

Due diligence is the attempt to do everything that is reasonable, but not everything that is possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430

NW2d 790 (1988). The test is one of reasonableness, and depends on the facts and circumstances of each case. The trial court's determination will not be set aside absent an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

Defendant argues that he is entitled to a new trial because the prosecution did not exercise due diligence to produce Stevenson at the time of trial. We disagree and affirm defendant's conviction. The test of due diligence is one of reasonableness, and depends on the facts of each case. The test is whether diligent, good-faith efforts were made to procure the testimony of a witness, and not whether more expansive and stringent efforts would have in fact produced the witness. *Id.* The evidence showed that Stevenson appeared at defendant's preliminary examination only because she had been arrested pursuant to a bench warrant. She disappeared after giving that testimony. The efforts made by the officer in charge to locate Stevenson for trial included visiting her last known address, which was found to be abandoned, checking the post office and finding that no change of address form had been filed, contacting her parents, who were cooperative but did not know her current whereabouts, checking local hospitals only to find that she was not a patient in any of them, and contacting local law enforcement agencies, only to find that she was not incarcerated. The officer had no leads as to Stevenson's location; therefore, he had no ground on which to broaden his search for her. *Cf. Id.*, 689-690 (no due diligence where officer failed to follow up on solid lead as to the witness's location). Defendant's assertion that due diligence was not exercised because the officer did not take steps such as appearing at Stevenson's last known address in the middle of the night, checking local schools to determine if Stevenson's children were enrolled, and ascertaining if Stevenson received public assistance, is without merit. Stevenson's last known address was clearly abandoned. Appearing there in the middle of the night would have been a futile act. Moreover, defendant's assertion that a check of the schools or the public assistance rolls would likely have yielded positive results is wholly speculative. Given the circumstances, the trial court's conclusion that the prosecution exercised due diligence to produce Stevenson at the original trial did not constitute an abuse of discretion. *Id.*, 684. A new trial was not warranted.

Affirmed.

/s/ William B. Murphy

/s/ Michael J. Kelly

/s/ Michael J. Talbot