

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW FREDDIE SMITH, a/k/a
JAMES ARTHUR SMITH,

Defendant-Appellant.

No. 53297

Motion to Withdraw
(Bench trial)

TO: Judges
FROM: Tim Sanderson
DATE: December 15, 1981; for submission January 19, 1982.

COMMISSIONER'S REPORT

FACTS:

Grand Ledge attorney Robert J. Robinson seeks leave of this Court to withdraw from defendant's bench trial conviction of larceny in a building, MCL 750.360; MSA 28.592, for the reasons:

"1. That he has thoroughly reviewed the record and transcripts in this case.

"2. That said record and transcripts reveal that the Defendant-Appellant was, after being afforded a trial wherein he was represented by counsel, convicted of violating MCLA 750.360; MSA 28.592 by the Honorable Hudson E. Deming, Circuit Judge.

"3. That a review of the trial transcript reveals that the Circuit Judge found, as the trier of fact, that the People had proven the Defendant-Appellant's guilt beyond a reasonable doubt.

"4. That a review of the records pertaining to sentencing reveals that the Court set the sentence within the statutory limits.

"5. That a review of the records and transcripts of this case reveals no meritorious issues which could be raised on behalf of Defendant-Appellant, Andrew Freddie Smith." (Motion, ¶¶ 1-5)

The motion to withdraw has been filed in substantial compliance with the practice of this Court adopted from Anders v California, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967).

On June 26, 1980, Eaton County Circuit Court Judge Hudson E. Deming sentenced defendant to a consecutive term of from 1-1/2 to 4 years imprisonment.

Defendant timely petitioned for appointment of appellate counsel and Bean, Robinson & Bean was appointed in an order

dated August 5, 1980. Attorney Robinson thereafter timely filed a claim of appeal on August 25, 1980.

After some delay in obtaining the transcript including a show cause against the court reporter subsequently dismissed upon the filing of the transcript, the motion to withdraw followed on June 22, 1981. Proof of service disclosed that the appropriate pleadings were served upon the prosecution and defendant by mail on June 30, 1981. The Clerk's office sent the standard Anders letter in June, 1981. From what can be gathered from the file of this Court, defendant was apparently on parole and the Anders letter was returned to the Clerk's office. The Clerk's office resent the standard Anders letter to defendant to his new address on July 17, 1981. Thereafter, on July 20, 1981, defense counsel served copies of the motion to withdraw, brief in support and notice of hearing upon defendant by mail at his new address.

As of this writing, no answer has been received from defendant.

Counsel does not formally state any issues for review. The issue, however, before the Court is:

ISSUE:

SHOULD THE MOTION TO WITHDRAW BE GRANTED BECAUSE THE COURT FINDS AFTER A FULL EXAMINATION OF ALL THE PROCEEDINGS THAT THE APPEAL IS WHOLLY FRIVOLOUS AND SHOULD DEFENDANT'S CONVICTION BE AFFIRMED?

FINDINGS:

No non-frivolous issues are found. Therefore, it is recommended that the motion to withdraw be granted, that defendant's conviction be affirmed and that the order be stayed for 30 days in the customary fashion to provide defendant with an opportunity to file a response which will be treated as a rehearing, defendant having filed no answer.

DISCUSSION:

In a complaint and warrant dated March 12, 1980, defendant was charged with the crime of larceny in a building. It was alleged on the previous day that defendant committed the crime at Meijer's, Inc., by stealing one ladies Timex watch which belonged to Meijer's.

A preliminary examination was held in the 56th District Court on April 2, 1980. Defendant was represented by counsel at the preliminary examination.

Briefly, the magistrate at a preliminary examination may bind a defendant over to circuit court for trial if it appears from the proofs that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging defendant with the crime. It does not require that the examining magistrate find the guilt of the defendant established beyond a reasonable doubt. The prosecution must show at a preliminary examination that the offense charged has been committed and there must be evidence on each element of the crime charged or evidence from which those elements may be inferred. The standard on review is that the reviewing court should not disturb the determination of the magistrate unless a clear abuse of discretion has been demonstrated, in other words, while the reviewing court may not agree with the findings of the magistrate, it has no right to substitute its judgment for that of the magistrate except in a case of clear abuse of discretion. People v Doss, 406 Mich 90 (1979).

The elements of larceny in a building are: (1) an actual or a constructive taking of goods or property; (2) a carrying away or asportation; (3) the carrying away must be with felonious intent; (4) the subject matter must be the goods or the personal property of another; (5) the taking must be without the consent and against the will of the owner, and (6)

the taking must be done within the confines of the building. People v Wilbourne, 44 Mich App 376 (1973). It is not necessary that the property be removed from the building. People v Patricia Williams, 63 Mich App 531 (1975).

Following the preliminary examination, defendant was bound over for trial in circuit court. From a review of the preliminary examination transcript, suffice it to say at this point that evidence was presented on each element of the crime charged or evidence from which those elements could be inferred and the proof established that an offense not cognizable by justice of the peace had been committed and there was probable cause for charging the defendant with the crime. Consequently, the examining magistrate did not clearly abuse his discretion in binding defendant over for trial.

It should also be noted that at the outset of the preliminary examination, counsel for defendant moved for a change of venue from Eaton County to Ingham County on the basis that defendant felt that since he was a black person and that there were very few black people in Eaton County he would obtain a fair trial in Ingham County.

The examining magistrate asked defense counsel whether he did not think himself that defendant could not get a fair trial in Eaton County. Defense counsel responded that defendant had asked him to make the motion and he was making it on defendant's behalf. The examining magistrate denied the motion indicating that the people in Eaton County and the jurors were not prejudiced against black people and in fact thought that if anything, they were partial to black people since that seemed to be the result of trials the examining magistrate had seen in his court.

No error is perceived in the denial of the motion for change of venue. In the first place, since the decision to grant

or deny a motion for change of venue is entrusted to the discretion of the trial judge whose decision will not be reversed absent a clear abuse of discretion, People v Dixon, 84 Mich App 675 (1978), and inasmuch as the trial court may defer a determination and request for a change of venue until an attempt has been made to select a jury, People v Thomas, 86 Mich App 752 (1978), the motion for change of venue should have been addressed to the trial court rather than to the examining magistrate. Second, the burden is on defendant to show undue influence or that the jurors had a preconceived opinion. People v Dixon, supra. Here, there was only the bear allegation by defense counsel. Third, as will be discussed, defendant waived his right to a jury trial thereby rendering the change of venue motion on the ground of juror prejudice moot.

Circuit court docket entries indicate that defendant was arraigned in circuit court on May 1, 1980, on the charge of larceny in a building and a not guilty plea was entered. A pretrial conference was held May 16, 1980, before Judge Deming. A transcript of the pretrial is in the lower court file.

The following inter alia occurred at the pretrial. Counsel for defendant indicated that he had just talked to defendant about the jury trial and that defendant indicated he wanted to waive a jury trial and was "now" signing the form. The written waiver appears at the end of the pretrial statement form filed in this case and stated:

"If a jury trial is to be waived, Defendant will so indicate below over his signature.

"I do hereby waive a jury for the trial of this cause, and request that it be tried before a Judge of this Court without a jury.

Dated: 5-18-80

/s/ Andrew F. Smith "
Defendant

Later in the pretrial proceedings, after determining that defendant was 28 years of age and had attended the 10th grade, the court asked defendant whether he was aware of the fact he was entitled to have a trial before 12 citizens of the county and defendant responded, "Yes". When asked whether he did not want to have a trial before 12 citizens of the county, defendant responded, "Yes, sir." and further when asked by the court whether he wanted "just me" to determine whether or not he was innocent or guilty, defendant indicated that the foregoing was correct.

At trial, Judge Deming inquired of defendant once again whether defendant wanted to have the hearing before the court and not before a jury and defendant indicated the foregoing was correct.

It appears that defendant properly waived his right to a jury trial.

At the time of the pretrial and trial in this case, MCL 763.3; MSA 28.856 provided:

"In all criminal cases arising in the courts of this state whether cognizable by justices of the peace or otherwise, the defendant shall have the right to waive a determination of the facts by a jury and may, if he so elect, be tried before the court without a jury. Except in cases cognizable by a justice of the peace, such waiver and election by a defendant shall be in writing signed by the defendant and filed in such cause and made a part of the record thereof. It shall be entitled in the court and cause and in substance as follows: 'I,....., defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which said cause may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury.'

.....
Signature of defendant.
"Such waiver of trial by jury must be made in open court after the said defendant has been arraigned and has had opportunity to consult with counsel."

The statute is in derogation of common law and must be strictly construed. There must not only be a written waiver but also an oral waiver in open court at or before trial. People v Rimmer, 59 Mich App 645 (1975).

Here, there was a written waiver as quoted above in open court, i.e., at the pretrial before Judge Deming. Although

the written waiver does not contain the specific language of the statute, it is submitted that the language of the written waiver substantially complied with the statutory requirement. While the written waiver does not specifically state that the waiver is voluntary as indicated by the suggested language of the statute, there is nothing in the transcript at pretrial or at trial to indicate the waiver was other than voluntary. Finally, as indicated, defendant orally waived the right to jury trial at trial in this case.

Additionally, at the pretrial conference, counsel for defendant indicated that since defendant had waived a jury trial the change of venue motion based upon the inability to obtain a jury of defendant's peers, i.e., black individuals, would be moot. Further, defendant stated to the court that he had no objection since apparently talking with the court and to his counsel. Defendant also indicated that the motion for change of venue would not be filed.

Additionally at the pretrial, counsel for defendant indicated he would file a motion to indorse one Don Kill as a res gestae witness. According to defense counsel at the pre-trial, Mr. Kill was a fellow employee of defendant, drove defendant to Meijer's, gave defendant a form for a courtesy card at Meijer's to take in while he (Mr. Kill) ran another errand nearby then came back to pick up defendant and then was supposed to pick up defendant afterwards and go back to the barber shop where both were employed. In response to an inquiry from the court, the prosecution indicated it would subpoena Mr. Kill to determine whether or not he was a res gestae witness. The trial court indicated that a Robinson hearing would be held at trial to determine whether or not Mr. Kill was a res gestae witness. The lower court file indicates that the prosecution subpoenaed Mr. Kill for trial. At

trial, defense counsel indicated that with the understanding Mr. Kill would be called as a defense witness, a Robinson hearing would be waived. Mr. Kill was called as a witness at trial by the defense as was defendant.

Although additional matters were covered at the pretrial, nothing rises to the level which would merit any discussion.

The bench trial was quite short. All of the witnesses indorsed on the information were called by the prosecution. The witnesses were employees of Meijer's and consisted of the manager of the photo and jewelry department, two store detectives and the home improvement manager. As indicated, the defense called Mr. Kill and defendant.

Rather than detailing the testimony, the findings by the trial court are attached to this report as Appendix "A".

GCR 1963, 517.1 provides, inter alia, that in all actions tried upon the facts without a jury the trial court must find the facts specially and state separately its conclusions of law and direct entry of the appropriate judgment. It is sufficient by the terms of the rule if the court makes a brief, definite and pertinent findings and conclusions upon contested matters without over elaboration of detail or particularization of facts.

The purpose of special findings of fact in non-jury criminal cases is to aid appellate review and there are no simple rules as to the sufficiency or specificity required in findings made by a trial court. People v Robert Jackson, 63 Mich App 249 (1975).

Nonetheless, the Court in People v Jackson, supra, continued, quoting from the author's comments in Honigman & Hawkins, Mich Court Rules Annotated:

"The findings must disclose the basis for each ultimate fact necessary to sustain the court's conclusions of law. But a mere recital of the conclusory facts which constitute the elements of the cause of action or defense will often be too general and not specific enough.

* * *

"The findings of fact must include as much of the subsidiary facts as is necessary to disclose the steps by which the trial court reached its ultimate conclusion on each factual issue. The findings should be made at a level of specificity which will disclose to the reviewing court the choices made as between competing factual premises at the critical point that controls the ultimate conclusion of fact. That is, at the point where a given choice as to the concrete facts leads inevitably to the ultimate conclusion, the findings should disclose the choice which was made, so that the appellate court may test the validity of its evidentiary support." 63 Mich App 253.

Further, this Court on appeal will only reverse the trial court findings of fact if the findings are clearly erroneous. Even though some statements in the findings may be clearly erroneous, this Court must look at all the findings to place the erroneous statements in proper context. People v Anderson, 64 Mich App 218 (1975). A finding is clearly erroneous if when although there is evidence to support the finding the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. Tuttle v Department of State Highways, 397 Mich 44 (1976).

From a reading of the bench opinion by the trial court attached to this report as Appendix "A", it is readily apparent that the findings met the requisite specificity. From a reading of the trial transcript not only was there evidence to support the findings by the trial court, this writer is not left with a definite and firm conviction that a mistake was committed. Nonetheless, the opinion by the trial court could be nit-picked.

For example, defense counsel stated it was the theory of the defense that either Mrs. Williams or Miss Baker or Mr. O'Donnell placed the watch in defendant's pocket. The trial court failed to mention Mr. O'Donnell in this regard. However, placing the omission in context, it is clear that the trial court simply did not believe defendant's theory and thus the omission of Mr. O'Donnell is irrelevant. Further, defendant's testimony would support the statement by the trial court that

it was defendant's position either Mrs. Williams or Miss Baker placed the watch in his pocket when he was being patted down by Mr. O'Donnell.

Further, in going through the elements of the crime as set forth on p 3-4of this report, the trial court did not specifically indicate that the property was taken against the will of Meijers. However, since defendant was stopped by Meijer's security personnel, it is readily apparent that the taking was against the will of Meijer's. All of the other elements were adequately covered by the bench opinion.

Two other issues apparent from the record should be mentioned.

First, there was testimony both at the preliminary examination and at trial concerning other potential res gestae witnesses. At the preliminary examination, Miss Baker, the store detective, testified that when defendant was followed out of the store, there were baggers outside the door. Defense counsel stated he needed the names of the baggers and the witness responded she did not know the names but knew Mr. O'Donnell the home improvement manager walked out "with us." The witness also admitted that there were some baggers at work in the lot which were standing in the parking lot when defendant was stopped. It should be noted that O'Donnell was called as a witness at trial but no baggers were called as witnesses at trial. At trial, witness Baker again indicated that baggers were "standing out there" when defendant was stopped but they did not come back inside the store and the baggers most likely assumed "It was a shoplifter. That--that's about it." The witness also indicated that she never talked with any of the baggers about the case and did not know their names.

Conceivably, the baggers were res gestae witnesses which has been defined as an eyewitness to some event in the

continuum of a criminal transaction and whose testimony would aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense. People v LeFlore, 96 Mich App 557 (1980).

It is well settled that the prosecution has an affirmative duty to indorse all such witnesses on the information and to produce them at trial. People v LeFlore, supra.

However, if the prosecution does not comply with its duty, it is the responsibility of the defendant to move for a hearing during trial or for a new trial prior to seeking appellate review. Normally the failure to move for either will foreclose the issue on appeal unless absent review manifest injustice would result. People v LeFlore, supra.

Assuming the baggers were res gestae witnesses, defendant did not move for a hearing during trial for indorsement of these witnesses nor has moved for a new trial. Thus, appellate review is foreclosed under the circumstances of this case since not only did the witness not know the names of the baggers, they would have been unable to have added anything to the defense that Meijer's personnel placed the watch in defendant's pocket, apparently after defendant was returned to the store. In short, it does not appear that manifest injustice resulted by not indorsing any baggers who simply may have seen defendant stopped in the parking lot.

The second issue which should be mentioned is concerned with the watch taken by defendant which was admitted into evidence both at the preliminary examination and at trial. There was no objection by defense counsel at either proceeding to the admission of the watch.

The watch was properly admitted and there was no ineffective assistance of counsel for the failure to object to the admission or move for the suppression of the watch from evidence. Admission of evidence obtained by a private individual not

acting under authority of the state is not prohibited whether the actions were reasonable or not. People v DeLeon, 103 Mich App 225 (1981).

Here, there is no contention or indication that the private store detective who seized the watch from defendant's coat pocket was acting under the authority of the state. Therefore, whether the action by the store detective was reasonable or not is irrelevant and the watch was properly admissible.

On June 26, 1980, defendant appeared before Judge Deming for sentencing. GCR 1963, 785.8 governs sentencing and by its terms the requirements of the rule are mandatory and failure to comply requires resentencing.

The first requirement is the presence of defendant's lawyer unless affirmatively waived by defendant. Defendant's attorney was present at sentencing.

The second requirement is that the trial court give defendant and his attorney a reasonable opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence.

Judge Deming gave both defendant and defense counsel an opportunity to address the court prior to sentencing. Although Judge Deming at one point asked both defense counsel and defendant whether they knew of any reason why sentence should not be imposed which would constitute error insofar as defendant's opportunity for allocation was concerned under People v Berry, 409 Mich 774 (1980). Later, the court inquired of defense counsel and inquired specifically of defendant separately as required by Berry, supra, whether there was anything they wished to say before the court imposed sentence.

Defense counsel made a few short statements. Defendant also made a short statement to the court.

The third requirement of the rule is that the court state the minimum and maximum sentence imposed by the court

together with any credit for time served to which defendant may be entitled.

After making a short statement including the observation that the court was considering the fact defendant saw fit to commit a crime while he was an inmate, Judge Deming imposed a minimum sentence of not less than 1-1/2 years and a maximum sentence of 4 years consecutive to any other sentence defendant was serving. Judge Deming further stated that the law precluded the court from giving defendant credit for the 108 days he had been in custody as a result of his actions with respect to the instant offense.

Judge Deming was correct in imposing a consecutive sentence with no credit under the circumstances outlined. See People v Shirley Johnson, 96 Mich App 84 (1980), holding that a community corrections program is a penal or reformatory institution within the ambit of the statute requiring consecutive sentences and further holding that a defendant who committed a crime outside of such center while serving a sentence in such program was not entitled to credit. The Department of Corrections has confirmed by telephone the statement by the trial court that defendant was an inmate at the time he committed the offense by advising that on the date of the offense defendant was a resident of the New Way In in Lansing which was a community correction program or halfway house operated by the Department of Corrections.

Subsequently, defendant wrote to Judge Deming indicating inter alia that his time sheet at Jackson Prison indicated there was no credit for the 108 days. Judge Deming replied by letter stating inter alia that a person who was an inmate of an institution and commits a crime while in such status was not entitled to time spent in confinement awaiting trial for the offense but that the court did want the record to indicate the number of days of confinement and that was the reason for stating the same

on the record. The Department of Corrections has also advised this writer by telephone that defendant was credited for the 108 days on the sentence he was serving at the time the present crime was committed.

Finally, the sentence imposed was within the statutory perimeters and did not violate the rule in People v Tanner, 387 Mich 683 (1972), since the minimum sentence did not exceed 2/3 of the maximum term.

As required by GCR 1963, 785.12, the sentencing transcript reflects that Judge Deming permitted defense counsel, who in turn permitted defendant, and the prosecution to examine the presentence report. Further, as required by the rule, Judge Deming gave both the prosecution and defense counsel an opportunity to make any additions, corrections or deletions to the report and although not required by the rule, provided defendant the same opportunity. None of the parties had any corrections and so forth to make in the report.

Finally, as required by GCR 1963, 785.11, Judge Deming adequately apprised defendant of his appellate rights which were timely exercised. It should be noted that there was some difficulty in defendant signing or accepting the appeal papers. In any event, it is clear that defendant finally obtained and executed the appropriate documents for appointment of counsel.

Having found no non-frivolous issues, it is recommended that the motion to withdraw be granted, defendant's conviction affirmed and the order stayed in the customary fashion for 30 days in order to provide defendant with an additional opportunity to respond, defendant not having filed a response. A proposed order is attached for consideration by the Court.