

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE DORAIL JONES,

Defendant-Appellant.

UNPUBLISHED

January 23, 1998

No. 194530

Eaton Circuit Court

LC No. 95-000243-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTWAN JOHNSON,

Defendant-Appellant.

No. 197356

Eaton Circuit Court

LC No. 95-000244-FC

Before: MacKenzie, P.J., and Holbrook, Jr., and Saad, JJ.

PER CURIAM.

In Docket No. 194530, defendant Jones was convicted by a jury of unarmed robbery, MCL 750.84; MSA 28.279, receiving stolen property under \$100, MCL 750.535; MSA 28.803, and fleeing and eluding a police officer, MCL 479a; MSA 28.747(1). As an habitual offender, second offense, MCL 769.10; MSA 28.1082, defendant Jones was sentenced to serve an enhanced prison term of twelve to twenty-two years. In Docket No. 197356, defendant Johnson was convicted by a separate jury of unarmed robbery, MCL 750.530; MSA 28.798, and sentenced, as an habitual offender, second offense, to serve an enhanced prison term of fifteen to 22- $\frac{1}{2}$ years. This Court consolidated defendants' appeals as of right.

Defendant Jones argues that the trial court erred when it failed to conduct an inquiry into defendant's request to dismiss his appointed counsel and to appoint substitute counsel. We find no error requiring reversal of defendant's conviction. The decision to order substitution of appointed counsel is within the sound discretion of the trial court, upon a showing of good cause and that the substitution will not disrupt the judicial process. See *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Here, defendant indicated to the trial court that he wanted to go to trial rather than plead guilty pursuant to a plea agreement that his attorney apparently had advised him to accept. Defendant further indicated that he wished to dismiss his attorney. The trial judge immediately cut off defendant, chastising him for wasting the court's time and "disrupt[ing]" the judge's courtroom. We find that the trial court abused its discretion in failing, at a minimum, to inquire into the reasons for defendant's dissatisfaction with his attorney. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Nonetheless, we find the error harmless under these circumstances because defendant has not established prejudice as a result of counsel's continued representation of him at trial. An indigent defendant is not entitled to the appointment of counsel of his choice. Rather, he is entitled only to representation by counsel who performs at least as well as a lawyer with ordinary training and skill in the criminal law. *Id.*; *People v Bradley*, 54 Mich App 89, 95; 220 NW2d 305 (1974). Defendant Jones has not argued on appeal that his representation by counsel at trial was ineffective, or that the trial court's failure to consider defendant's request for substitute counsel otherwise resulted in prejudice to his case. See *People v Gendron*, 144 Mich App 509, 523; 376 NW2d 143 (1985). Accordingly, although the trial court abused its discretion in arbitrarily denying defendant's request without further inquiry, we find the error to be harmless in this instance.

Defendant next argues that he is entitled to resentencing because the trial court improperly scored the guidelines, improperly considered two prior misdemeanor convictions, and imposed a disproportionate sentence. To the extent that defendant argues that the trial court erred when it scored his prior conviction for frequenting a drug house, MCL 750.167(1)(j); MSA 28.364(1)(j), we decline to review this issue. The Michigan Supreme Court has recently held that calculation of sentencing guidelines variables does not present an appealable claim of legal error. *People v Mitchell*, 454 Mich 145, 175; 560 NW2d 600 (1997). Moreover, a defendant sentenced under the habitual offender statute, as was defendant Jones, may not challenge the trial court's calculations of the guidelines. *People v Edgett*, 220 Mich App 686, 694-695; 560 NW2d 360 (1996). However, neither *Mitchell* nor defendant's status as an habitual offender precludes review of defendant's claim that the trial court improperly considered two prior misdemeanor convictions allegedly obtained pursuant to an invalid waiver of his right to counsel. Defendant Jones has met his burden on his collateral challenge by producing a transcript of the district court plea-taking proceeding in which defendant pleaded guilty to second-degree retail fraud and assault and battery. See *People v Carpentier*, 446 Mich 19; 521 NW2d 195 (1994), reaffirming *People v Moore*, 391 Mich 426; 216 NW2d 770 (1974). The transcript indicates that defendant was apprised of his Sixth Amendment right to counsel in the event he chose to go to trial, but he clearly was not apprised of his right to counsel in the event he chose to enter a guilty plea. See MCR 6.610(E); *People v Courtney*, 104 Mich App 454, 456; 304 NW2d 603 (1981); *People v Richert*, 216 Mich App 186, 190; 548 NW2d 924 (1996). Accordingly, because

our review of defendant's sentencing for the current offense indicates that the trial court improperly considered defendant's invalid prior convictions in imposing an enhanced sentence, defendant must be resentenced. *Moore, supra* at 440.

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Defendant Johnson first argues that he was denied his Fifth Amendment right against self incrimination and his Sixth Amendment right to counsel when he was subjected to custodial interrogation subsequent to his assertion of these rights and without having *Miranda* warnings repeated. He further claims that this custodial interrogation led to involuntary statements that severely prejudiced his defense. When reviewing the voluntariness of a statement, this Court makes an independent determination after a review of the entire record. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992), but gives great deference to the trial court's assessment of the credibility of witnesses. Moreover, its findings of fact will not be reversed unless clearly erroneous. *Id.*

Once a defendant has asserted his Fifth Amendment right to remain silent or his Sixth Amendment right to counsel, the police procedures for reinitiating interrogation are altered. An accused who requests an attorney, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Minnick v Mississippi*, 498 US 146, 150; 111 S Ct 486; 112 L Ed 2d 489 (1990), citing *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). Regarding the situation where an accused has asserted his right to remain silent, the admissibility of these statements depends upon whether the accused's "right to cut off questioning" was "scrupulously honored" by the police. *Michigan v Mosley*, 423 US 96, 104; 96 S Ct 321; 46 L Ed 2d 313 (1975). An inquiry into the totality of the circumstances is necessary to determine whether the police scrupulously honored this right. Whether an accused was re-advised of his *Miranda* rights should be considered only to the extent that it is relevant in conducting this inquiry. *People v Slocum (On Remand)*, 219 Mich App 695, 704; 558 NW2d 4 (1996).

Here, the trial court was presented with the testimony of a police officer, who stated that he was told defendant had requested to talk to him, and the testimony of defendant, who stated that he never asked to speak with the police. This conflicting testimony presented an issue of credibility, which the trial court decided in favor of the police officer. We will not revisit this credibility determination anew. *Brannon, supra* at 131. Given the totality of the circumstances—the trial court's credibility determination, and the fact that the officer reminded defendant that he had requested an attorney and was therefore not required to talk to him—we conclude that defendant's statement was voluntarily made, notwithstanding the officer's failure to re-advise defendant of his *Miranda* rights.

Defendant Johnson next challenges the trial court's scoring of certain variables in the sentencing guidelines. As explained above, review of this issue is precluded under *Mitchell* and *Edgett, supra*, except to the extent that defendant claims that his sentence is disproportionate under *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990). Although the sentencing guidelines may not be considered in sentencing an habitual offender, *People v Gatewood (On Remand)*, 216 Mich App 559,

560; 550 NW2d 265 (1996); *Edgett, supra* at 694, the proportionality of a defendant's sentence is still reviewable for an abuse of discretion. *People v Hansford (After remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). The *Hansford* Court held:

We believe that a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. [*Id.* at 326.]

At defendant Johnson's sentencing, the trial court took into account the severity of the crime and defendant's prior record, including (1) that defendant was on a tether while on probation for assault with intent to rob while armed when he committed the instant offense, (2) the emotional trauma suffered by the robbery victims, (3) that defendant's professed reason for the robbery was because he was on drugs, (4) that defendant initially gave police a false name when arrested for the instant offense to avoid detection of his probation violation, (5) defendant's prior juvenile record, which included four offenses, and his adult criminal record, which included two misdemeanors and one felony, and (6) that defendant had little hope of rehabilitation. Accordingly, in light of these considerations, we find no abuse of discretion by the trial court in sentencing defendant Johnson to serve an enhanced prison term of fifteen to 22-1/2 years, which was the statutorily allowed maximum sentence.

In Docket No. 194530, defendant Jones' convictions are affirmed, but we remand for resentencing in accordance with this opinion. In Docket No. 197356, defendant Johnson's conviction and sentence are affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Henry William Saad