STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY RAMONE FRAZIER,

Defendant-Appellant.

UNPUBLISHED
August 7, 1998

No. 193891
Genesee Circuit Court
LC No. 95-052613-FC

ON REHEARING

Before: Corrigan, C.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of two counts of first-degree felony murder, MCL 750.316; MSA 28.548, two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and one count of armed robbery, MCL 750.529; MSA 28.797. The court sentenced defendant to two mandatory terms of life imprisonment without parole for murder, two mandatory two-year terms for his felony-firearm convictions, and life imprisonment for armed robbery. We vacate defendant's conviction for armed robbery and remand for further proceedings consistent with this opinion.

This case arises from the slayings of James Goff and Aaron McColgan in McColgan's home in Grand Blanc Township. Both men died of gunshot wounds to the head. Kenneth Haywood implicated defendant in the crime, stating that he drove defendant and codefendant Idell Cleveland[1] to McColgan's home. Haywood heard gunshots after one of the victims allowed defendant and codefendant to enter the house. Three days after the crime, Sergeant Dan Collardey of the Grand Blanc Township Police Department presented a complaint, authorized by the prosecutor, to the magistrate, seeking a warrant for defendant's arrest. The court issued the warrant. Defendant and his retained counsel arrived at the police station two days later so defendant could surrender to the police. Police officers then arrested defendant and he was subsequently arraigned.

On the advice of counsel, defendant made a statement to the police two days after his arrest describing his involvement in the crime. Defense counsel allegedly encouraged defendant to make the statement even though the police and prosecutor had told him that they would not enter into a plea

agreement. Defendant subsequently made two more statements, one after he took a polygraph examination.

I

Defendant first argues that he was denied the effective assistance of counsel because defense counsel advised him to waive his *Miranda*[2] rights and to make incriminating statements to the police in the hope of receiving a favorable plea bargain, even though the prosecutor never offered a plea agreement.

Both the Sixth Amendment, US Const, Am VI, and Const 1963, art 1, § 20, guarantee a defendant the right to counsel. Generally, our courts construe the two provisions identically. *People v Winters*, 225 Mich App 718, 723-724; 571 NW2d 764 (1997); *People v Richert (After Remand)*, 216 Mich App 186, 194; 548 NW2d 924 (1996). Following the initiation of adversary judicial criminal proceedings, a defendant is entitled to the presence of counsel at "critical" proceedings, including interrogations. *United States v Gouveia*, 467 US 180, 189; 104 S Ct 2292; 81 L Ed 2d 146 (1984); *Moore v Illinois*, 434 US 220, 226-227; 98 S Ct 458; 54 L Ed 2d 424 (1977); *Brewer v Williams*, 430 US 387, 401; 97 S Ct 1232; 51 L Ed 2d 424 (1977). The right to counsel under the Sixth Amendment also comprehends the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 685-686; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In this case, defendant had a Sixth Amendment right to counsel at the postarraignment interrogations.[3] *Michigan v Jackson*, 475 US 625, 629 n 3; 106 S Ct 1404; 89 L Ed 2d 631 (1986); *People v Anderson (After Remand)*, 446 Mich 392, 403; 521 NW2d 538 (1994); *People v Bladel (After Remand)*, 421 Mich 39, 52; 365 NW2d 56 (1984). The record, however, is inadequate to facilitate review of defendant's claim of ineffective assistance. We therefore remand this matter to the trial court for a *Ginther*[4] hearing on the issue whether defendant was denied the effective assistance of counsel by trial counsel's advice that he make statements to the police about his role in the crime. We limit the scope of remand to this narrow issue because, as discussed below, defendant's other assertions of error have no merit.

II

Defendant contends that the trial court erred in denying his motion to suppress his three statements to the police on the ground that he made them while negotiating a plea bargain. We disagree. This Court reviews a trial court's determinations regarding the admissibility of evidence for an abuse of discretion. *People v Honeyman*, 215 Mich App 687, 696; 546 NW2d 719 (1996). MRE 410(4) provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> * * *

> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

To determine whether a defendant made a statement in the course of plea discussions, a court must apply a two-tiered analysis, asking: (1) whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and (2) whether the accused's expectation was reasonable under the totality of the circumstances. *People v Dunn*, 446 Mich 409, 415; 521 NW2d 255 (1994); *People v Manges*, 134 Mich App 49, 59-60; 350 NW2d 829 (1984).

The trial court determined that defendant had an actual subjective expectation to negotiate a plea agreement, but the expectation was unreasonable under the totality of the circumstances. We agree. Defense counsel repeatedly requested a plea bargain, but the authorities consistently denied his requests. Defendant's mother testified that she encouraged defendant to tell the truth because of defense counsel's statements regarding a plea bargain, not because of statements by the police or prosecutor. Although defendant testified that Sergeant Dan Collardey promised to help him if he gave information, Collardey denied making such a statement. The trial court credited Collardey's testimony. Further, before each statement, the authorities gave defendant *Miranda* warnings, which informed him that his statements could be used against him, and both defendant and his counsel signed written *Miranda* waivers. See *Manges, supra* at 60-61. On these facts, the trial court did not abuse its discretion in admitting the evidence because defendant did not have a reasonable expectation of negotiating a plea when he made the statements.

The trial court also held that MRE 410 did not apply because defendant made the statements to the police instead of the prosecuting attorney. Defendant argues that the police were acting as agents of the prosecutor's office when he made the statements. The record does not support defendant's claim. Therefore, the trial court properly admitted the statements. *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1996).

III

Defendant argues that defense counsel was ineffective because he limited his argument during the suppression hearing to MRE 410 and did not argue that the statements were involuntary. We disagree. To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced him. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Regarding the second requirement, defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996).

Defendant contends that the trial court should have suppressed his statements because: (1) his counsel was not present when he made the statements, (2) the statements were involuntary and taken in violation of his *Miranda* rights and his rights to counsel and due process, and (3) he made his post-

polygraph examination statement only after the police assured him that anything he said during a polygraph examination would be inadmissible. Defendant did not preserve this issue by raising it below. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). We review the issue nonetheless because it involves an important constitutional question. *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996).

After a defendant asserts his right to counsel at arraignment, the police may not directly initiate an interrogation, but rather must funnel all requests through defense counsel. *Michigan v Jackson*, *supra* at 636. A defendant may, however, generally waive his Sixth Amendment right to counsel. *Brewer v Williams*, *supra* at 403-404. Courts indulge every reasonable presumption against waiver, and the State must prove "an intentional relinquishment or abandonment of a known right." *Id.* at 404, quoting *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). A defendant may likewise waive his right to counsel under *Miranda*. *People v Smielewski*, 214 Mich App 55, 61; 542 NW2d 293 (1995). Whether a defendant validly waived his right to counsel involves a two-part test:

> First, the waiver must be a product of a "free and deliberate choice rather than intimidation, coercion, or deception." Second, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." [*People v Bender*, 452 Mich 594, 604; 551 NW2d 71 (1996) (Cavanagh, J.) (citations omitted).]

Here, no *Jackson* violation occurred because the police proceeded through defense counsel to question defendant. Defendant then voluntarily waived his right to counsel before making the first statement. Before defendant made his statement, Sergeant Collardey read him his *Miranda* rights and defendant signed a written waiver. Defense counsel was present and also signed the *Miranda* waiver. The record does not reflect that the police coerced, intimidated, or deceived defendant into waiving his rights. Defendant never stated that he wished to remain silent.

Defendant relies on *McNeil v Wisconsin*, 501 US 171; 111 S Ct 2204; 115 L Ed 2d 158 (1991), and *Minnick v Mississippi*, 498 US 146; 111 S Ct 486; 112 L Ed 2d 489 (1990), to support his contention that the police questioning was improper because his retained counsel was not actually present during questioning. These cases are distinguishable. In the present case, defense counsel accompanied defendant when he surrendered to the police and was present when defendant signed an express waiver of his *Miranda* rights. Therefore, unlike the *Minnick* defendant, defendant never invoked his *Miranda* right to counsel by requesting counsel during questioning; rather, he explicitly waived that right. *McNeil* is inapposite to the present case because it addressed whether an accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding also constitutes an invocation of his *Miranda* right to counsel. *McNeil*, *supra* at 173. Here, the police respected defendant's Sixth Amendment right to counsel. After consulting counsel, defendant voluntarily waived his right to have counsel present during the questioning.

Regarding his second statement, defendant argues that the statement was involuntary because the police did not readvise him of his *Miranda* rights following a two-hour interruption between the two

statements. The failure to readvise defendant of *Miranda* warnings before each interrogation does not render his subsequent statements inadmissible. *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992); *People v Godboldo*, 158 Mich App 603, 607; 405 NW2d 114 (1986). Rather, a factual question arises whether the statements were voluntary. *Id.* Sergeant Collardey testified at the evidentiary hearing that defendant made the second statement on his own initiative because he wanted to clarify his prior statement. Defendant testified that he made the statement only after Collardey asked him if he wanted to clarify something. Even if defendant's testimony is true, the record does not reflect illegal police conduct, or that the police coerced defendant into making the statement. See *Littlejohn, supra*. Therefore, defendant voluntarily made the second statement.

We reject defendant's contention that his third statement was involuntary because Deputy Chief Michael Ahearne told him that any statement he made during a polygraph examination would not be admissible. Statements made before, during, and after a polygraph examination are not per se inadmissible. Rather, the question is whether the statements were voluntary under the totality of the circumstances. *People v Ray*, 431 Mich 260, 268; 430 NW2d 626 (1988); *People v Hicks*, 185 Mich App 107, 113-114; 460 NW2d 569 (1990). In *Hicks*, this Court held that the trial court did not err in failing to suppress the defendant's statement, which he made after completing a polygraph examination, even though the police did not readvise the defendant of his *Miranda* rights. *Hicks, supra* at 113-114. This Court emphasized that the same individual who had earlier warned the defendant of his rights interrogated him after the examination and no significant time elapsed between the examination and the postexamination questioning. *Id.*

The circumstances in the present case are similar to those in *Hicks*. Deputy Chief Ahearne told defendant three days before the polygraph examination that any statements he made at the examination would be inadmissible. Detective Donald Elford gave defendant three forms containing different versions of the *Miranda* warnings shortly before conducting the polygraph exam, all of which defendant signed. Therefore, the statement was voluntary under the totality of the circumstances. Accordingly, defense counsel's decision not to argue alternate grounds for suppression did not constitute ineffective assistance of counsel. *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994).

IV

Defendant asserts that his convictions of first-degree felony murder and the underlying felony of armed robbery violated his right against double jeopardy. We agree and vacate his conviction and sentence for armed robbery. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).

Vacated in part and remanded. We retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

[1]A separate jury convicted codefendant Cleveland of two counts of first-degree murder, two counts of felony-firearm, and one count of armed robbery for his role in the murders. This Court affirmed the convictions. *People v Cleveland,* unpublished opinion per curiam of the Court of Appeals, issued June 17, 1997 (Docket No. 194236).

[2]*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3]Although defendant has consistently maintained that the interrogations occurred after arraignment, the original record did not identify the date of arraignment. Generally, the appellant bears the burden of furnishing this Court with a record that supports his argument. *Petraszewsky v Keeth (On Remand),* 201 Mich App 535, 540; 506 NW2d 890 (1993). In his motion for rehearing, defendant finally supplemented the record with an additional transcript that supports his assertion regarding the arraignment. Had defendant initially supplied this Court with a complete record in support of his claim, he would have prevented the needless expenditure of judicial resources and avoided unnecessary delay in obtaining the remedy of a hearing on his claim of ineffective assistance to which he is entitled.

[4]*People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).