

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ORLANDO PEAY,

Defendant-Appellee.

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UNPUBLISHED

September 22, 1998

No. 205917

Recorder's Court

LC No. 97-000120

Before: Hood, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals by right the Recorder's Court order granting defendant's motion to dismiss. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with first-degree murder, MCL 750.316; MSA 28.548 and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2) arising out of the death of Clifton Smith. Defendant's ex-wife, Tamela Peay, was the key witness at the first preliminary examination. Defendant was bound over for trial, but Tamela Peay failed to appear for the trial. The court found that the prosecution failed to show that it exercised due diligence in producing Mrs. Peay for trial and charges were dismissed without prejudice.

The prosecutor refiled charges, and a second preliminary examination was held. Two additional witnesses testified at the second preliminary examination. The prosecution was again unable to produce Tamela Peay and after taking additional testimony, the court found that the prosecution established due diligence. Without reviewing Mrs. Peay's prior testimony, the court found that the testimony of the additional witnesses was sufficient to establish probable cause. Where the court did not rely on Mrs. Peay's prior testimony, this Court will not reach the question of its admissibility under MRE 804(a)(5).

Defendant moved to dismiss, asserting that the prosecution engaged in judge shopping, and that he was denied due process of law. The trial court granted the motion, stating that the prosecution failed to present additional evidence.

The prosecution was not required by MCR 6.110(F) to hold the second preliminary examination before the same judicial officer. Defendant was bound over as charged after the first preliminary examination, thus MCR 6.110(F) was inapplicable. There is no showing that the prosecution engaged in improper judge shopping or that its actions deprived defendant of due process of law.

Even without Tamela Peay's testimony, there was sufficient evidence to bind over defendant for trial. This Court's review of the bindover process is de novo. We must redetermine if the magistrate committed an abuse of discretion in finding probable cause to believe that the defendant committed the offense charge. *People v McBride*, 204 Mich App 678, 681; 516 NW2d 148 (1994). There must be evidence of each element of the crime charged or evidence from which the elements can be inferred. *Id.* Here, the evidence showed that the victim was murdered by two gunshots, and that defendant was the person who committed the shooting. Where a neighbor testified that Tamela Peay stated that defendant came up to the house, saw that Smith was there, then went back to the car, returned with a gun and began firing, the court could find sufficient evidence of premeditation to bind over defendant on first-degree murder and felony-firearm.

Reversed and remanded for trial. We do not retain jurisdiction.

/s/ Harold Hood  
/s/ Richard Allen Griffin  
/s/ Peter D. O'Connell