# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAULO MONTALVO,

Defendant-Appellant.

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UNPUBLISHED
October 2, 1998

No. 200302
Kent Circuit Court
LC No. 96-001866

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant was charged with felony murder, MCL 750.316; MSA 28.548, and conspiracy to commit felony murder, and conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The charge of conspiracy to commit felony murder was dismissed by stipulation and a jury convicted defendant as charged of the remaining counts. He was sentenced to life imprisonment, consecutive to the mandatory two year sentence for felony firearm, and appeals as of right. We affirm.

The case arises out of a shooting death during an armed robbery, in which defendant's codefendants Christopher Peltier and Robert Maze[1] entered the Westside Beer Cooler in Grand Rapids. Maze shot and killed the store's clerk, and Peltier then grabbed the cash register. The three men went to another friend's apartment where the cash from the register was divided. Testimony was that Maze took the largest share of the money because he went into the store with the gun. Peltier received the next largest share because he grabbed the cash register, and defendant got the least, mostly quarters and some bills, because he merely drove the car. They were arrested the next day, February 2, 1996, at a shopping mall. Defendant and Montalvo were tried together, although they had separate juries.

I.

Defendant argues first that the trial court erred in failing to suppress defendant's confession to police. Defendant contends that the police failed to honor his request for an attorney, and that the police officers "tricked" him into making statements.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694, reh den 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966). The prosecutor may not use custodial statements as evidence unless he demonstrates that, before any questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel. *Id*. If an accused validly waives his Fifth Amendment rights, the police may continue questioning him until and unless he clearly requests an attorney. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). An ambiguous statement regarding counsel does not require the police to cease questioning or to clarify whether the accused wants counsel. *Id*.

In this case, Grand Rapids police officer Philip Betz testified that after hearing the *Miranda* warnings, defendant said "maybe" he should talk to an attorney. Defendant testified that he said "I want an attorney." The trial court found that defendant's statement that "maybe" he should talk to an attorney was ambiguous, and therefore Betz was not required to cease questioning. The trial court did not expressly address the discrepancy between defendant's version of his request for an attorney and Betz' version, but apparently accepted the latter. We note, however, the transcript of the interview indicates Officer Betz stating, ". . . we read you your constitutional rights and you indicated originally that you wished to talk to an attorney. Is that correct?" This seems to indicate that defendant's request may not have been ambiguous. We agree with the prosecution, however, that even if defendant's request for counsel was unambiguous, the admission of the statement was still proper. In this case the record is clear that defendant thereafter initiated further conversation and waived his right to counsel when he called the police back to talk to him. *People v Myers*, 158 Mich App 1, 9; 404 NW2d 677 (1987).

Defendant also argues that he initiated further conversation because Betz "tricked" or "coerced" him into making a statement after defendant requested an attorney by informing defendant of the charges against him and the maximum possible penalty of life imprisonment. The statements made by Betz merely advised defendant of the crime with which he was charged and the possible penalty, and were not intended to elicit a response from defendant. *People v McCuaig*, 126 Mich App 754, 760; 338 NW2d 4 (1983). The nature and circumstances of Betz' statements do not indicate that Betz was attempting to coerce defendant into making further statements or that he intended to elicit any response from defendant by informing defendant of the charges and penalties.

Defendant also challenges the voluntariness of his confession on the grounds that he was not an "experienced criminal," was a ninth grader at an alternative school, and had no family or counsel present during the interview. In *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997), this Court discussed the factors that must be considered in applying the totality of the circumstances test to determine the admissibility of a juvenile's confession, including the following:

> (1) whether the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27; MSA 28.886 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age,

> education and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention.

Defendant waived his right to the presence of counsel at the interview. Although defendant's parents were not present during the interview, there is no indication that defendant requested their presence. Therefore, the absence of defendant's parents at the interview does not make the confession involuntary. *Id*. Defendant does not have a prior criminal record or extensive experience with the police; however, consideration of the other factors serves to outweigh that factor. Betz testified that the length of detention before defendant's statements had been about one hour. The transcript of the interview indicates that the interview began at "18:41 hours" and ended at "19:00 hours." Therefore, the questioning lasted approximately twenty minutes, and does not appear to be prolonged or repeated in nature. Analysis of the relevant factors and consideration of the totality of the circumstances indicate that defendant's confession was voluntary.

II.

Next, defendant argues that the trial court abused its discretion in admitting certain evidence at trial. First, defendant contends that the trial court abused its discretion in admitting portions of the movie "Menace II Society," because the movie was irrelevant to defendant's case and was overly prejudicial. Although the trial court ruled that a portion of the movie was relevant and could be shown to the jury if the jury asked to view the movie, the movie was never shown to the jury. Therefore, this issue is moot. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

Second, defendant argues that the trial court abused its discretion in admitting out-of-court statements made by codefendant Maze through the testimony of a youth worker at the Kent County juvenile detention center. The youth worker testified that Maze said "I shot his [the victim's] ass in the chest" after telling the youth worker that he had been arrested for felony murder. The trial court found the testimony to be admissible pursuant to MRE 804(b)(3), statements against interest.

To be admissible under MRE 804(b)(3), the declarant must be unavailable as a witness. Defendant contends that Maze was not unavailable. However, where a codefendant is being prosecuted for the same offenses as the defendant, and the statement at issue relates to those charges, the prosecutor is unable to call the codefendant as a witness and the codefendant is unavailable as a witness. *People v Poole*, 444 Mich 151, 163; 506 NW2d 505 (1993). Because Maze was charged for the same offense as defendant, the trial court properly found Maze unavailable to testify.

Third, defendant contends that the trial court abused its discretion in admitting statements of Peltier and Maze, which tended to establish a conspiracy, through the testimony of two other witnesses. The trial court found the statements admissible pursuant to MRE 801(d)(2)(E), which reads in pertinent part:

(d) A statement is not hearsay if --

* * *

(2) *Admission by Party-Opponent*. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.

Defendant claims that the testimony of the two witnesses was inadmissible because no independent proof of a conspiracy had been presented before the two witnesses testified. However, the trial court may vary the order of proofs and admit coconspirators' statements contingent upon later production of independent evidence under MRE 801(d)(2)(E). *People v Hall*, 102 Mich App 483, 490-491; 301 NW2d 903 (1980). Therefore, the trial court did not err in admitting the testimony of the two witnesses before the prosecution presented independent evidence of a conspiracy. To the extent defendant challenges whether there was sufficient independent proof of the conspiracy to support the admission of the evidence, we reject the challenge.

III.

Finally, defendant argues that the trial court abused its discretion in sentencing him as an adult. We disagree. The provisions of MCL 769.1(3); MSA 28.1072(3) in effect at the time defendant was sentenced required[2] that "a judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the public would be served by placing the juvenile on probation and committing the juvenile to a state institution or agency . . . , or by imposing any other sentence provided by law for an adult offender." In making that determination, the judge was required to consider certain factors enumerated in the statute, "giving each weight as appropriate to the circumstances." MCL 769.1(3); MSA 28.1072(3).[3] Those factors mirror those listed in MCR 6.931(E)(3) for determining whether to sentence a juvenile as an adult:

(a) the juvenile's prior record and character, physical and mental maturity, and pattern of living;

(b) the seriousness and circumstances of the offense;

(c) whether the offense is part of a repetitive pattern of offenses which would lead to the determination:

(i) that the juvenile is not amenable to treatment, or

(ii) that, despite the juvenile's potential for treatment, owing to the nature of the delinquent behavior, the juvenile is likely to disrupt the rehabilitation of others in the treatment program owing to the nature of the delinquent behavior;

(d) whether, despite the juvenile's potential for treatment, the nature of the juvenile's delinquent behavior is likely to render the juvenile dangerous to the public when released at age 21;

(e) whether the juvenile is more likely to be rehabilitated by the services and facilities available in the adult programs and procedures than in the juvenile programs and procedures; and

(f) what is in the best interests of the public welfare and the protection of the public security.

In order to properly exercise its discretion at a juvenile sentencing hearing, a court must attempt to weigh the relevant factors in a meaningful way at the sentencing hearing. *People v Perry*, 218 Mich App 520, 542; 554 NW2d 362 (1996). Although greater weight may be given to the seriousness of the offense, no single statutory criterion may be given preeminence. *Id*. The prosecution must do more than demonstrate that the defendant is guilty of a serious offense for which adult punishment is permitted. *Id*. at 543. Review of the juvenile hearing transcript in this case reveals that the seriousness of defendant's crime was indeed a driving factor in the determination, but that it was not impermissibly preeminent.

The hearing was held over two days, and numerous witnesses testified. It was demonstrated that defendant had no prior juvenile record, although he was being investigated for an attempted breaking and entering, where he was acting as the "lookout" for one of his co-defendants in this case. There was also no history of disruptive behavior in school, before he dropped out because, according to one teacher, he was frustrated by his inability to keep up.

Dennis Robydek, a probation agent for Kent County, and Rudy Gutierrez, a juvenile probation agent for the Family Independence Agency, both recommended that defendant be sentenced as an adult. Both testified that, because of the seriousness of the crime, it was in the best interest of the public that defendant be sentenced as an adult. Neither had ever recommended that a juvenile convicted of murder be sentenced as a juvenile.

Dr. Brett May, a psychologist called by defendant, and the only behavioral expert testifying as the hearing, testified that defendant would react positively to positive influences in the juvenile system, and would not be a danger at 21. In response to the revelation that defendant admitted use of alcohol and marijuana, Dr. May indicated that 40% of adolescents do so at the some point in their development. Several lay witnesses testified in defendant's behalf, and defendant himself testified, and expressed remorse. Defendant also denied that he had actually tried to escape from the county jail, a point upon which the trial court placed some emphasis in assessing defendant's potential for rehabilitation.

On the other hand, there is no question that defendant was involved in this very serious crime. Defendant also admitted that he and his co-defendants had been planning the robbery weeks in advance of the incident. He also conceded that he “thought [co-defendants] probably would” shoot the clerk

when they went into the store, and that he had helped saw off the shot gun used in the killing, as well as test-firing it. He also admitted gang activity, and was almost seventeen years of age at the time of sentencing. The trial court concluded, after weighing all the evidence, that defendant's potential to remain dangerous beyond age 21 was high, and that the interests of society would not be served by placing defendant in a juvenile detention center.

This case represents a close and difficult decision, with factors favoring sentencing defendant as a juvenile, and also factors favoring sentencing him as an adult. In applying the operative abuse of discretion standard, we cannot conclude that the trial court abused its discretion. *People v Brown*, 205 Mich App 503, 505; 517 NW2d 806 (1994).

Affirmed

/s/ Helene N. White
/s/ Harold Hood
/s/ Hilda R. Gage

[1] Defendant Robert Maze was also convicted in a separate trial. His appeal is currently pending, No. 199224.

[2] MCL 769.1(3); MSA 28.1072(3) was amended, effective January 1, 1997, to provide that the court must sentence a juvenile convicted of certain enumerated offenses, including first degree murder, as an adult, and that as to non-enumerated offenses "unless the court determines by a preponderance of the evidence that the interests of justice would be best served by placing the juvenile on probation and sentencing the juvenile to a state institution or agency described in Act No. 150 of the Public Acts of 1974." This provision was not in effect when defendant was sentenced.

[3] As amended, the statute now requires the judge to give greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency.