# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 5, 1999 |
| v | No. 197153<br>Recorder's Court |
| KENNETH MOORE,<br><br>Defendant-Appellant. | LC No. 94-013924 |

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant was charged with three counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). After a jury trial, he was convicted of one count of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and felony-firearm. The trial court sentenced defendant, a second habitual offender, to an enhanced term of ten to fifteen years' imprisonment for the assault conviction, MCL 769.10; MSA 28.1082, to be served consecutively to the five-year term imposed for defendant's second felony-firearm conviction. Defendant appeals as of right. We affirm in part, reverse in part and remand for further proceedings.

Defendant first argues that he was denied the effective assistance of counsel because defense counsel failed to secure the presence at trial of several defense witnesses. In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that a reasonable probability exists that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994), the Michigan Supreme Court, citing *Strickland, supra* at 691-692, explained that the purpose of the right to counsel "is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." Thus, in order to find that counsel's performance qualifies as ineffective

assistance, it is axiomatic that counsel's performance of the conduct complained of, i.e. a failure to request an adjournment, would have rendered a different result at trial.

Regarding defense counsel's performance in this case, counsel had properly issued subpoenas for the witnesses before trial. On April 2, 1996, the second day of trial testimony, counsel apprised the court that she had attempted without success to contact two of the witnesses, defendant's mother and sister, and expected the third, Sharon Montgomery, to appear the next day. However, immediately at the beginning of the third day of trial, counsel informed the court that the witnesses still had not appeared. The court subsequently issued bench warrants for defendant's mother and sister, and immediately dispatched an investigator to attempt to locate the three missing witnesses. Counsel indicated that she herself had visited Montgomery's address the prior evening, but that Montgomery had apparently moved.

Our review of the trial transcript indicates that defense counsel did everything reasonably possible to locate the missing witnesses and that the trial court also attempted to cooperate in this effort. However, the court very clearly indicated to counsel after these efforts had failed that in the middle of trial, after the prosecution had rested, the court had no intention of further adjourning trial:

> We're ready to proceed. As to the witnesses that are not present, we made the record, Ms. Austin [defense counsel], and we are not going to belabor this point. We have a mother and sister who clearly know that they were subpoenaed and they were to be here. They're not here. The court has made every effort to have them present. *We are not going to delay this matter and we are going to proceed. Is there anything else for appellate purposes?* [Emphasis added.]

After counsel then conferred with defendant, she informed the court that defendant "feels like I should make some better effort to try and locate [his mother]."

> *The Court*: All right. It's noted for the record. You won't be making one unless you're able to do it on your lunch hour. The court believes every reasonable effort has been made to have the defendant's mother and sister present in court. I'm not aware of anything else that can be done. I'm sorry. I believe all efforts have been made and the court has ruled on that and so we're going to proceed.

Given the trial court's clear position against any further delay, counsel is not required to appear disrespectful to the court by making further requests for adjournment. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (defense counsel not required to make frivolous or meritless motions); *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994) (defense counsel's failure to move for separate trial not ineffective assistance when the motion would have been unsuccessful in light of court's prior denial of codefendant's motion for separate trial). Therefore, we find no ineffective assistance in counsel's alleged failure to request an adjournment.

Defendant next argues that the absence of the three witnesses deprived him of his right to a fair trial, his right to compulsory process, and his right to present a defense. Although defendant failed to

raise these issues before the trial court, this Court may review an issue not raised below when a criminal defendant claims he was denied a fundamental constitutional right at trial that was decisive to the outcome of the case. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). We review constitutional questions de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). However, we review a trial court's decision regarding compulsory process for an abuse of discretion. *People v Yeoman*, 218 Mich App 406, 413; 554 NW2d 577 (1996).

The Compulsory Process Clause of the Sixth Amendment guarantees criminal defendants the right to present witnesses in their defense. *People v McFall*, 224 Mich App 403, 407; 569 NW2d 828 (1997). A defendant's right to compulsory process is fundamental, but not absolute, and requires that the defendant show that the witness' testimony would be both material and favorable to the defense. *Id*. at 408. The right to secure witnesses in one's favor must be balanced against the state's legitimate interest in the integrity of the adversary process and the fair and efficient administration of justice. *Id*. at 410.

In this case, while it is clear that the trial court did not exhaust all possible means in locating the witnesses, the court did make reasonable efforts to secure their presence. The United States Supreme Court has explained that

> [i]t is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. [*Taylor v Illinois*, 484 US 400, 414; 108 S Ct 646; 98 L Ed 2d 798 (1988).]

In the instant case, once it became apparent that the witnesses were not going to be present to testify, the trial court issued bench warrants for their arrest and requested that the investigator attempt to locate them. Only after these efforts had failed did the court indicate that it could think of no further measures to take, and that it could no longer delay the progress of defendant's trial. In the interests of fair and efficient justice, the trial court reasonably concluded that it had done enough to locate these witnesses. Accordingly, we conclude that the trial court did not err in refusing to continue the search efforts for the missing witnesses.

Defendant next argues that defense counsel's refusal to request jury instructions regarding felonious assault constituted ineffective assistance of counsel. Felonious assault is a cognate lesser included offense of assault with intent to murder. *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). Before instructing the jury on a cognate lesser offense, the court must examine the evidence to determine whether it would support a conviction on the lesser offense. *People v Beach*, 429 Mich 450, 464; 418 NW2d 861 (1988). To find a defendant guilty of felonious assault, it must be shown that he assaulted another with a dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder. MCL 750.82(1); MSA 28.277(1).

In this case, the evidence would not have supported a felonious assault conviction. If the jury believed defendant's testimony that he acted in self-defense, then defendant would be not guilty of a

felonious assault. However, if the jury rejected defendant's self-defense claims, in light of the evidence that defendant fired his weapon directly at the victim from a distance of approximately six feet, the jury could not rationally find that defendant did not have the intent to cause great bodily harm. Because a felonious assault instruction would not have been proper, defense counsel was not ineffective in failing to request this instruction.

Defendant next argues that he was denied a fair trial and the effective assistance of counsel because defense counsel failed to request, and the trial court did not give, a jury instruction regarding the misdemeanor offense of causing injury by the discharge of a firearm intentionally aimed or pointed without malice, MCL 750.235; MSA 28.432. Michigan courts employ a five-part test to determine whether a requested misdemeanor instruction should be given. *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982). First, the party must properly request the instruction by informing the court of exactly what lesser offenses it is seeking. *Id*. at 261-262. Second, there must be an appropriate relationship between the charged offense and the requested misdemeanor, such that (a) the greater and lesser offenses relate to the protection of the same interests, and (b) generally, proof of the misdemeanor is necessarily presented as proof of the charged offense. *Id*. at 262. Third, the requested misdemeanor instruction must be supported by a rational view of the evidence. *Id*. at 262-263. Fourth, if the prosecutor requests the instruction, the defendant must have adequate notice of it as one of the charges against which he may have to defend. *Id*. at 264. Fifth, the requested instruction should not be given if it results in undue confusion or injustice. *Id*.

In this case, the third element of the *Stephens* test was not established because the requested misdemeanor instruction was not supported by a rational view of the evidence. If the jury believed defendant's claim that he acted in self-defense, then his actions were excused and he would be not guilty of the misdemeanor. If the jury did not believe defendant's claim of self-defense, it could not have rationally found that defendant did not intend to cause the victim great bodily harm. Thus, the misdemeanor instruction would have been improper, and defense counsel was not ineffective for failing to request it.

Defendant additionally contends that he is entitled to resentencing because he was not represented by counsel at his sentencing hearing. The Sixth Amendment right to counsel is a fundamental right that attaches at all critical stages of the proceeding, including sentencing. *People v Pubrat*, 451 Mich 589, 593-594; 548 NW2d 595 (1996). However, a defendant also has a constitutional right to self-representation. *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996). Before a court grants a defendant the right to represent himself, the court must comply with the waiver of counsel procedures set forth in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), and MCR 6.005(D). Here, the trial court completely neglected to comply with either *Anderson* or MCR 6.005(D) before allowing defendant to represent himself at the sentencing hearing. Therefore, defendant is entitled to resentencing. *People v Durfee*, 215 Mich App 677, 683; 547 NW2d 344 (1996).

Lastly, defendant claims entitlement to credit for an additional twenty-seven days he served in a Florida jail before being returned to Michigan for arraignment on the instant offenses. A defendant is entitled to credit for time spent in jail in a foreign jurisdiction in which he was apprehended, before being returned to the jurisdiction in which he was charged. *People v Gibson*, 101 Mich App 205, 207; 300 NW2d 500 (1980). On November 12, 1994, defendant turned himself in on the instant charges to the police in Daytona Beach, Florida. Defendant asserts that the amended judgment of sentence did not account for the twenty-seven days he served in jail in Florida between November 12, 1994 and December 9, 1994. Therefore, at defendant's resentencing, we direct the trial court to determine the number of days of credit to which defendant is entitled, and to resentence him accordingly.

We affirm defendant's convictions, but remand to the trial court for resentencing. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra