

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WINBUSH,

Defendant-Appellant.

UNPUBLISHED

August 24, 1999

No. 203442

Detroit Recorder's Court

LC No. 96-004881

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant was charged with two alternative counts of first-degree murder, one for felony-murder and one for premeditated first-degree murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a bench trial, defendant was found guilty of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and life imprisonment with the possibility of parole for the second-degree murder conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that the on-the-scene identification procedure used by the police was improperly conducted because he did not have counsel present. Defendant failed to bring a motion to suppress the on-the-scene identification¹ and did not object to admission of the evidence at trial. Failure to object at trial or to bring a motion to suppress identification testimony precludes appellate review absent manifest injustice. *People v Lee*, 391 Mich 618, 626-627; 218 NW2d 655 (1974); *People v Daniels*, 163 Mich App 703, 710; 415 NW2d 282 (1987). Because we find no manifest injustice, we decline to further review this unpreserved issue.

Defendant next argues that he was denied due process because the police failed to fully investigate the case. Specifically, defendant contends that had the police tested his hands and clothing for gunpowder residue, and attempted to lift fingerprints off the decedent's wallet, the tests would have produced exculpatory evidence. Defendant asserts that the police's failure to conduct these tests denied him the right to due process. We disagree.

Defendant failed to raise this issue before the trial court in a motion to compel testing or fingerprinting, and therefore, appellate review is precluded absent manifest injustice. *Daniels, supra* at 710. However, because defendant raises a constitutional issue, we may consider the claim absent a challenge in the trial court. *People v Morey*, 230 Mich App 152, 163; 583 NW2d 907 (1998). On appeal, constitutional issues are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

Michigan law is well settled on this issue. The police are not required to seek and find exculpatory evidence. *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995); *People v Stephens*, 58 Mich App 701, 705-706; 228 NW2d 527 (1975). In *Miller*, a panel of this Court found no violation of the defendant's right to due process where the police did not test the defendant's hands for gunpowder residue. *Miller, supra* at 43. Similarly, in *Stephens*, a panel of this Court rejected the defendant's claim that the failure to dust a weapon for fingerprints was tantamount to suppression or withholding of evidence to the detriment of the defendant in violation of his due process rights:

The crucial distinction is between failing to disclose evidence that has been developed and failing to develop evidence in the first instance. When the police fail to run any tests, the lack of evidence will tend to injure their case more than defendant's since the prosecution has the burden of proving guilt beyond a reasonable doubt. Whether or not to run fingerprint tests is a legitimate police investigative decision. Defendant's rights were not violated. [*Stephens, supra* at 705-706.]

In the case at bar, the police did not suppress evidence or fail to disclose evidence that had already been developed. The decision whether to test defendant's hands and clothing for gunpowder residue, and to dust the decedent's wallet for fingerprints, was a legitimate police investigative determination. Accordingly, we find that defendant's right to due process of law was not violated.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

¹ Defendant filed a motion for a *Wade* hearing to suppress the lineup and identification; however, the motion was withdrawn before it was heard by the court.