STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 5, 1999
v	No. 203799 Wayne Circuit Court
RONALD LEE HARDEMAN, Defendant-Appellant.	LC No. 96-002745

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions 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 twenty to forty years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction. We affirm.

Defendants first issue on appeal is that the trial court erred when it admitted into evidence defendant's statements to the police because they were the fruit of an illegal arrest. The standard of review for evaluation of a trial court's findings in a *Walker*[1] hearing is the clearly erroneous standard. *People v Williams*, 163 Mich App 744, 749; 415 NW2d 301 (1987). This Court will affirm the trial court's findings absent a definite and firm conviction that a mistake has been made. *Id.*

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *In re Forfeiture of $176,598*, 443 Mich 261, 264-265; 505 NW2d 201 (1993). Absent a compelling reason to impose a different interpretation, the Michigan Constitution is construed to provide the same protection as that secured by the Fourth Amendment. *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991).

A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony. MCL 764.15(c); MSA 28.874(c); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). In reviewing a challenged finding of probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in

believing that the suspected individual had committed the felony. *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995); *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992); *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983); *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). Evidence obtained as a result of an unconstitutional infringement of an accused person's rights may be inadmissible at trial under the "fruit of the poisonous tree" doctrine. *People v Roderick Walker*, 27 Mich App 609, 614; 183 NW2d 871 (1970). The focus of the pre-trial *Walker* hearing was the voluntariness of defendant's statement in light of his physical condition at the time, and the testimony was directed to this issue. At the conclusion of the testimony, defense counsel argued:

> Your honor, at this point, even while the record is perhaps somewhat incomplete, we are going to renew our motion to suppress the statement as being involuntarily made, first, because there was no probable cause for Mr. Hardeman's arrest that particular night, secondly, because we believe even on the state of this record, the Court cannot be convinced to any degree of certainty that Mr. Hardeman's ability to voluntarily relinquish, intelligently relinquish or give up his rights [sic] to speak with police officers.

Counsel continued his argument, addressing defendant's physical condition when he gave the statement. The prosecutor's argument in response addressed only the voluntariness of the statement in light of defendant's condition, and defense counsel's rebuttal was confined to this issue as well. The following colloquy then ensued:

> THE COURT; Mr. Winters [defense counsel], you're also asking that the case be dismissed because of lack of probable cause to arrest?
>
> MR. WINTERS; Yes, Your Honor, I'm asking that the statement itself be suppressed as fruit of an illegal arrest, because there's nothing on this record . . . that shows why they went to the hospital, why they ordered this man arrested and conveyed. They had nothing at all to connect him with the shooting. So he's a suspect at that point. And he's arrested, he's conveyed . . .
>
> THE COURT: Well, I don't think that I can grant your motion regarding no probable cause for the arrest, but I can deal with the statement . . .
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> * * *
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> [Discussion of defendant's physical condition at the time of the statement.]
>
> . . . And so I'll deny that motion. I'll also deny the motion to dismiss the case based on lack of probable cause.

After trial, defendant filed a motion seeking, in part, either clarification that the probable cause issue had been fully presented to the trial court, or that an evidentiary hearing be held to complete the record. The prosecutor opposed the motion, arguing that the issue had been forfeited because, although it had been raised, it had not been vigorously argued, and, in any event, there had been an outstanding

warrant for defendant's arrest, which rendered the existence of probable cause irrelevant whether police were aware of the warrant or not.

The trial court stated that it probably denied the motion because there was nothing developed in the record to support it. The court left it to this Court to decide if the issue was forfeited. We conclude that defendant preserved the issue by clearly seeking suppression on the basis that the statement was the fruit of an illegal arrest without probable cause. However, we decline to remand for further development of the record because we conclude that testimony presented at trial established that police had probable cause to arrest defendant.

At the time defendant gave his statement, police had interviewed witnesses and had been informed that the incident occurred around 12:30 or 12:45 a.m., shots had been fired back at the perpetrators, and the perpetrators drove a blue Mustang. Officer Lyons testified that he arrived at Grace Hospital with his partner around 1:30 a.m., after being notified that there were shooting victims at the hospital. He and his partner interviewed defendant and his companion who were both being treated for gunshot wounds. The two gave conflicting statements regarding where they were located when they were shot. Officer Lyons testified that after leaving Grace Hospital he went to 9122 Whitcomb to inspect the complainants' car. He found a blue Mustang with a bullet hole and impounded the vehicle. We conclude that this information was sufficient to cause a prudent person of reasonable caution to conclude that defendant had participated in the shooting incident. Thus, there was probable cause to arrest defendant when he gave his statement and his statement was not the fruit of an illegal arrest.

Defendant next argues that his waiver of his *Miranda* rights was not knowingly, intelligently or voluntarily made. 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 (1966); *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). In *People v Dunlap*, 82 Mich App 171; 266 NW2d 637 (1978), this Court held that the defendant knowingly and intelligently waived his rights even though he was being treated with pain medications for a serious gunshot wound. *Id*. at 176-177. In *Dunlap*, the defendant had received shots of Morphine and Phenergan for several days when the police officer visited him in the hospital. The officer testified that the defendant was in full control of his faculties when he made the statements. "That the defendant was narcotized does not per se render him incapable of a knowing waiver." *Dunlap, supra*, 82 Mich App 176. Rather, the Court stated that it depends on the totality of the circumstances whether the waiver was voluntary and knowing. Given that the police officer testified that the defendant was in full control, this Court held that the trial court's ruling that the waiver was voluntary and knowing was not clearly erroneous. *Dunlap, supra*, 82 Mich App 176.

In the instant case, Sergeant Visbara testified that at the time defendant waived his rights, he never complained about his injury and did not seem to be under the influence of drugs or narcotics. Defendant did not have trouble answering questions. Furthermore, Dr. McGraw testified that, although defendant received Demerol, Morphine and Tylenol with codeine, the medications should not have affected defendant by the time he gave his statement to the police. Dr. McGraw also testified that the medications would not have had mind altering effects. Here, as in *Dunlap, supra*, 82 Mich App 171,

the mere fact that defendant received narcotics for pain before he made his statements, did not prevent defendant from making a knowing and intelligent waiver of his rights.

Defendant's final issue on appeal is that he was denied a fair trial by an in-court identification and that counsel's failure to object to this at trial constituted ineffective assistance of counsel. Defendant did not properly preserve this issue for appeal because he did not raise objections to the in-court identification at trial. Therefore, this Court will review this issue if failure to do so would result in a manifest injustice. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994); *Herald Co v City of Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998). A trial court's decision to admit identification evidence will not be reversed on appeal unless it was clearly erroneous. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). A decision is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *McElhaney*, *supra*.

If a witness is exposed to an impermissibly suggestive pretrial lineup, his in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification would be based on a sufficiently independent basis to purge the taint of the illegal identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977).

To determine whether the in-court identification would result from a sufficiently independent basis, the trial court must hold a hearing and consider the totality of the circumstances. *Gray*, *supra*, 457 Mich 115; *Kachar*, *supra*, 400 Mich 96-97. Appropriate factors include: (1) the witness' prior knowledge of the defendant; (2) the witness' opportunity to observe the criminal doing the crime; (3) the length of time between the crime and the disputed identification; (4) the witness' level of certainty at the prior identification; (5) discrepancies between the pretrial identification description and the defendant's actual appearance; (6) any prior proper identification of the defendant or failure to identify the defendant; (7) any prior identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and, (9) any special features of the defendant. *Gray*, *supra*, 457 Mich 116; *Kachar*, *supra* 400 Mich 95-96.

At trial, Willie Davis identified defendant as the driver of the car. Davis admitted that he identified defendant after he saw him coming into the police station. Examination of the eight applicable factors reveals that the admission of the identification evidence was not clearly erroneous. The first factor is whether Davis had prior knowledge of defendant. It does not appear that Davis knew defendant. Second, this Court must consider Davis' opportunity to observe defendant during the crime. Davis testified that he witnessed defendant from the time he first pulled into the driveway to the time he started shooting. The next factor to consider is the length of time between the crime and the disputed identification. Davis witnessed defendant committing the crime on March 17, 1996. He identified defendant as the suspect at the police station later that day when defendant was brought in. Davis identified defendant again at trial on March 12, 1997.

The next factor to consider is Davis' level of certainty at the prior identification. At the time of the incident, Davis witnessed the occupants of the car. At trial, he testified that he would recognize

them again if he saw them. Davis testified at trial that when defendant was brought into the police station, he recognized him as the suspect. This is because, as Davis testified, when defendant first pulled the car alongside the bar and then moved on to the parking lot, he was not wearing a mask. It was not until the car approached the bar a second time after exiting from the parking lot that defendant was seen wearing a mask.[2] The fifth factor to consider is any discrepancies between the pretrial identification description and defendant's actual appearance. Davis acknowledged at trial that he originally told investigators that he could not describe the suspect. However, he testified that he was upset at the time and had changed his mind after he calmed down. The next factor to consider is any prior proper identification of defendant or failure to identify defendant. As stated earlier, Davis identified defendant at the police station when he was brought in.

The eighth factor considers the mental state of the witness at the time of the crime. Davis testified that, at the time of the crime, he was upset. However, he testified that by the time he identified defendant at the police station, he was calm. Regarding factors seven and nine, the record does not reflect whether there was any prior identification of another as the culprit or whether defendant had any special features.

Considering the eight factors, the admission of the in-court identification was not clearly erroneous. Even if Davis' identification of defendant at the station house was prejudicial, there was an independent basis to admit the in-court identification. Davis had an adequate amount of time to witness defendant at the time the crime occurred. Furthermore, Davis did not give a conflicting previous identification. He acknowledged that he told the police initially that he could not describe defendant. However, he further acknowledged that, at the time he told police he could not describe defendant, he was upset.

Even if we were to conclude that Davis' identification was tainted, we would view the error as harmless in light of defendant's statement admitting his presence at the scene, which we conclude was properly admitted.

Defendant also argues that, alternatively, he was denied the effective assistance of counsel when his attorney failed to object to the in-court identification at trial. To establish ineffective assistance counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

Defendant was not denied the effective assistance of counsel. The admission of the in-court identification was proper. Thus, even if defendant's counsel would have objected or moved to suppress the identification, the in-court identification would have been properly admitted.

Defendant's proceeding was not fundamentally unfair or unreliable because the in-court identification was properly admitted into evidence.

Affirmed.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Helene N. White

[1] *People v Walker* (On Remand), 374 Mich 331; 132 NW2d 87 (1965).

[2] Davis' testimony that defendant was not masked at the initial appearance of the car was corroborated by the testimony of Thomas Pringle, another witness to the shooting.