

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FELIPE MORALES, JR.,

Defendant-Appellant.

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UNPUBLISHED

February 1, 2000

No. 209503

Ottawa Circuit Court

LC No. 97-020748-FH

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Defendant Felipe Morales, Jr. was convicted by a jury of possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6), and sentenced to two and a half to five years imprisonment. He appeals as of right. We affirm.

I

In April, employees at the photo lab at a Wal-Mart in Grand Haven were developing photographs when they saw a number of pictures of a person with a large number of guns. The employees turned the photographs over to the Ottawa County Sheriff's Department. Several deputies recognized defendant as the person in the photographs. At the time, defendant was on parole.

Police obtained a warrant to search defendant's house. In the course of the search, they found three handguns and three rifles; all but one were found in a gun safe, with the remaining gun in a closet. Defendant was taken into custody and questioned. Defendant first claimed that the guns belonged to Brenda Loucks, with whom defendant lived; however, he later referred to the guns as "my toys" and told the officers that he kept one of the guns out of the gun safe for protection. He also told the officers that he shot the guns with Loucks and "the kids."

II

Defendant argues that his felon in possession conviction must be vacated because it infringes on his right under the Michigan Constitution to keep and bear arms. Const 1963, art 1, § 6. This Court

has found the felon in possession statute, MCL 750.224f; MSA 28.424(6), constitutional in the face of an identical challenge. *People v Swint*, 225 Mich App 353, 375; 571 NW2d 666 (1997). We reject defendant's argument that *Swint* should be revisited.

### III

Defendant contends that the court erred in finding that his post-arrest statement was voluntary. We disagree.

Defendant did not object to the introduction of his statement at trial; however, this Court remanded the case for a hearing under *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965), on the issue of voluntariness. The hearing on remand shows that defendant was interviewed within a couple of hours after he was arrested and was advised of his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). When asked if he wanted to waive his rights and talk to officers, defendant replied that he understood and would waive his rights, adding that he would not answer any questions that he did not believe to be in his best interests. Defendant then gave his statement.

At the time he was questioned, defendant was recovering from surgery for a hernia. Toward the end of the questioning, defendant indicated that he was beginning to feel pain from his surgery; the questioning ceased shortly thereafter. The officers present did not see any indication that defendant was under the influence of drugs at the time of the interview.

Defendant testified that his surgery had been performed on an outpatient basis two days before he was arrested. The doctor gave him two medications, Vicodin and Ativan, for the pain accompanying the surgery. On the day he was arrested, he had taken each of the medications about two hours before police arrived at his house. He could not remember receiving *Miranda* warnings or any of the questions and answers during the questioning; however, he remembered the location of the office where he was taken for questioning, his state of mind at the time of the arrest, where he was located in the house when the police arrived, that the questioning officers did not ask him about his physical condition, that he was not asked to sign anything, and that he was interviewed in a partitioned area inside a large room. He admitted that the information that the officers testified he gave them was accurate; however, he did not remember giving them the information.

Defendant's surgeon testified that although defendant's surgery would have caused him a great deal of pain, it would not affect his judgment. The doctor characterized the side effects of Vicodin, a narcotic, as drowsiness and impaired judgment at times and further testified that Ativan, a muscle relaxant similar to Valium, has "reported amnesic effects." The combination of medications would give the person taking them a sense of well-being and euphoria. The peak effect from the medications would come approximately two hours after they were taken; the effects would be gone four to six hours after they were taken, but the effect of the medications could differ between individuals. The court then found, considering the totality of the circumstances, that defendant's statements were voluntary.

The factors to be considered by the trial court in evaluating the voluntariness of a confession are articulated in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). The voluntariness of a confession is a question for the trial court. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). In reviewing the court's determination, we examine the entire record and make an independent determination regarding voluntariness. *People v Johnson*, 202 Mich App 281, 287; 508 NW2d 509 (1993). Nonetheless, this Court will defer to the trial court's superior ability to view the evidence and the witnesses and will not disturb the court's findings unless they are clearly erroneous. *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

Defendant contends only that the court's finding of voluntariness was clearly erroneous because he was under the influence of medication at the time. Advanced intoxication from drugs may preclude an effective waiver of *Miranda* rights; however, the fact that a person is under the influence of drugs is not dispositive of the issue of voluntariness. *People v Feldmann*, 181 Mich App 523, 531; 449 NW2d 692 (1989). Although defendant's doctor testified that a person on defendant's medication could suffer impaired judgment, the officers saw no indication that defendant's judgment was impaired. Defendant testified that he did not remember being read his rights or the questions and answers; however, he could remember many other details of the arrest that did not go to the waiver of his rights or his incriminating statements. Defendant was questioned approximately four hours after he last took the medications, the time by which effects of the medication would be gone. The court's finding that there was no credible evidence that defendant was under the influence of medication to the extent that he could not waive his rights was not clearly erroneous. The confession was voluntary.

Defendant also contends that counsel was ineffective for failing to object to testimony about his statement. We disagree. Defense counsel is not under a duty to make meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

#### IV

Defendant contends that the court abused its discretion in admitting into evidence the photographs that were sent to the sheriff's department by Wal-Mart employees. We disagree.

The admission of photographs is within the discretion of the trial court. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). The proponent of photographic evidence may establish a proper foundation for the admission of photographs if someone who is familiar from personal observation of the scene or person photographed testifies that the photograph is an accurate representation of the scene or person. *In re Robinson*, 180 Mich App 454, 460-461; 447 NW2d 765 (1989). If there are any changes in the scene, the photograph may still be admitted if the sponsoring witness testifies to the extent of the changes. *Id.* Photographic evidence is admissible if relevant, pertinent, competent, and material to any issue in the case. *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972). The foundation for the admission of the photographs was established by witnesses who testified that defendant appeared in the pictures, that he was in possession of guns, and that the room in which he was photographed appeared to be one of the rooms in the house searched. Nothing further must be done to lay a foundation. Defendant argues that the photographs showing defendant holding weapons were admissible only if it could be established when he possessed them.

We disagree. The authenticity of the pictures and their materiality was established simply by showing the element of possession; they did not have to show both possession and time of possession. There was no abuse of discretion.

V

Defendant contends that the presentence report does not contain three corrections that the court said it would make during sentencing. Defendant filed a motion with this Court to remand the case to the trial court for a hearing on a motion for new trial and to correct the errors contained in the presentence investigation report. On October 7, 1998, this Court granted the motion and directed the trial court to correct the errors in the presentence investigation report. In the order denying the motion for new trial, entered on January 20, 1999, the parties stipulated that the corrections had been made and that a corrected copy of the report had been sent to the department of corrections. There is nothing further that this Court can order. The issue is moot.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Janet T. Neff