

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRED M. WHEELER,

Defendant-Appellant.

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UNPUBLISHED

July 14, 2000

No. 208847

Oakland Circuit Court

LC No. 97-152821-FC

Before: Griffin, P.J., and Holbrook, Jr. and J.B. Sullivan,\* JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of unarmed robbery, MCL 750.530; MSA 28.798, for which he was sentenced to two years' probation with the first six months in jail. We affirm, but remand for correction of the judgment of sentence.<sup>1</sup>

Defendant contends that the prosecutor should not have been allowed to introduce evidence of a photographic lineup because defendant was readily available for a corporeal lineup. Aside from the fact that defendant failed to preserve this issue by raising it at trial, *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999); *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000), it is without merit. Generally, a photographic identification should not be used when the defendant is either in custody, *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), or when he is "readily available" for a corporeal lineup. *People v Dumas*, 102 Mich App 196, 200; 301 NW2d 849 (1980). "Readily available" has been strictly construed to mean subject to legal compulsion to appear at a line-up. *People v Harrison*, 138 Mich App 74, 76; 359 NW2d 256 (1984). A defendant is subject to legal compulsion to appear when a warrant has been issued for his arrest. *Id.*, at 77. See *People v Kurylczyk*, 443 Mich 289, 298 n 8; 505 NW2d 528 (1993).

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<sup>1</sup> Although defendant was tried before a jury, the judgment of sentence erroneously indicates that he was tried before the court. We therefore remand for correction of the judgment of sentence.

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In this case, defendant was neither in custody nor had a warrant been issued for his arrest. Therefore, the photographic lineup was proper. *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). Because the photographic lineup was proper, counsel was not ineffective for failing to move for suppression of the witness' in-court identification. *People v McFadden*, 159 Mich App 796, 798; 407 NW2d 78 (1987). In any event, there was an independent basis for the in-court identification of defendant. See *People v Gray*, 457 Mich 107; 577 NW2d 92 (1998).

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Donald E. Holbrook, Jr.

/s/ Joseph B. Sullivan