

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE ARTRIA BARNES, a/k/a RALPH
MOMASTER,

Defendant-Appellant.

UNPUBLISHED
October 24, 2000

No. 220817
Kent Circuit Court
LC No. 98-009927-FH

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of felonious assault, MCL 750.82; MSA 28.277, and two counts of resisting and obstructing a police officer, MCL 750.479; MSA 28.747. He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to four to fifteen years' imprisonment for the felonious assault conviction and thirty-two to fourth-eight months' imprisonment for each resisting and obstructing conviction. Defendant appeals as of right, and we affirm, but remand for correction of the presentence investigation report.

Defendant was seated at an outdoor table at a restaurant. Defendant was not a patron of the restaurant and was asked to leave by the owner. In response, defendant "displayed" a weapon that resembled a screwdriver with a "sharper pointed edge." The restaurant owner called police. When police arrived, defendant had moved across the street to a gas station. Police attempted to speak to defendant, but he fled. A foot pursuit ensued. During the course of the chase, defendant struck one officer in the neck area. He also threatened an officer with his "weapon" before throwing it on the roof of a building. Defendant was brought to the ground, but continued to resist by flailing his arms and punching. Defendant had to be sprayed with pepper gas to allow the officers to secure him.

At trial, defense counsel was conducting cross-examination of Officer Michael Maycroft when the officer revealed that a "fail to stop" report had been completed. The report had been prepared to address a city ordinance. The prosecutor was also unfamiliar with the report. Defendant moved to dismiss the case for failure to comply with discovery. Defendant argued that the delay in receipt of the information affected trial preparation and plea negotiations. The prosecutor argued that the information

within the report had been revealed at the preliminary examination, and defendant's attorney at the preliminary examination appeared to be aware of the report. The trial court adjourned trial to allow review of the report and held that any prior plea offer would be renewed. The next day, when trial resumed, defense counsel again moved for dismissal. However, defense counsel acknowledged, upon questioning by the trial court, that the report merely corroborated the officers' oral testimony that defendant had been ordered to stop. The trial court denied defendant's motion to dismiss, and defendant did not avail himself of the renewed plea offer.

Defendant first argues that the prosecutor deprived him of his right to due process by failing to turn over "critical discovery" and the trial court failed to grant a meaningful remedy as a result of the misconduct. We disagree. We review a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). The exercise of discretion involves balancing the interests of the courts, the public, and the parties. *Id.* at 598. Inquiry into all relevant circumstances must occur, including the cause of the tardy or total noncompliance and a showing by the objecting party of actual prejudice. *Id.* In the present case, the prosecutor stated that he also became aware of the report during trial when defense counsel cross-examined Officer Maycroft. Accordingly, the prosecutor's failure to provide the report does not appear to be purposeful or flagrant misconduct. Furthermore, defendant makes a blanket assertion of prejudice, but has failed to make any showing. The document merely corroborated the oral testimony of police. Even if the existence of the report would have caused defendant to accept a plea offer prior to trial, the court ordered that the plea offer would be extended at trial to avoid any prejudice. Despite the offer, defendant did not accept any plea. Accordingly, we cannot conclude that the trial court abused its discretion in denying defendant's motion to dismiss for failing to comply with discovery.¹ *Davie, supra.*

Defendant next argues that his presentence investigation report ("PSIR") should be corrected and forwarded to the Michigan Department of Corrections. At sentencing, the trial court agreed to strike disputed information from the report. However, a line was merely drawn through a portion of the report and the offending information was not stricken. The prosecutor agrees that defendant is entitled to have the information stricken from the report. Accordingly, we remand for correction of the PSIR.

¹ We note that defendant argues that his due process rights were violated as a result of the failure to provide the discovery. In *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997), we identified three situations in which a defendant's due process rights to discovery were implicated. Specifically, due process was implicated where a prosecutor allowed false testimony to stand, where material evidence favorable to the defendant was suppressed, or where defendant made a general or no request for exculpatory information and exculpatory information was suppressed. *Id.* These circumstances are not present here, and consequently defendant's due process rights were not implicated. Rather, the discovery of the report harmed defendant's case because it further corroborated oral testimony given by police.

Affirmed. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Harold Hood

/s/ Gary R. McDonald