STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 218724 Charlevoix Circuit Court
RONALD WILLIAM ROSS, Defendant-Appellant.	LC No. 98-028709-FC 98-028809-FC

Before: Talbot, P.J., and Hood and Smolenski, JJ.

PER CURIAM.

After a jury trial, defendant was convicted on two counts of safe-breaking, MCL 750.531; MSA 28.799, as a fourth habitual offender, MSA 769.12; MSA 28.1084. He was sentenced to a concurrent term of life imprisonment on each charge. Defendant appeals as of right from his convictions and sentences. We affirm.

I. The Vehicle Search

Defendant first argues that the trial court erroneously refused to suppress the evidence seized during the warrantless search of his vehicle. Although defendant admits that he initially consented to the vehicle search, he argues that he revoked that consent when he requested the presence of counsel. Defendant contends that police officers violated his Sixth Amendment right to counsel by continuing to ask for his consent to search the vehicle after he had asked for an attorney. Defendant also contends that police officers violated his Fourth Amendment rights by conducting the warrantless vehicle search without his consent.

A. Sixth Amendment Right to Counsel

A criminal suspect's right to counsel is guaranteed by both the Fifth and Sixth Amendments of the United States Constitution, as well as Const 1963, art 1, §§ 17 and 20. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). However, the Sixth Amendment right to counsel does not attach until "adversarial legal proceedings have been initiated against a defendant by way of indictment, information, formal charge, preliminary hearing, or arraignment." *Id.* at 377.

In *Marsack*, police officers suspected that the defendant was involved in a homicide. The police asked the defendant a few preliminary questions and then asked him to answer additional questions at the police station. After arriving at the police station, the defendant requested the presence of counsel. Despite that request, the police asked the defendant to sign several consent to search forms. On appeal, the defendant argued that the police violated his constitutional rights by asking him to sign the consent to search forms after he had invoked his right to counsel. This Court disagreed, holding that the defendant's Sixth Amendment right to counsel had not yet attached. We believe that the same analysis applies in the present case. As in *Marsack*, the instant defendant was neither in police custody when answering the police officers' preliminary questions nor when asked to sign the consent to search form. *Id*. at 374. As in *Marsack*, formal adversarial proceedings had not begun when defendant was asked to sign the consent to search form. *Id*. at 377. Therefore, the police officers' request in the instant case for defendant to sign the vehicle search consent form did not violate defendant's Sixth Amendment right to counsel.

B. Fourth Amendment Proscription
Against Unreasonable Searches and Seizures

Defendant next argues that the warrantless search of his vehicle violated his constitutional rights because the search was performed without his consent. Both the United States and the Michigan Constitutions guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). As a general matter, a "reasonable" search requires that police obtain a warrant. *People v Goforth*, 222 Mich App 306, 309; 564 NW2d 526 (1997). However, Fourth Amendment rights may be waived and one may always consent to a search. *Id*. In order to determine the validity of consent to a search, a trial court must review the "totality of the circumstances." *Id*. Finally, a criminal suspect may revoke consent to search at any time and police must stop the search at that point unless continuing the search can be justified under some basis other than the suspect's consent. *People v Powell*, 199 Mich App 492, 500-501; 502 NW2d 353 (1993).

In the present case, the trial court made a factual finding that defendant consented to the vehicle search and confirmed that consent after requesting counsel. According to Officer Meredith, defendant invoked his right to counsel and then he asked defendant, "I suppose this means you don't want us to search your car?" Meredith further testified that defendant agreed the vehicle search could continue. In contrast, defendant testified that he specifically told police officers that "[e]verything is off until I speak to an attorney," including the vehicle search.

A trial court's ruling on a motion to suppress evidence is entitled to deference, and will not be disturbed on appeal unless clearly erroneous. *People v Faucett*, 442 Mich 153, 170; 499 NW2d 764 (1993); *Snider*, supra at 406. In the present case, we do not believe that the trial court's determination was clearly erroneous because defendant's testimony was contradicted by his own signed statement: "Even though I wish to have an attorney in this matter[,] I still give officers permission to search my vehicle." The circuit court's interpretation of that statement as renewed consent to search is much more reasonable than defendant's interpretation, that it represented a refusal of consent to search unless defendant's attorney was physically present. Further, as the trial court noted, defendant was actually present during the vehicle search and he never asked the officers to stop the search until an attorney arrived. We therefore conclude that

the trial court properly denied defendant's motion to suppress evidence seized during the vehicle search.

II. The Recorded Telephone Conversation

Defendant next argues that the trial court erroneously refused to suppress the evidence seized as a result of police officers' electronic recording of a telephone call which defendant placed from the booking desk of the county jail. In order to establish a Fourth Amendment violation with regard to a telephone conversation, a defendant must have had a reasonable expectation of privacy in that conversation. *People v Bell*, 131 Mich App 586, 588; 345 NW2d 652 (1983).

Defendant relies on *People v Tebo*, 37 Mich App 141; 194 NW2d 517 (1971), for the proposition that an inmate of a correctional facility maintains a reasonable expectation of privacy in his telephone conversations. In *Tebo*, the defendant made a telephone call from jail after he had been booked. One of the police officers testified that he picked up the extension to ascertain whom the defendant was calling. *Id*. at 144-145. On appeal, this Court held that the defendant's telephone conversation had been improperly intercepted because there was "nothing in the record which indicates that the defendant should have known someone was listening in." *Id*. at 149.

The prosecution relies on *People v DeGeer*, 140 Mich App 46; 363 NW2d 37 (1985), for the proposition that defendant did not have a reasonable expectation of privacy in making the telephone call. In that case, the defendant made a telephone call from the booking desk of the county jail, and a sign located near the telephone stated that all conversations would be recorded. The trial court denied the defendant's motion to suppress incriminating statements made while using the telephone, ruling that defendant had only a limited expectation of privacy in the conversation. On appeal, the defendant argued that he had not seen the sign warning that his telephone call would be recorded. This Court held that the defendant was on reasonable notice that his telephone conversation might be monitored and affirmed the trial court's decision denying defendant's motion to suppress. *Id*. at 47-48.

In the present case, the trial court concluded that defendant did not have a reasonable expectation of privacy in making his telephone call. That decision is supported by numerous facts: (1) defendant placed the telephone call from the booking desk of the county jail, which was a public area, (2) defendant placed the telephone call during the shift change, when there were a number of people passing through the booking area, (3) defendant asked an officer to dial the telephone for him, (4) a large video camera was mounted on the wall approximately ten feet from defendant, (5) a prominent sign was posted on the wall next to the video camera, stating that the jail inmates' actions and conduct would be videotaped, (6) the video camera had audio capabilities and its portable microphone was located only a short distance from defendant, and (7) defendant had experience as an inmate in other correctional facilities and knew that telephone conversations could be recorded. We cannot say that the trial court clearly erred in holding that defendant did not have a reasonable expectation of privacy in the telephone conversation. Therefore, we affirm the trial court's decision to admit the challenged evidence.

III. Prior Convictions Introduced for Impeachment Purposes

Defendant next argues that the trial court erroneously allowed the prosecutor to introduce evidence of defendant's prior conviction for breaking and entering, for impeachment purposes, in violation of MCR 609(a)(2)(B). Given the strong evidence of defendant's guilt, we need not determine whether the probative value of defendant's prior breaking and entering conviction outweighed its prejudicial effect. The admission of evidence of a prior conviction will be considered harmless where reasonable jurors would have found the defendant guilty beyond a reasonable doubt, even if evidence of the prior conviction had been suppressed. *People v Coleman*, 210 Mich App 1, 7; 532 NW2d 885 (1995). In the present case, the prosecutor introduced overwhelming evidence which tied defendant to the charged offenses. The police found boot prints at both crime scenes which matched boots defendant purchased the previous day. Bank bags and checks from one of the crime scenes were found in the trash can in the motel room which defendant occupied on the night of the crime, a room which he rented under a false name. A hat which witnesses saw defendant wearing on the day before the crime was found in the same trash can. A roll of pennies inscribed with the restaurant manager's unlisted home telephone number was found in the glove box of defendant's car. Police also found a large sum of quarters in defendant's car, corresponding to the quarters stolen from the vending machines at one of the crime scenes. Finally, police seized approximately $5,000 in cash, hidden in boxes in the closet at the home of defendant's girlfriend. That cash included bundles of one-dollar bills which corresponded to items missing from one of the crime scenes. We conclude that reasonable jurors would have found defendant guilty on both counts of safe-breaking even if evidence of defendant's prior breaking and entering conviction had been suppressed.

IV. Prosecutorial Misconduct

Defendant next argues that prosecutorial misconduct deprived him of a fair trial. First, defendant challenges the prosecutor's decision to question him about the possible motives the prosecution witnesses would have had for fabricating testimony. In addition, defendant argues that the prosecutor improperly appealed to the emotions of the jury when he asked one of the victims how he felt about the safe-breaking and when he asked one of the witnesses how she felt about testifying. Defense counsel's failure to object or request a curative instruction forecloses appellate review of allegedly improper remarks by the prosecutor unless the prejudicial effect of the remarks is so serious that no objection or instruction could have cured the prejudice or manifest injustice would result from failure to review the misconduct. *People v Holt*, 207 Mich App 113, 122; 523 NW2d 856 (1994).

We have reviewed all of the instances contained in the trial court record in which the prosecutor asked defendant whether another witness was lying. Taken in context, and particularly viewed in light of defendant's claims that the police had planted evidence and that prosecution witnesses were lying, we conclude that the prosecutor's questions constituted proper attempts to impeach defendant's credibility. We also disagree that the victim's brief answer regarding his feeling when he saw the damage to his business deprived defendant of a fair trial. When considered in the context of a four-day jury trial involving thirty-two witnesses, that brief exchange could not have unduly influenced the jury's decision.

Finally, we conclude that the prosecutor did not engage in misconduct when questioning witness Mary Whiteloon. At the very end of Whiteloon's direct examination, she testified that she had never met defendant and that she did not bear any grudge against him. She also testified that she was nervous because she had served time in jail before and she did not want to see anybody else sent to jail. We conclude that the prosecutor's questions went to the witness's potential motive to fabricate testimony. This line of questioning was appropriate given defendant's theory that the police had framed him. In particular, Whiteloon's testimony tended to rebut defendant's claim that key evidence could not have been found in defendant's motel room. We conclude that no prosecutorial misconduct occurred.

V. Rebuttal Witness

Defendant next argues that the trial court erroneously permitted the prosecutor to call a rebuttal witness who did not respond to any issue or testimony presented by the defense, essentially allowing the prosecutor to divide her case in chief. Because defense counsel did not object to the testimony of this witness at the time of trial, we review the issue only for manifest injustice. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). Our reading of the record convinces us that the witness's testimony tended to rebut defendant's testimony that the hat, gloves, and other items recovered from the motel dumpster had not originated from his room. We find no manifest injustice in the prosecutor's decision to call this witness in rebuttal.

VI. Sentencing

Finally, defendant argues that the trial court abused its discretion when it imposed two concurrent life sentences for what defendant views as non-violent offenses. We note that defendant is a fourth habitual offender whose record includes a previous safe-breaking offense. When reviewing a challenge to the proportionality of an habitual offender's sentence, this Court is limited to determining whether the lower court abused its discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). An abuse of discretion will be found where the sentence imposed does not reasonably reflect the serious nature of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). As noted by our Supreme Court in *Hansford*, *supra* at 326, "a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." Defendant's sentences were within the limits authorized by the Legislature for a fourth habitual offender. MCL 769.12(a); MSA 28.1084. We cannot conclude that the sentences imposed by the trial court were disproportionate given the serious nature of the crimes committed, defendant's extensive criminal record, and his clear inability to conform his conduct to the laws of society.

Affirmed.

/s/ Michael J. Talbot
/s/ Harold Hood
/s/ Michael R. Smolenski