

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WENDY SMITH,

Defendant-Appellant.

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UNPUBLISHED

February 2, 2001

No. 217951

Wayne Circuit Court

LC No. 98-008398

Before: Markey, P.J., and Whitbeck and J. L. Martlew\*, JJ.

PER CURIAM.

Defendant Wendy Smith appeals as of right from her convictions of carjacking<sup>1</sup> and possession of a firearm during the commission of a felony<sup>2</sup> entered after a bench trial. The trial court found Smith not guilty of armed robbery.<sup>3</sup> The court sentenced Smith to 2½ to fifteen years in prison for carjacking and to a consecutive two-year term, with credit for 209 days, for felony-firearm. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E)

I. Basic Facts And Procedural History

The complainant in this matter reported to the police that Smith, whom she had met in a club, pointed a gun at her head and commandeered her vehicle. The incident occurred after Smith had followed the complainant's vehicle to another club.

Before trial, Smith moved for assistance in locating a witness known only as "Star," who had been present in Smith's vehicle during the incident. "Star" was neither listed as a *res gestae* witness nor endorsed as a witness by the prosecution. At trial, the complainant testified that "Star" was present in Smith's vehicle at all times. An officer who took a report from the complainant testified that the complainant had stated that the other female, not Smith, carried the

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<sup>1</sup> MCL 750.529a; MSA 28.797(a).

<sup>2</sup> MCL 750.227b; MSA 28.424(2).

<sup>3</sup> MCL 750.529; MSA 28.797.

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

gun. Another officer testified that when she spoke on the telephone with “Star,” she refused to provide her full name and stated that she did not want to be involved in the proceedings. The trial court adjourned the trial to allow the prosecution to attempt to locate “Star.” Subsequently, an officer testified, he went to an address obtained through the telephone company, but was told that “Star” had relocated to Atlanta. He visited a different address on two occasions, but was unable to make contact with anyone. The trial court found that the prosecution had exercised due diligence in attempting to locate “Star,” and refused to conclude that had she been produced, her testimony would have been unfavorable to the prosecution.

## II. Res Gestae Witnesses

### A. Standard Of Review

Smith argues that the trial court erred by finding that the prosecution exercised due diligence in attempting to locate “Star.” We review a trial court’s conclusion on this issue for an abuse of discretion.<sup>4</sup>

### B. Due Diligence

Under MCL 767.40a(2) and (5); MSA 28.980(1)(2) and (5), the prosecution has a continuing duty to provide notice of known res gestae witnesses and reasonable assistance in locating witnesses upon the defendant’s request.<sup>5</sup> Due diligence is the attempt to do everything that is reasonable, but not everything that is possible, to obtain the presence of a witness.<sup>6</sup> “The test is one of reasonableness, and depends on the facts and circumstances of each case . . . .”<sup>7</sup>

### C. The Prosecution’s Efforts

The prosecution did not name “Star” as a res gestae witness, apparently because it could not fully identify her. There is no duty to use due diligence to discover the names of witnesses.<sup>8</sup> A prosecutor must produce an endorsed witness unless it is shown that the witness could not be produced notwithstanding the exercise of due diligence.<sup>9</sup> The record shows that the prosecution did not endorse “Star” as a witness. Nevertheless, in response to Smith’s request and as required by MCL 767.40a(5); MSA 28.980(1)(5), the prosecution provided assistance in attempting to locate “Star.” Ultimately, the prosecution learned that “Star” had relocated to Atlanta. No more specific information was obtained. This was not a case in which the prosecution was attempting to have an endorsed witness declared unavailable so that previous testimony given by that

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<sup>4</sup> *People v Bean*, 457 Mich 677, 684; 680 NW2d 390 (1998).

<sup>5</sup> *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995).

<sup>6</sup> *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988), quoting *People v George*, 130 Mich App 174, 178; 342 NW2d 908 (1983).

<sup>7</sup> *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

<sup>8</sup> *Burwick*, *supra* at 293.

<sup>9</sup> *Cummings*, *supra* at 584-585.

witness could be used at trial. In such a case, the failure to follow a lead concerning the location of a witness who has left the state has resulted in a finding that due diligence was not used to secure the presence of the witness.<sup>10</sup> Here, the prosecution took reasonable steps to ascertain the missing witness's complete identity and to discover that she had left the state. The trial court did not abuse its discretion by concluding that the prosecution provided the required reasonable assistance, or exercised due diligence, in attempting to locate the missing witness.<sup>11</sup> Furthermore, the trial court's decision to accept the complainant's testimony that Smith pointed the gun at her, while rejecting testimony that the complainant stated otherwise at one point, leads to the conclusion that the missing witness's testimony would not have assisted Smith. Thus, any error was harmless.

Affirmed.

/s/ Jane E. Markey

/s/ William C. Whitbeck

/s/ Jeffrey L. Martlew

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<sup>10</sup> *Bean, supra* at 686.

<sup>11</sup> MCL 767.40a(5); MSA 28.980(1)(5); *Cummings, supra* at 585.