# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUJUAN I. HANSPARD,

Defendant-Appellant.

UNPUBLISHED
September 4, 2001

No. 218906
Wayne Circuit Court
LC No. 98-007883

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Defendant was convicted of aiding and abetting the delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced as a fourth habitual offender, MCL 769.12, to three to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the unavailability of the transcript of the first day of trial requires reversal of his conviction. We disagree.

Following a three-day bench trial resulting in defendant's conviction of aiding and abetting the delivery of less than fifty grams of cocaine, defendant filed a motion in this Court to remand the case to the trial court in order to settle the record of the first day of trial because the transcript of that day was unavailable. The court reporter testified in an affidavit that the tape of the first day of the trial was blank. In view of the circumstances and consistent with MCR 7.210(B)(2), this Court ordered a remand to the trial court for settlement of the record. In response to our remand order, the trial court read her trial notes of the first day into the record as the certified statement of facts settling the record.[1] Now, on appeal, defendant argues that the

[1] Afterward, defense counsel informed the trial court that defendant wanted to read his trial notes into the record as well and argued defendant should be permitted to participate in the proceeding. The trial court did not allow defendant to read his notes into the record, but allowed him to submit a copy of his notes as part of the record. The court gave defendant time to prepare a proposed statement of facts using his notes and scheduled a future hearing on the matter. Defendant filed a revised proposed statement of facts and a supplemental memorandum of law with the trial court, arguing that the court could not accurately and fairly settle the record. At the final hearing on this issue, the trial court reviewed and rejected defendant's revised proposed statement of facts, finding that portions of the proposed facts were mere allegations as opposed

(continued…)

absence of the transcript precludes meaningful appellate review and requires reversal of his conviction.

Whether the unavailability of a trial transcript denies a defendant his due process right to proper appellate review is a constitutional issue which this Court reviews de novo on appeal. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). While the inability to obtain a transcript of a criminal proceeding may so impede a defendant's right to appeal that a new trial must be ordered, *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981), the unavailability of a transcript does not automatically require the vacation of a defendant's conviction. If the surviving record is sufficient to allow evaluation of a defendant's claims on appeal, the defendant's right is satisfied. *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). Furthermore, a defendant must demonstrate prejudice resulting from the missing transcripts. *Bransford v Brown*, 806 F2d 83, 86 (CA 6, 1986). Although demonstrating prejudice is difficult in the absence of transcripts, a defendant must present something more than gross speculation that the transcripts were requisite to a fair appeal. *Id*.

In the instant case, defendant contends that the testimony of a key prosecution witness (the intermediary in the drug transaction in question who purchased the cocaine for the police) is contained in the missing transcript. Defendant argues that this witness' testimony, by the prosecutor's own admission, was purportedly "rough around the edges," and there is no way for defendant to meaningfully challenge such questionable testimony on appeal. Defendant further argues that "[s]ingularly absent from the trial court's purported findings were any objections made, the basis for such objections, and the rulings made in response to such objections," and "[y]et the final arguments suggest that there must have been significant objections during the March 1st proceedings, but there is no way to reproduce the events." However, we conclude that defendant's broad allegations in this regard, including his contention that the transcript might reveal error on evidentiary rulings, are so nebulous that they constitute mere speculation that reversible error may have occurred.

Although defendant also maintains that the transcript is necessary in order to assess alleged error regarding the foundation for the admissibility of the marked funds used in the drug transaction and referenced at trial, our review of the record does not substantiate defendant's claim. The transcript of the second day of trial reflects that defense counsel complained that he did not receive any information during discovery regarding the denominations of the alleged pre-recorded funds. With regard to the police report indicating the pre-recording of the cash used in the transaction, the following transpired:

> *The Court*: Didn't you get the report with all the pre-recorded funds serial numbers on it?
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> * * *

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to facts and many of the proposed facts were untrue. The trial court then certified its own notes that had been read into the record at the previous hearing as the settled statement of facts.

*The Court*: Did you get that?

*Mr. Hennigan (defense counsel)*: Yes.

*The Court*: Well what else would you want?

*Mr. Hennigan*: Well, judge, that's after the fact.

*Mr. Wenzel (assistant prosecutor)*: It was the inventory of what funds were removed from what persons with serial numbers and the serial number of the one bill that wasn't recovered as well. That's –

*Mr. Hennigan*: I want to separate something out, judge.

The point I'm making on that issue is simply that I wasn't getting discovery. And that this – that regarding the pre-recorded funds, I am not asking at this point that that testimony regarding the pre-recorded funds be stricken because there isn't any testimony regarding any pre-recorded funds *unless you look at this report* which is after the fact.

I simply mention that to illustrate the fact that I am not getting the full discovery in this case. And in fact this one is so tardy it's unacceptable. [Emphasis added.]

Defendant's proposed statement of facts alleged as follows with regard to the pre-recording of the serial numbers of the cash used in the transaction:

4. Taylor Police Sergeant Dale Tamsen testified that he had provided $200.00 for the use of Officer Jeff Patterson in attempting to buy drugs.

5. Tamsen did not know the serial numbers of the funds.

6. He claimed he had documentation of the serial numbers and denominations of the bills, but he left the documentation at his office.

7. The prosecution used Officer Patterson's police report for the ostensible purpose of refreshing Sgt. Tamsen's recollection. Sgt. Tamsen had not indicated he had previously known the serial numbers or denominations, and that review of Patterson's report could have refreshed his recollection. Defense counsel objected that this was improper refreshment of recollection, and that using Patterson's report to verify the denominations and serial numbers recorded on Tamsen's absent documentation lacked a foundation of personal knowledge, and violated the best-evidence rule. The trial court overruled.

8. Sgt. Tamsen could not testify as to the denominations of the bills. Over a defense objection to improper refreshment of recollection, and improper speculation, *he was permitted to rely on Officer Patterson's report to refresh his recollection.* He had no independent knowledge as to how certain serial numbers and bill denominations came to be listed on Patterson's report, but Tamsen was

allowed to speculate, "Well, I guess he got them off mine [my documentation]," which was never produced. [Emphasis added.]

Even assuming the facts were as alleged in defendant's proposed statement of facts, we conclude that no error requiring a new trial occurred due to the missing transcript. MRE 612(A) allows a witness to review a writing for the purpose of refreshing the witness' recollection. This was done in the present case. Defendant cites no authority for the proposition that the witness himself must be the author of the document from which his memory is refreshed. In any event, if error occurred on this evidentiary issue, we conclude such error was harmless. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999); MCL 769.26. Ample evidence was presented from the prosecution witnesses that defendant, by his presence during the drug transaction and the nature of his questioning of the undercover police officer, intended to assist in the transaction and aided and abetted the delivery of less than fifty grams of cocaine.

Defendant also argues that the trial court's adoption of its own notes as the settled statement of facts denied him the right to meaningfully participate in the settlement of the record. This argument is refuted by the facts set forth in this decision, *supra* at p 2, n 1. As these facts demonstrate, defendant was permitted to participate in the proceedings to settle the record; the trial court simply disagreed with his version of the statement of facts and used its own trial notes, which it perceived to be "an accurate, fair and complete statement of the proceedings before it," MCR 7.210(B)(2)(c), as the basis for the certified statement of facts.

Finally, defendant argues that the trial court's decision to vacate the original sentence and impose a harsher habitual offender sentence was improper. We disagree.

Although defendant's habitual offender status was determined prior to the imposition of his sentence on the underlying offense, the trial court mistakenly followed the procedure set forth in an outdated, former version of MCL 769.13, whereby a defendant's habitual offender status was to be determined *after* the imposition of his sentence on the underlying offense, see, generally, *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998), and imposed a sentence of eighteen months to twenty years' imprisonment. The trial court then vacated the original sentence and imposed a habitual offender sentence of three to twenty years' imprisonment. However, MCL 769.13 had been amended effective May 1, 1994, to provide for the determination of a defendant's habitual offender status *at or before* the sentencing hearing on the underlying offense so as to obviate the need to vacate a defendant's underlying sentence. MCL 769.13(5); *Green*, *supra* at 699 ns 2 and 3.

Noting that once a valid sentence is imposed, it cannot be set aside or modified, MCR 6.429, *People v Wybrecht*, 222 Mich App 160, 564 NW2d 903 (1997), defendant argues that the trial court did not have jurisdiction to vacate the initial eighteen month to twenty year sentence and impose a harsher one. However, it is obvious from our review of the record that the trial court intended to impose on defendant a sentence of three to twenty years' imprisonment but was under the misconception that it was required to first impose the eighteen-month minimum sentence for the underlying offense before enhancing the sentence pursuant to the habitual offender statute, MCL 769.12. The trial court's operation under the former, pre-amended version of MCL 769.13 was based on a misconception of law and constituted a tangible procedural error that led to the imposition of the eighteen-month minimum sentence. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997); *People v Thenghkam*, 240 Mich App 29, 70-71;

610 NW2d 571 (2000). As such, the original sentence was invalid. *Id*. Because the trial court has the authority to correct an invalid sentence, the court's vacation of the original sentence and imposition of the three-year minimum sentence was not improper. MCR 6.429(A); *Wybrecht, supra; People v Lamb (After Remand)*, 201 Mich App 178, 181; 506 NW2d 7 (1993).

The trial court did not otherwise abuse its discretion when it sentenced defendant as an habitual offender within the statutory limits. It is evident that the underlying felony, in the context of previous felonies, evinced defendant's inability to conform his conduct to the laws of society. *People v Hansford (After Remand)*, 454 Mich 320, 323-326; 562 NW2d 460 (1997); *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000); *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998).

In light of our conclusion that the initial sentence was invalid, defendant's argument that the trial court's vacation of the original sentence and imposition of a harsher sentence subjected him to double jeopardy, two punishments for the same offense, is without merit.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell