STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 17, 2002
v JONATHAN D. HICKMAN, Defendant-Appellant.	No. 232041 Saginaw Circuit Court LC No. 00-018884-FJ

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v RICHIE LADDELL HARRIS, Defendant-Appellant.	No. 232042 Saginaw Circuit Court LC No. 00-018885-FC

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendants appeal as of right from their convictions, following a jury trial, of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.529(c). Defendant Hickman also appeals as of right his conviction of possession of a firearm during the commission of a felony. MCL 750.227b(1). The trial court sentenced defendant Harris to concurrent terms of 135 to 202 months' imprisonment for each offense. The trial court sentenced defendant Hickman to concurrent terms of 85 to 130 months' imprisonment for the armed robbery convictions, and a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

Docket No. 232041

Defendant Hickman contends that the trial court erred by denying his motion to suppress evidence relating to the victim's on-the-scene identification. Generally, we review a trial court's

factual findings at a suppression hearing for clear error.[1] *People v Van Tubbergen*, 249 Mich App 354, 359; 642 NW2d 368 (2002), quoting *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). Where the trial court's ruling is a mixed question of fact and law, or a pure question of law, we review de novo the trial court's rulings. *Van Tubbergen, supra* at 359, quoting *Marsack, supra* at 372.

Defendant Hickman contends that the trial court should have excluded the victim's on-the-scene identification because he was not represented by counsel during the identification. However, in *People v Winters*, 225 Mich App 718, 727; 571 NW2d 764 (1997), we held that "it is proper and does not offend the *Anderson*[2] requirements for the police to promptly conduct an on-the-scene identification." In fact, we noted: "Such on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance." *Id.* at 728. "Whatever the perceived problems of on-the-scene confrontations, it appears to us that prompt confrontations will, if anything, promote fairness by assuring greater reliability." *Id.* Accordingly, a prompt, on-the-scene identification does not violate an individual's right to counsel. Defendant Hickman contends that the on-the-scene identification was not "prompt." However, there was credible evidence indicating that the identification took place as soon as sixteen minutes after the incident. As such, we are not persuaded that the trial court erred by rejecting defendant's motion to suppress on this ground.

Alternatively, defendant Hickman contends that the trial court erred by failing to suppress the identification because it was unduly suggestive, and, therefore, violated his due process rights. Specifically, he contends that the identification was unduly suggestive because he "was the only person shown to the witness, it was nighttime, he was already in police custody, sitting in the back seat of a police car, restrained with handcuffs, and the police shined bright lights in his face."

An identification may be challenged on the basis of a lack of due process where "'the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.'" *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Here, there was evidence that defendant Hickman was identified approximately sixteen minutes after his arrest. Although his placement in a patrol car was certainly suggestive, there is no evidence that the police made any suggestive comments at the identification or acted for any reason other than to determine whether Hickman was one of the assailants. Moreover, the record indicates that Hickman ran from police; therefore, handcuffing him and placing him in

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[1] A finding is clearly erroneous where, after reviewing the entire record, we are "left with a definite and firm conviction that a mistake has been made." *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

[2] *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973). Although it is well established that the Sixth Amendment does not attach until a prosecution commences or adversarial judicial proceedings have begun, the *Anderson* Court ruled that, subject to several exceptions, individuals have a right to counsel for all pretrial identification procedures. *Id.* at 186-187 n 23.

the patrol car before the identification was reasonable under the totality of the circumstances. Accordingly, we do not believe that the trial court erred by denying defendant's motion to suppress on this alternative ground.

Next, defendant Hickman challenges the trial court's decision to impose the highest sentence within the guidelines range. Defendant concedes that MCL 769.34(10) mandates that we affirm any sentence that is within the sentencing guidelines range. Indeed, MCL 769.34(10) provides: "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Nevertheless, defendant contends that MCL 769.34(10) unconstitutionally violates the separation of powers doctrine and conflicts with Article I, § 20 of our Constitution.

Initially, we note that defendant forfeited appellate review of the constitutionality of MCL 769.34(10) by failing to raise the issue below. Thus, defendant is not entitled to relief unless he can show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We presume a statute to be constitutional unless its unconstitutionality is readily apparent. *People v Rutledge*, 250 Mich App 1, 4; 645 NW2d 333 (2002).

In regard to defendant Hickman's separation of powers issue, we note that our Constitution provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. However, in *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), our Supreme Court explained that "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." Accordingly, MCL 769.34(10) does not infringe on the judiciary's authority. Consequently, the Legislature's enactment of MCL 769.34(10) did not violate Const 1963, art 3; § 2.

Defendant also contends that MCL 769.34(10) unconstitutionally conflicts with Article I, § 20 of our Constitution, which provides in pertinent part as follows: "In every criminal prosecution, the accused shall have the right . . . to have an appeal as a matter of right**,** except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court . . . ." To be sure, MCL 769.34(10) prevents us from considering the proportionality of a sentence that falls within the sentencing guidelines range. However, MCL 769.34(10) does not prevent appellate review of the scoring of the sentencing guidelines or the accuracy of the information relied upon in determining the sentence. Thus, where, as here, a defendant is sentenced within the sentencing guidelines range, appellate review of that sentence is not completely abrogated by MCL 769.34(10). Therefore, we are not persuaded that MCL 769.34(10) unconstitutionally conflicts with Article 1, § 20 of our Constitution. Consequently, we reject defendant Hickman's challenge to the constitutionality of MCL 769.34(10).

Defendant Harris contends that the trial court abused its discretion by admitting certain hearsay statements. Specifically, defendant Harris argues that the trial court improperly allowed police officers to testify about the victim's statements relating to his assailants' clothing, including the accusation that defendant Harris changed his clothes before he was apprehended. MCR 801(d)(1)(C) states that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination, and the statement is "one of identification of a person made after perceiving the person." See *People v Malone*, 445 Mich 369, 389-390; 518 NW2d 418 (1994). Defendant Harris attempts to distinguish this rule by arguing that the victim's statements concerned an identification of clothing, rather than a person. However, in this case, we believe that the victim's statements were sufficiently part of his identification to qualify as non-hearsay. MCR 801(d)(1)(C). Consequently, the trial court did not abuse its discretion in admitting the statements.[3]

Finally, defendant Harris argues that his sentence was invalid because the trial court altered the maximum term of his sentence to 202 months' imprisonment, without holding a hearing. The trial court initially sentenced defendant Harris to a maximum term of life imprisonment.[4] Without question, defendant Harris' initial maximum sentence of life imprisonment violated MCL 769.9(2), which provides that the "court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence." However, following the alteration, defendant Harris' judgment of sentence complied with MCL 769.9(2). Moreover, the trial court stated on the record that it intended to sentence defendant Harris within the legislative sentencing guidelines and cited the specific reasons for the sentence imposed. Because defendant Harris' sentence was within the legislative sentencing guidelines, the trial court articulated its reasons for the sentence on the record, and the altered sentence had the same minimum term and a more lenient maximum term, we believe that a remand is unnecessary and would be a waste of judicial resources. We conclude that the judgment of sentence is valid.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens

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[3] Even if we were to conclude that the statements were improperly admitted as hearsay, we would nevertheless conclude that the erroneous admission of the statements was harmless error because the victim testified consistently with the statements.

[4] The trial court did not alter defendant's minimum sentence of 135 months' imprisonment.