

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOREAN WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

September 17, 2002

No. 234022

Wayne Circuit Court

LC No. 00-011897-01

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant Torean Williams appeals as of right from his convictions of armed robbery¹ and possession of a firearm during the commission of a felony (“felony-firearm”),² entered following a bench trial. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts

This case involves the robbery of sixteen-year-old complainant, Jason Williams, at a bus stop close to Kettering High School in Detroit on October 2, 2000. According to the complainant, he left school early, at approximately 12:30 p.m., because he was approached by three students talking about his jewelry and he became scared. Torean Williams was not one of those boys. After leaving school, the complainant arrived at the bus stop where Torean Williams allegedly stopped him and told him that he was going to rob him. According to the complainant, who was with acquaintance Angelo Kelly, Torean Williams stood “inches away” from him, showed him that he had a handgun in his waistband, and then took his designer glasses and a designer neck chain. The complainant filed a police report after returning home and speaking with his parents.

At trial, the complainant testified that he had seen Torean Williams once previously at the school. Two days after the robbery, when the complainant saw Torean Williams again outside the school walking past the front door, he told a Detroit police officer stationed at the school that

¹ MCL 750.529.

² MCL 750.227b.

Torean Williams had robbed him. Ten other students were outside the school busses at the time. The police then arrested Torean Williams. Later that day, the complainant was taken to the police station where he identified Torean Williams from a photographic array of five individuals. The complainant was not sure whether an attorney was present during the procedure. Angelo Kelly generally corroborated the complainant's testimony, but stated that Torean Williams punched or nudged the complainant before taking his glasses and neck chain. Kelly positively identified Torean Williams at trial as the robber. Though Kelly had spoken with the complainant after the complainant made the police report, Kelly did not make a report.

Detroit police officers Jeremy Everitt and Anthony Richardson also testified at trial. Everitt stated that he took the complainant's police report on the evening of the robbery and the complainant described Torean Williams. Richardson testified that the complainant pointed Torean Williams out to him on October 4, 2000. Richardson and his partner then arrested Torean Williams. Richardson identified Torean Williams at trial. Richardson stated that, after Torean Williams was informed of his rights and told that he was being arrested because he was pointed out as the person who had robbed "someone," Torean Williams stated "I'm not the brightest bulb in the box, but if I would have robbed him, would I be over here?" Richardson also described the front of the school building and stated that there were approximately ten individuals outside when the complainant pointed out Torean Williams to him.

Torean Williams testified that he was at home sick the day of the robbery. He admitted that his statement to the police at the time of his arrest did not mention this fact. Torean Williams's mother testified that she was with him at home during the morning of October 2, and that he was sick with a cold. She and her own mother left the house at 10:30 a.m. and returned at 1:30 p.m., and Torean Williams was in the house when they left and when they returned.

Torean Williams now claims that he was denied the effective assistance of trial counsel because his attorney failed to move to suppress the photographic lineup shown to the complainant after he was taken into custody.

II. Standard Of Review

Because Torean Williams failed to preserve this issue for appeal by raising it in the trial court, we must examine the existing record³ for plain error affecting his substantial rights.⁴

III. Suppression

In *People v Knapp*,⁵ this Court explained the applicable legal standard for a defendant's argument that he was denied the effective assistance of counsel, saying:

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of

³ See *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

⁴ See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁵ *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001) (citations omitted).

reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial.

Although a photographic identification procedure can be so suggestive it deprives the defendant of due process,⁶ the fairness of an identification procedure is evaluated in light of the total circumstances.⁷ The test is whether the procedure was so impermissibly suggestive it led to a substantial likelihood of misidentification.⁸ Torean Williams has failed to provide support for his claim that the photographic identification procedure was so suggestive it made his trial attorney's decision not to object objectively unreasonable. He did not provide a copy of the photographic array itself, nor a description of the other individuals used in the procedure. He maintains that the array was suggestive because the complainant failed to provide an identification based upon his most noticeable facial feature, serious acne, but does not explain how this distinctive feature played a role in the photographic identification. Torean Williams does not assert that he was denied counsel during the photographic lineup. Because an attorney need not raise a meritless motion to suppress,⁹ Torean Williams has failed to demonstrate that his attorney's failure to move to suppress the identification fell below an objective standard of reasonableness. Clearly, this was not plain error.

The only circumstance on the record to suggest that the photographic identification was unusual is the fact that it was held while Torean Williams was in custody. When a suspect is in custody or can be compelled to appear for a corporeal lineup, a photographic identification is generally disfavored absent a legitimate reason.¹⁰ However, Torean Williams does not discuss the underlying circumstances of the procedure. Nor does he claim that he would have participated in a corporeal lineup had one been held.¹¹ Torean Williams has thus failed to show that his counsel's decision not to raise this issue during trial was objectively unreasonable in light of his custody.¹² This, again, was not plain error.

In addition, Torean Williams has failed to demonstrate that the outcome of the proceeding would have been different if the photographic identification testimony had been excluded. The complainant had previously identified Torean Williams, Kelly provided untainted identification evidence, and there was other evidence presented at trial. Moreover, Torean Williams' trial counsel was able to cross-examine both the complainant and Kelly thoroughly at trial, had the opportunity to raise doubt in the trial court's mind concerning the credibility of

⁶ *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998).

⁷ *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974).

⁸ *People v Kurylczyk*, 443 Mich 289, 306 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993).

⁹ See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

¹⁰ See *Kurylczyk*, *supra* at 298, 318; *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973).

¹¹ See *Anderson*, *supra* at 186-187.

¹² See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

photographic and other identification testimony, and discussed these issues in her closing argument. Torean Williams has thus failed to meet his burden of demonstrating the outcome-determinative error necessary to reverse his conviction on this basis.¹³

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly

¹³ See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); see also *Carines*, *supra*.