

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVIN FRANK ROGERS,

Defendant-Appellant.

UNPUBLISHED

May 27, 2004

No. 246880

Wayne Circuit Court

LC No. 02-006567-01

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of armed robbery,¹ carjacking,² felon in possession of a firearm,³ and possession of a firearm during the commission of a felony.⁴ Defendant was sentenced to eight to fifteen years' imprisonment for his armed robbery conviction; eight to fifteen years' imprisonment for his carjacking conviction; forty months to five years' imprisonment for his felon in possession conviction; and two years' imprisonment for his felony-firearm conviction. We affirm.

I. Facts

In the early morning hours of May 6, 2002, Takyesia Washington was robbed at gunpoint outside the front door of a Detroit gas station. The assailant took Ms. Washington's keys and drove off in her vehicle with her purse, \$3200 in cash, and other belongings inside. Ms. Washington indicated that she had ample opportunity to view the robber's face. The area near the door was well-lighted and she stood face-to-face with her assailant during the robbery. Ms. Washington described the robber to officers on the scene as approximately twenty-five years old, five feet seven inches tall, 130 pounds, with a medium complexion and wearing all black.

¹ MCL 750.529.

² MCL 750.529a.

³ MCL 750.224f.

⁴ MCL 750.227b.

Ms. Washington's vehicle was protected by Onstar. Ms. Washington contacted an acquaintance employed with the company to help locate her vehicle. The Onstar employee indicated that the vehicle was on Dacosta street in the city of Detroit. Ms. Washington arrived in the neighborhood after dawn, shortly after the robbery, and found her vehicle parked behind a vacant home. She contacted the police and a patrol unit arrived on the scene. While awaiting the arrival of officers from the carjacking unit, Detroit police officer Juaquita Johnson ticketed an illegally parked vehicle. Defendant came out of a nearby home and removed the ticket. Ms. Washington recognized defendant as the robber, so the police officers detained defendant for questioning. After having an opportunity to take a close look at defendant, Ms. Washington again identified him as her assailant and defendant was placed under arrest. At the time of his arrest, defendant was twenty years old, five feet nine inches tall, 150 pounds and wearing all blue. Officer Johnson described defendant as dark complexioned.

II. Waiver of Jury Trial

Defendant contends that he was denied the right to a trial by jury because the trial court failed to properly establish that his waiver of this right was valid. We disagree. We review a trial court's determination regarding the validity of a jury trial waiver for clear error.⁵

A criminal defendant may waive the right to a jury trial with the consent of the prosecutor and approval of the court.⁶ The defendant's waiver must be made both in writing and verbally in open court.⁷ For a waiver to be valid, the trial court must advise the defendant that he has the right to a trial by jury, and ascertain on the record "by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court."⁸

The following colloquy ensued between the trial court and defendant on the record:

The Court: I have been given a form that your attorney gave. Did you have an opportunity to discuss this with your attorney? Yes?

Mr. Rogers: Yes.

The Court: And you recognize, sir, that you have an absolute right to have an attorney, you understand that?

Mr. Rogers: Yes, ma'am.

⁵ *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997), citing *People v James (After Remand)*, 192 Mich App 568, 570; 481 NW2d 715 (1992).

⁶ MCL 763.3(1).

⁷ *Id.*; MCR 6.402(B).

⁸ *People v Pasley*, 419 Mich 297, 303; 353 NW2d 440 (1984), superseded by MCR 6.402(B).

The Court: That this form indicates to me that you'd like to waive that right have me decide that, that's--

[Defense Counsel]: (Interposing) Judge, I believe you said right to an attorney, you meant right to a jury trial.

The Court: Did I say that? I am so sorry. . . .

* * *

The Court: I'm sorry. . . . You understand you have an absolute right to a jury trial in this matter?

Mr. Rogers: Yes, ma'am.

The Court: But you wish to waive that right and have me decide the facts of this case?

Mr. Rogers: Yes, ma'am.

The Court: We will then proceed by waiver.^[9]

The record indicates that the trial court's questioning of defendant to ascertain that he voluntarily and understandingly waived his right to a jury trial was limited at best. The court did not make a sufficient finding regarding the voluntariness of defendant's waiver. However, defendant signed a written waiver and does not claim that he was coerced into signing or that the waiver was given involuntarily and without understanding the right. Therefore, the trial court's inadequate questioning does not amount to reversible error.

III. Identification

Defendant claims that Ms. Washington's on-the-scene identification was so suggestive that it amounted to a denial of his right to due process of law. We disagree. As defendant failed to object to the admission of the identification evidence below, our review is limited to plain error affecting substantial rights.¹⁰

"The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification."¹¹ We note that this Court has upheld the use of on-the-scene identification procedures conducted without the presence of counsel.¹² Defendant

⁹ [Trial Transcript, November 4, 2002, pp 3-4.]

¹⁰ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

¹¹ *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 764 (2002), citing *People v Kurylczyk*, 443 Mich 289, 306, 311-312, 318; 505 NW2d 528 (1993).

¹² *People v Winters*, 225 Mich App 718, 727-728; 571 NW2d 764 (1997). Our Supreme Court
(continued...)

contends that the identification procedure was overly suggestive as he was the only suspect placed before Ms. Washington and she identified him on the scene while he was handcuffed. However, the record indicates that Ms. Washington independently identified defendant as her assailant, before the police officers took any action to question or detain defendant, and even before police officers suspected defendant. We further note that the trial court determined that Ms. Washington's description of her assailant was not inconsistent with defendant's actual appearance. As there was no "identification procedure" to be overly suggestive, we find that the trial court properly admitted the identification evidence.

Defendant also asserts that his trial counsel was constitutionally ineffective for failing to move for suppression of the identification evidence. However, defense counsel is not required to make frivolous or meritless motions.¹³ As the identification evidence was properly admitted, defense counsel was not ineffective for failing to move for its suppression.

III. Sentencing

Defendant contends that his sentences for armed robbery and carjacking are disproportionate. Defendant concedes that his sentences are within the statutory minimum sentencing guidelines range, and therefore, must be affirmed pursuant to MCL 769.34(10).¹⁴ However, defendant contends that MCL 769.34(10) is unconstitutional as a violation of separation of powers and due process. We disagree. We review the constitutionality of statutes de novo.¹⁵

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.¹⁶

It is well established that the limitation on the power of our Court to review a trial court's sentencing determination does not violate the separation of powers.¹⁷ "The ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. The authority to impose sentences and to administer the sentencing statutes *enacted by the*

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recently granted leave to appeal in *People v Hickman*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2002 (Docket No. 232041), lv gtd 468 Mich 942 (2003), to determine whether counsel is required before an on-the-scene identification can be admitted at trial. Oral arguments were heard regarding this issue on April 20, 2004.

¹³ *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

¹⁴ MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

¹⁵ *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003).

¹⁶ MCL 769.34(10).

¹⁷ Const 1963, art 3, § 2; *Garza*, supra at 435.

Legislature lies with the judiciary.”¹⁸ It is well within the Legislature’s power to grant or *limit* the judiciary’s discretionary sentencing power.¹⁹ Accordingly, it cannot violate separation of powers for the Legislature to impose such limitations.

Defendant also asserts that the statute offends due process because it limits the constitutionally granted power of appellate review²⁰ and because it prohibits this Court from determining that a sentence amounts to cruel and unusual punishment if it falls within the legislatively created sentencing guidelines. The only authority cited by defendant for this proposition is *Dodge v Detroit Trust Co*,²¹ which describes the denial of due process in a criminal trial as “the failure to observe the fundamental fairness essential to the very concept of justice.”²² However, the statute does not abolish a defendant’s right to appeal. The statute limits a defendant’s right to challenge his sentence to circumstances in which the sentence does not adhere to the legislative requirements. A defendant may still show on appeal that the trial court committed a scoring error or relied upon inaccurate information. Therefore, the statute does not unconstitutionally interfere with a defendant’s right to appeal.

Furthermore, the sentencing guidelines were designed to comport with the principle of proportionality, taking into account factors relating to the specific defendant and offense.²³ As this Court found regarding the former judicially created sentencing guidelines, “[a] sentence imposed within an applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate.”²⁴ Defendant has not persuaded us that MCL 769.34(10) fails “to observe the fundamental fairness essential to the very concept of justice.” Therefore, we decline to review the proportionality of defendant’s sentence.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper

¹⁸ *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001), citing Const 1963, art 4, § 45, MCL 769.1(1) (emphasis in original).

¹⁹ *Id.* at 440.

²⁰ Const 1963, art 1, § 20.

²¹ *Dodge v Detroit Trust Co*, 300 Mich 575; 2 NW2d 509 (1942).

²² *Id.* at 618, quoting *Lisenba v California*, 314 US 219; 62 S Ct 280; 862 L Ed 166 (1941).

²³ See *Babcock*, *supra* at 263, citing *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

²⁴ *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000).