

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN KEITH COURTNEY,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 249189
Wayne Circuit Court
LC No. 02-010050-01

Before: Cavanagh, P.J., and Kelly and H Hood*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years in prison for the felony-firearm conviction, and a probationary term for the remaining convictions. We affirm.

Defendant's convictions arise from a police raid of his home, where the police discovered cocaine, marijuana, and firearms.

Each of defendant's issues on appeal involves an ex parte communication between the trial court and Juror No. 12 after the jury had begun deliberations. The communication was recorded on the record, but in the absence of the parties or their attorneys. Juror No. 12 initially informed the court that she had a problem with making a decision because "this is to be left up to the Lord, not to me." After questioning by the trial court, Juror No. 12 explained that she did not have any religious convictions against sitting on a jury and could make a decision, but it was not the decision the other jurors wanted to hear and she was being pressured. In response, the trial court told Juror No. 12 "you're suppose[d] to listen to each other, but in the end the decision has to be yours." Juror No. 12 then assured the court that she was able make a decision and continue deliberating.

Subsequently, before a verdict was reached, the trial court informed both attorneys of its communication with Juror No. 12. Defense counsel asked the trial court whether it believed that Juror No. 12 was sincere when she said that she was able to continue deliberating. When the trial court responded in the affirmative, defense counsel replied, "I'll rely on that."

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

Defendant now seeks reversal of his conviction and a new trial on the ground that the trial court improperly engaged in an ex parte communication with Juror No. 12, that the substance of the communication improperly coerced Juror No. 12 into reaching a decision, and that the court's ex parte communication denied him his constitutional right to the assistance of counsel at a critical stage of the proceeding. We conclude, however, that defense counsel affirmatively waived this issue by effectively acquiescing to the trial court's handling of the matter.

In *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000), our Supreme Court held that a defense attorney's approval of a trial court's jury instruction, as opposed to a mere failure to object, "constitutes a waiver that *extinguishes* any error." See also *People v Pollick*, 448 Mich 376, 386-388; 531 NW2d 159 (1995). As the *Carter* Court explained, "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Carter*, *supra* at 215, quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

We reject defendant's claim that defense counsel did not have a meaningful opportunity to object because the trial court failed to disclose Juror No. 12's specific statement "that I'm being pressured." Contrary to what defendant argues, there is no support for the suggestion that this statement might have meant that Juror No. 12 was the target of jury tampering, and that the trial court therefore erred when it interrupted her statement without inquiring further. Rather, it is clear from the context that the statement was referring to pressure that Juror No. 12 felt from other jurors during deliberations, not from external sources. It is also apparent that the trial court interrupted Juror No. 12's statement to prevent her from revealing the substance of the deliberations. Thus, defendant's suggestions of more insidious influences are without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood