STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2005
v	No. 257547 Kent Circuit Court
TYROSH TRENCELL BROWN, Defendant-Appellant.	LC No. 03-008877-FH

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of resisting and obstructing a police officer, MCL 750.81d. He was sentenced as an habitual offender, MCL 769.12, to eighteen months to fifteen years' imprisonment. Defendant appeals by right. We affirm.

Two police officers arrived at defendant's home in search of a suspect in an earlier domestic violence complaint. Officers saw defendant at the residence but immediately concluded that defendant was not the person for whom they were looking. When the officers began to question defendant's mother, defendant became belligerent and started screaming at his mother and at the officers. The officers' attempts to calm defendant proved futile, and because defendant continued to scream and swear, the officers attempted to arrest defendant for his disorderly behavior. In an attempt to avoid arrest, defendant fled into the home where a struggle ensued with a third officer. The struggle continued into the basement where defendant fought with four officers, but he was eventually handcuffed and taken into custody.

Defendant first contends that the circuit court erred when it denied his motion to quash the charge of resisting and obstructing a police officer. Defendant does not deny that he resisted arrest. Rather, he argues that he had the right to resist because the arrest was unlawful. Specifically, defendant argues that because he was arrested for a misdemeanor in his home, and because the officers did not have a warrant for his arrest, the arrest was unlawful. Thus, he urges this Court to find that the circuit court erred in denying his motion to quash because he had the right to resist the unlawful arrest. We disagree.

We review de novo this question of law involving statutory interpretation. *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

Before its amendment by 2002 PA 270, the Penal Code prohibition against resisting arrest, MCL 750.479, provided that the officer must have been performing "lawful acts." *People v Ventura*, 262 Mich App 370, 374; 686 NW2d 748 (2004). Thus, under the prior version of the statute, a person could use reasonable force to resist an unlawful arrest. *People v MacLeod*, 254 Mich App 222, 226-227; 656 NW2d 844 (2002).

However, we have explicitly held that MCL 750.81d, enacted by 2002 PA 266,[1] does not require a showing that the arrest was lawful. *Ventura, supra* at 378. Therefore, a person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties *regardless of whether the arrest is illegal* under the circumstances. *Id.* at 377 (emphasis added). In *Ventura*, we recognized that mechanisms exist to correct any injustices that may result from an illegal arrest and that assaulting, resisting, or obstructing an officer must be avoided to protect the safety of those arrested and others. *Id.*

Defendant alleges that his arrest was unlawful because he was arrested for a misdemeanor, in his home, without a warrant. In *Payton v New York*, 445 US 573, 576 (1980), the United States Supreme Court held that absent exigent circumstances, the police may not enter a defendant's home without a warrant to make a routine felony arrest. Further, this Court has held that the police may not enter a defendant's home to effectuate a warrantless misdemeanor arrest. *People v Reinhardt*, 141 Mich App 173, 178; 366 NW2d 245 (1985) (finding that the Legislature did not authorize police officers to enter homes without permission to effect warrantless misdemeanor arrests). However, in this case, the initial attempt to arrest defendant was made outside the home and the police officers only entered the home because defendant went there to elude them.

We find that the prosecution presented evidence that defendant resisted or obstructed a person who defendant knew or had reason to know was performing his or her duties. Therefore, the requirements of MCL 750.81d have been satisfied. Defendant's argument that he had a right to resist the arrest is without merit. Therefore, the circuit court did not err in denying defendant's motion to quash.

In the alternative, defendant argues that the circuit court erred in denying his motion to quash because he was entrapped into committing the crime of resisting and obstructing a police officer by the police officers' conduct. We disagree.

Entrapment is analyzed under a two-prong test. *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998). Entrapment is established where (1) the police engaged in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that such conduct cannot be tolerated. *Id.* We note that defendant raised the entrapment defense for the first time on appeal. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[1] 2002 PA 266 took effect July 15, 2002, and was tied to the enactment of 2002 PA 270.

Defendant argues that the police entrapped him into committing the crime of resisting and obstructing a police officer when they refused to leave the premises and threatened to arrest him. Defendant argues that because the police had no basis for arresting him at that time, the threat of arrest was merely used to induce him into committing the crime of resisting and obstructing a police officer.

However, the police specifically told defendant that if he did not calm down, he would be arrested for "disorderly creating," not for resisting and obstructing a police officer. By "disorderly creating" the officer apparently meant "disorderly conduct/creating a disturbance," which is punishable under a city ordinance. Grand Rapids Ordinance § 9.137 provides in pertinent part:

> No person shall:
>
> (1) Create or engage in any disturbance, fight or quarrel in a public place.
>
> (2) Create or engage in any disturbance, fight or quarrel that causes or tends to cause a breach of the peace.
>
> (3) Disturb the peace and quiet by loud or boisterous conduct.

In light of defendant's actions, we find that there was a clear basis for the police to conclude that defendant violated the city ordinance.

Moreover, the officers gave defendant two chances to calm down and warned him that he would be arrested if he did not stop his yelling and belligerence. The officers' conduct was neither impermissible nor reprehensible. Therefore, we find that defendant was not entrapped into committing the crime of resisting and obstructing a police officer.

Accordingly, we find that defendant failed to show the existence of any plain error, and so, has forfeited his claim of entrapment.

Last, defendant argues that he was denied due process when he was physically removed from the courtroom during voir dire. No person indicted for a felony shall be tried unless personally present during the trial. MCL 768.3. A defendant must be physically present in the courtroom to be "personally present" as required by MCL 768.3. *People v Krueger*, 466 Mich 50, 53-54; 643 NW2d 223 (2002). Thus, a defendant's statutory right to be personally present may be violated even when if a defendant is allowed to watch testimony on closed circuit television, to take notes, and to confer with his attorney during breaks. *Id.* at 55.

Further, the defendant's right to be present at trial is guaranteed not only by statute but also by the Due Process Clause of the Fourteenth Amendment. *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982). Accordingly, a defendant has a right to be present during any stage of trial where the defendant's substantial rights might be adversely affected. *People v Parker*, 230 Mich App 677, 689; 584 NW2d 753 (1998). Thus, a defendant has the right to be present during voir dire. *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984).

Even though a defendant has the right to be present at trial, he may waive both his statutory and constitutional right to be present through improper and disruptive behavior in the courtroom. *Illinois v Allen,* 397 US 337, 343; 90 S Ct 1057; 25 L Ed 2d 353 (1970). A trial court's decision to remove a defendant from the courtroom during the defendant's trial is reviewed by this Court for an abuse of discretion. See *People v Reginald Harris,* 80 Mich App 228, 230; 263 NW2d 40 (1977).

In this case, we find that defendant waived his statutory and constitutional rights to be present at trial. First, defendant had specific knowledge of the right because the judge explicitly told him he had the right to be present in the courtroom. Second, he made an intentional decision to waive that right when he disrupted the proceedings in an attempt to obtain new counsel after the court clearly stated he was not entitled to such. He further waived his right when, after being told he could return to the courtroom if he acted appropriately, he told the judge that he refused to cooperate and indicated to the judge that he did not wish to return to the courtroom.

Further, we will not presume that defendant was prejudiced merely because he was absent from a portion of the trial. *People v Morgan,* 400 Mich 527, 535; 255 NW2d 603 (1977). Rather, the burden is on the defendant to prove that he was prejudiced by his removal from the courtroom. See *Carines, supra* at 763-764. In this case, defendant has not met that burden. After defendant was placed in the holding cell, the judge made sure that the proceedings were broadcast in the holding cell and explained to the jury that defendant could hear everything that was said in the courtroom. Also, defendant's attorney received permission from the court to confer with defendant during voir dire, which she did before exercising one of defendant's peremptory challenges. Last, the court twice instructed the jury that they were not to consider defendant's absence as evidence in the case against him. Indeed, the court instructed the jurors to decide the case solely on the evidence presented at trial.

Thus, defendant failed to establish that his removal from the courtroom affected the outcome of the trial. Therefore, we find that defendant failed to establish any error or prejudice stemming from his removal from the courtroom during voir dire. Further, we note that defendant voluntarily removed himself from the courtroom during the later stages of the trial. During the presentation of defendant's case, he explicitly requested he be returned to the holding cell. The defendant remained in the holding cell, at his request, through the reading of the verdict.

Thus, we hold that the trial court did not abuse its discretion and did not deprive defendant of due process when it removed defendant from the courtroom during voir dire.

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey