

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELIJAH JAMOND NOBLE,

Defendant-Appellant.

UNPUBLISHED

May 11, 2010

No. 290462

Oakland Circuit Court

LC No. 2008-219475-FC

Before: TALBOT, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

Defendant Elijah Jamond Noble appeals as of right his jury conviction for armed robbery. MCL 750.529. The trial court sentenced defendant as a third habitual offender, see MCL 769.11, to serve 10 to 40 years in prison. On appeal, defendant argues that he was deprived of a fair trial by his trial counsel's ineffective assistance and by the trial court's decision to deny his motion to suppress the statements that he made to an investigating officer. Defendant further argues that these errors, either independently or in the aggregate, were so prejudicial as to warrant a new trial. We conclude that there were no errors warranting relief. For that reason, we affirm.

I. BASIC FACTS

Defendant's conviction arises out of the July 2007 robbery of Sim Dry Cleaners. Yoomi Sim testified that, on the day in question, she was attending the counter at the cleaners in Waterford Township when two men entered her store. Sim identified defendant as the taller of the two men who came in on the day in question and stated that he did all the talking. She said that defendant asked her for an order under the name of Johnson, but there was no order under that name. Sim said the men then left only to return five minutes later.

When the men returned, defendant was on the phone and indicated that he was speaking with his brother and asked if she could check under the name Dean. Sim said that she did have an order for Dean, but explained that she knew that customer and told defendant that there must be a mistake. Sim noted that the tags on the order, which included the customers' names, were visible from where defendant stood. Sim said that defendant then told her that his brother was coming over and began to chat with her while he was ostensibly waiting for him. At some point, Sim turned to check an unclaimed order. When she turned back to the front of the store, she saw defendant holding the two-by-four that was commonly used to prop open the front doors. Sim

said that defendant was partly around the counter and standing close to her with the two-by-four raised up like a baseball bat. Sim said he told her “don’t move.”

Sim testified that the shorter man tried to open the register, but was unsuccessful. So defendant ordered her to open it, which she did. Sim said that defendant and the shorter man emptied the register. Defendant then asked about the safe, but Sim told him that they did not have one. After this defendant asked for Sim’s purse and she indicated where she kept it. Defendant and the shorter man went through her purse and took her cash and her business’ checkbook. After taking the items from Sim’s purse, defendant told his companion “come on come on let’s go” and both men ran out the back entrance.

Officer Erik Kaledas testified that he worked for the Canton Township police department. Kaledas stated that he pulled defendant over on January 10, 2008, for driving with expired plates and tinted windows. After Kaledas asked defendant for his license, registration and proof of insurance, defendant told him that he did not have his license and told Kaledas that his name was Robert Lewis Jackson. Kaledas ran that name through the Law Enforcement Information Network and noted that the description associated with that name did not match defendant. After this, Kaledas decided to arrest defendant for driving without a license. Kaledas found a checkbook for Sim Dry Cleaning in defendant’s car.

Brian Schultz testified that he was a Canton Township detective and that he became involved with defendant’s case. Schultz said that he contacted the Waterford Township police about the checkbook found in defendant’s car after the traffic stop and obtained information about the unsolved robbery at Sim Dry Cleaners. Schultz then interviewed defendant on the same day as his arrest. Schultz testified that before asking any questions, he told defendant about his rights. Defendant stated that he understood his rights, signed a waiver, and then agreed to talk to Schultz.

Schultz stated that defendant at first denied knowing anything about the checkbook found in his car. However, defendant eventually admitted that he accompanied a friend to the dry cleaners and waited out back. He said that his friend came out with some property and money and they ran to a car and left. The prosecutor also admitted defendant’s written statement. In his statement, defendant wrote that he went for a ride with his friend who “stated he had to do ‘something’ again. I stood in the back of the dry cleaners and he came out with money.”

Rick Lemos testified that he was a detective with the Waterford Township police department and had been assigned to investigate the robbery at Sim Dry Cleaners. On January 10, 2008, someone from the Canton Township police department contacted him about defendant’s arrest and the fact that defendant was found with a checkbook from Sim Dry Cleaners. Lemos stated that, on the same day, he composed a photo array of six total photos using defendant’s photo along with five photos of men with appearances similar to defendant. Lemos took the photo array to Sim and asked her if she recognized anyone. Sim immediately picked defendant out from array.

After hearing all the testimony and examining the evidence, the jury found defendant guilty of armed robbery. This appeal followed.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that his trial counsel was ineffective for failing to move to suppress the photo identification by Sim. In order to establish ineffective assistance of counsel warranting relief, defendant must show that his trial counsel's decision fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the error, the outcome of the proceeding would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

Defendant argues on appeal that his trial counsel should have moved to suppress the photo identification because the police's decision to use a photo line-up was improper under the circumstances. Specifically, defendant relies on the decisions stated in *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973) and *People v Kurylczuk*, 443 Mich 289, 298; 505 NW2d 528 (1993), for the proposition that, when a defendant is in custody, the police cannot conduct a photo line-up in lieu of a corporeal line-up absent certain exceptions. Likewise, where the defendant is in custody, the police may not conduct a photo line-up unless the defendant's counsel is present. Defendant asserts that the photo line-up was plainly inadmissible under these precedents because the police did not have a legitimate reason for conducting the photo line-up instead of a corporeal line-up and failed to provide defendant with representation at the line-up.

In *Anderson*, our Supreme Court determined that photo identifications were inherently unreliable and, except where certain exceptions applied, disavowed their use when the defendant is in custody and available for a corporeal line-up. See *Anderson*, 389 Mich at 186-187, 186 n 22. The Court characterized the use of a photo line-up absent such an exception as a violation of the defendant's right to counsel. *Id.* at 188.

In *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004), our Supreme Court reexamined *Anderson*. The Court first noted that the Court in *Anderson* had expanded the right to counsel to "all pretrial corporeal identifications, including those occurring before the initiation of adversarial proceedings." *Id.* at 605. The Court explained that this expansion was not grounded in either the federal constitution or state constitution and had resulted in a great deal of confusion among the lower courts with regard to its proper application. *Id.* at 605, 609-610. Rather than continue this confusion, our Supreme Court overruled *Anderson* and adopted the analysis stated in *Moore v Illinois*, 434 US 220; 98 S Ct 458; 54 L Ed 2d 424 (1977). Under *Moore*, the right to counsel attaches only after the initiation of adversarial judicial criminal proceedings. *Hickman*, 470 Mich at 610. Moreover, in overruling *Anderson*, the Court in *Hickman* specifically noted that, where the right to counsel has not yet attached, the relevant inquiry is whether the identification procedure violated due process: "This eliminates any unwarranted confusion and allows the focus to be on whether the identification procedure used violates due process." *Id.* at 610. Accordingly, although the Court in *Hickman* specifically overruled *Anderson* only to the extent that it expanded the right to counsel to identifications where the defendant is in custody but where adversarial proceedings have not yet commenced, *id.* at 603-604, by limiting the applicable inquiry for identifications that occur prior to the attachment of the right to counsel to whether the identification procedure violated due process, it also implicitly rejected the general limitations stated in *Anderson*, *id.* at 607, 610. Similarly, because the decision in *Kurylczuk* relied—in relevant part—on application of the rule stated in *Anderson*, our Supreme Court's analysis in *Hickman* applies equally to *Kurylczuk*.

In this case, the prosecution had not yet commenced adversarial criminal proceedings against defendant for the robbery at the dry cleaners. Therefore, defendant did not have the right to have an attorney present at the photo identification. *Hickman*, 470 Mich at 610. Likewise, with regard to the use of a photo identification procedure to determine whether defendant was involved in the robbery, the relevant inquiry is whether that identification procedure violated defendant's due process rights and not whether the police officer had a legitimate reason for using the photo identification procedure rather than a corporeal line-up. *Id.* at 607.

Defendant does not contend that the photo identification was unduly suggestive or otherwise violated due process. Because there is no indication that the use of the photo identification violated due process, defendant's trial counsel would not have been able to successfully move for the suppression of the photo identification. Therefore, defendant's trial counsel's decision not to move for the suppression of the photo identification did not fall below an objective standard of reasonableness under prevailing professional norms. See *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003) ("Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion.").

Even if we were to conclude that the limitations on the use of photo identifications stated in *Anderson* had survived the decision in *Hickman*, defendant would nevertheless not be entitled to relief. The rule stated in *Anderson*—and reiterated in *Kurylczyk*—applies only to pretrial situations where the defendant was in custody on the charges to which the identification was related. *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986). In this case, defendant was in custody on the day of the identification, but on unrelated charges. Hence, the police could use a photo line-up even absent the existence of one of the exceptions stated in *Anderson*. And, for that reason, defendant's trial counsel cannot be faulted for failing to move to suppress that identification. *Riley*, 468 Mich at 142.

III. SUPPRESSION OF STATEMENT TO POLICE

A. STANDARD OF REVIEW

Defendant next argues that the trial court erred when it denied his motion to suppress the evidence of the statements that he made to the police on the day of his arrest. Specifically, defendant contends that he was under the influence of narcotics at the time of his statements and, for that reason, was incapable of knowingly and intelligently waiving his Fifth Amendment rights. This Court reviews the entire record de novo to independently determine whether a defendant knowingly and intelligently waived his Fifth Amendment rights. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). However, this Court reviews a trial court's factual findings for clear error. *Id.*

B. ANALYSIS

A custodial statement is inadmissible against a defendant unless the defendant voluntarily, knowingly and intelligently waived his Fifth Amendment rights prior to making the statement. A statement is voluntary in the absence of police coercion. *Daoud*, 462 Mich at 635. In order to establish that the waiver was knowingly and intelligently made, the prosecution must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to have counsel present, and that the state could use what he said in a

later trial against him. *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996). The inquiry into whether the defendant's waiver was knowing and intelligent usually involves an inquiry into the totality of the circumstances surrounding the interrogation, including evaluation of the suspect's age, experience, education, background, and intelligence. *Id.* at 27. However, on appeal, defendant does not contest whether his statements were voluntary. Instead, defendant argues that he was so intoxicated on narcotics that he could not have knowingly and intelligently waived his Fifth Amendment rights.

The trial court held a hearing to determine whether defendant knowingly and intelligently waived his rights. At the hearing, detective Schultz testified that, on the day of defendant's arrest in Canton Township, he questioned defendant about the checkbook found in his car. Schultz stated that before he questioned defendant he went over defendant's Fifth Amendment rights. Schultz said that defendant did not appear to have difficulty reading or understanding his rights, did not have any problems walking, did not smell of intoxicants, and was generally "alert" and "talkative." Schultz also said that defendant denied that he was on drugs at the time. Schultz did not have any difficulty in understanding defendant's version of events and noted that defendant's answers seemed logical. Indeed, Schultz testified that defendant was slow to make admissions and appeared to be considering the ramifications of each of his statements.

Defendant also testified at the hearing. Defendant testified that he used marijuana and ecstasy daily at the time of his arrest and denied having any memory of the interrogation. Instead, he stated that his first memories were of waking up in jail and being told that he had been hospitalized for delusional behavior. Defendant admitted that the signature on the waiver appeared to be his and that the statement was in his handwriting.

The prosecution admitted the waiver and written statement that defendant executed on the day of the interrogation and defendant admitted the medical records from his hospitalization several days after his arrest.

At the conclusion of the hearing the trial court found that defendant was coherent at the time he executed the waiver:

[T]he Court has reviewed the exhibits in detail, and as I've indicated, the forms do appear to have been signed by a coherent person. His statement makes sense. I'm not going to read it into the record, but it's pretty clear that he did in fact know what he was writing. A person who doesn't know what they're writing wouldn't be able to put together words that were correct spelling, detailed sentences.

For that reason, the trial court denied defendant's motion to suppress his statements as having not been made after a knowing and intelligent waiver of his Fifth Amendment rights.

On appeal, defendant argues that the trial court erred in its determination because it concentrated on the content of defendant's statements rather than defendant's mental state at the time he purportedly waived his rights. We do not agree that the trial court erred by focusing on the content of defendant's written statement. At the hearing, defendant presented evidence that he was a drug addict, that he had no memory of the interrogation or waiver, and that several days later he was hospitalized. From this evidence, he invited the trial court to find that he must have

been so affected by narcotics that he could not have knowingly and intelligently waived his rights. However, the trial court clearly rejected this evidence as an indication of defendant's mental and physical state at the time. Instead, the trial court focused on defendant's written statement and waiver.

A review of the statement shows that defendant had relatively good handwriting, used relatively good grammar and spelling, and made coherent and logical statements. Similarly, the content of the statements reveals that he was generally aware of the facts and issues being discussed and even wrote a statement that placed blame for the robbery on someone else and minimized whatever culpability he may have had. Taken as a whole, the written statement is powerful evidence that defendant was not so affected by narcotics that he could not knowingly and intelligently waive his rights. Accordingly, the trial court did not clearly err when it found that defendant was coherent—that is, capable of making a knowing and intelligent waiver—at the time he waived his rights notwithstanding his purported drug use. The trial court did not err when it denied defendant's motion to suppress.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly