STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2010
v	No. 290624 Wayne Circuit Court
WILLIE DUKES, Defendant-Appellant.	LC No. 08-013954

Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Defendant was found guilty by a jury of one count of first-degree home invasion, MCL 750.110a(2), and one count of assault with intent to rob while armed, MCL 750.89. Defendant was sentenced to a term of imprisonment of 95 months to 20 years for the first-degree home invasion conviction, and 225 months to 40 years for the assault with intent to rob while armed conviction, with the sentences running concurrently. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that a statement he made to the police was erroneously admitted over his objection. We disagree. This Court reviews a trial court's ultimate decision on a motion to suppress de novo. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). The Court gives deference to a trial court's factual findings, and will only reverse a trial court if its findings are clearly erroneous. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005). A finding is clearly erroneous only if the Court is left with a definite and firm conviction that a mistake has been made. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004).

A statement made by a defendant to the police that was given in response to a custodial interrogation will not be admissible unless a defendant was first made aware of his rights. *Miranda v Arizona*, 384 US 436, 467-473; 86 S Ct 1602; 16 L Ed 2d 694 (1966). If a defendant unequivocally invokes his right to remain silent after having been advised of his *Miranda* rights, the police must stop questioning the defendant. *People v Adams*, 245 Mich App 226, 231-234; 627 NW2d 623 (2001). So long as the defendant's invocation was "scrupulously honored" by the police, a later statement by the defendant may be admissible. *People v Williams*, 275 Mich App 194, 198; 737 NW2d 797 (2007).

In the present case, defendant's invocation of his right to remain silent was not unequivocal. About 45 minutes to an hour after defendant was arrested, a police officer brought

defendant out of a "bull pen" and into a room. The officer did not read defendant his *Miranda* warnings. The officer testified that he did not ask defendant any questions specifically about the case. He only asked defendant general questions, such as defendant's name, and where defendant went to school. He asked these questions in order to develop a rapport with defendant. But, he thought that defendant was "playin' hard ball, playin' tough guy, streetish, acting ghetto. . . ." Seeing that the questioning was not "going well at all," the officer ended the questioning. The officer testified that defendant never said he did not want to answer any questions, nor did defendant ever ask for an attorney. A different officer later interrogated defendant. The officer gave defendant his *Miranda* warnings, and obtained a written statement from defendant. That statement was used at trial.

Defendant's testimony differs from the officer's testimony. Defendant testified that the officer asked defendant if defendant "had anything to do with hittin' that old man?" Defendant responded no, and told him "I don't feel good, and I don't wanna talk."

Although the transcript from the motion hearing is somewhat confusing, it is clear that the trial court did not find defendant's testimony credible. This Court defers to the trial court's assessment of the credibility of the witnesses. *Tierney*, 266 Mich App at 708. Giving deference to the trial court's determination of credibility, it cannot be said that the trial court's finding was clearly erroneous, because its finding was consistent with the testimony of the officer. The trial court did not find defendant's testimony to be credible. Accordingly, the trial court did not err in denying defendant's motion to suppress the admission of his statement to the police.

Defendant next challenges his sentence. He argues that it constitutes cruel and unusual punishment. We disagree.

By statute, the Court's review of a sentence is limited. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A trial court must impose a minimum sentence within the guidelines range, unless grounds for departure exist. MCL 769.34(2). A minimum sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information in sentencing the defendant. MCL 769.34(10). However, this limitation on review is not applicable to claims of constitutional error. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). However, because defendant did not raise this issue below, review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A sentence within the guidelines range is presumptively proportionate, and a sentence that is proportionate is not cruel or unusual punishment. *Powell*, 278 Mich App at 323.

According to the Sentencing Information Report, the minimum guidelines range for defendant's conviction of first-degree home invasion is 57 to 95 months. Likewise, the minimum guidelines range for defendant's conviction of assault with intent to rob while armed is 135 to 225 months. The trial court imposed a minimum sentence of 95 months for the first-degree home invasion conviction, and 225 months for defendant's assault with intent to rob while armed conviction. As the sentences fall within the guidelines range, they are presumptively proportionate, and thus, are not cruel and unusual punishment. Therefore, defendant has not shown plain error.

Even though defendant's challenge is without merit, *Powell* noted the severity of the crime committed justified the sentence, and held that the sentence was not disproportionate in light of the crime. *Powell*, 278 Mich App at 323-324. The same is true in this case. Defendant invaded the home of an elderly couple at gun point, forced them to the ground, and kicked an elderly victim in the face repeatedly. Accordingly, defendant's challenge is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder