

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDRICK D. DIXON a/k/a FREDERICK D.
DIXON,

Defendant-Appellant.

UNPUBLISHED

August 22, 1997

No. 120881

Recorder's Court

LC No. 89-001278

ON REHEARING

Before: White, P.J., and Bandstra and W.P. Cynar,*JJ.

PER CURIAM.

Defendant was convicted by a jury of first degree felony murder, MCL 750.316; MSA 28.548, and arson of an occupied dwelling, MCL 750.72; MSA 28.267, in connection with the burning of an apartment building and the death of a little girl trapped inside. He was sentenced to life without parole on the murder conviction and to a term of fifteen to twenty years on the arson conviction. Defendant appealed as of right and on November 7, 1996, in an unpublished opinion, we affirmed in part, but vacated the arson conviction on double jeopardy grounds.

On February 1, 1996, we granted defendant's motion for rehearing and remanded:

for further fact-finding, and, if necessary, further testimony. The court shall state on the record the reasons for concluding that there was probable cause to arrest defendant. For purposes of judicial economy, regardless of the court's decision on the probable cause issue, the court shall also address the issue of attenuation, focusing on the question whether the prosecution has established that defendant's confession was not only voluntary but also "sufficiently an act of free will to purge the primary taint" of an illegal arrest. *Brown v Illinois*, 442 US 590; 45 L Ed 2d 416, 426; 95 S Ct 2254 (1975) quoting *Wong Sun v United States*, 371 US 471, 486; 9 L Ed 2d 441; 83 S Ct 407 (1963). The court shall also look to the temporal proximity of the arrest and the

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

confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Brown*, at 427.

Thus, the only issue on rehearing is whether there was probable cause to arrest defendant and, if there was not, whether the link between the illegal arrest and his confession was nevertheless so attenuated that the confession could be admitted. In all other respects, including the voluntariness of defendant's confession, our opinion of November 7, 1996, remains controlling.

As we noted in our previous opinion, at the hearing of defendant's motion to suppress, his attorney interrupted the prosecution's examination of the arresting officer and conceded that defendant had been arrested while officers were executing a search warrant at his home. The prosecutor responded that she was seeking to establish that there was probable cause to arrest defendant and tried to continue. Counsel then stipulated that defendant had been "lawfully detained." The court responded:

THE COURT: Okay, what we have here then for the record is that the search warrant was properly gotten, that the warrant was executed at the address in question, that in the process of executing the search warrant the defendant arrived, and was then subsequently legally arrested. Ms Petito, is that the content of where you were going?

MS. PETITO: Yes, Your Honor.

THE COURT: Okay.

MS. PETITO: With that stipulation, I'll move further, move on.

THE COURT: Is that correct Mr. Waske, for the record?

MR. WASKE: Correct, Your Honor.

The prosecutor did not pursue the probable cause issue further. Similarly, the trial court did not address the legality of defendant's arrest in its bench opinion.

On remand, the trial court was "troubled" that this Court would:

examin[e] the probable cause issue beyond defense counsel's original stipulation over seven years ago. A **Ginther Hearing** was conducted in which defense counsel[s] performance was held not ineffective. No testimony was offered contrary to this. There is nothing in the record to support anything but the fact that defendant's stipulation and waiver of this issue was a trial decision. Any subjective determination as to the reason(s) for this stipulation at this point is not supported by the record and can only be conjecture. [Emphasis original.]

Nonetheless, the trial court made factual findings based on its review of the evidence previously presented that there was probable cause to arrest defendant and that, even if there was not probable cause, there was sufficient attenuation between the arrest and defendant's voluntary confession to satisfy

constitutional requirements. We do not conclude that these findings are clearly erroneous, MCR 2.613(C), and, as in our previous opinion, we affirm in part but vacate the arson conviction on double jeopardy grounds.

Affirmed in part and vacated in part in accordance with our November 7, 1995, opinion.

/s/ Richard A. Bandstra

/s/ Walter P. Cynar

I concur in result only.

/s/ Helene N. White