

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK GARZA,

Defendant-Appellant.

UNPUBLISHED

September 23, 1997

No. 195995

Recorder's Court

LC No. 95-005637

Before: Markey, P.J., and Neff and Smolenski, JJ.

MEMORANDUM.

Defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(1) and (2)(a)(iv); MSA 14.15(7401)(1) and (2)(a)(iv), and sentenced to lifetime probation. Defendant appeals as of right. We affirm.

The district court bound defendant over for trial on the testimony of one of the two arresting police officers. Between defendant's preliminary examination and trial, that police officer was killed in the line of duty. The trial court permitted the prosecution to introduce the deceased officer's prior testimony at trial, over defense objection. Defendant argues that the admission of the deceased officer's preliminary examination testimony violated his right to confront witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution.

A prosecutor may use the prior testimony given at a preliminary examination consistent with the constitutional guarantee of confrontation if the witness is "unavailable" for trial, MRE 804(b)(1), and if the opportunity to cross-examine the witness was provided at the preliminary examination. *Ohio v Roberts*, 448 US 56, 66, 70-71; 100 S Ct 2531; 65 L Ed 2d 597 (1980); *People v Moore*, 78 Mich App 294, 259 NW2d 351 (1977).

Defendant does not challenge the trial court's determination that the deceased officer was unavailable to testify at trial. See MRE 804(b)(1). Rather, defendant argues that the restrictions placed on defense counsel's cross-examination of the officer rendered the cross-examination inadequate to establish the requisite indicia of reliability to allow the use of the prior testimony.

Our review of the record reveals that defense counsel subjected the officer to thorough cross-examination, including detailed questioning as to the officer's powers of observation, recall, and credibility. Additionally, the minor restrictions the district court placed on the scope of cross-examination merely prevented defense counsel from exploring for a second time areas already addressed during cross-examination. Under these circumstances, the restrictions in no way undermined defense counsel's attempts to thoroughly cross-examine the officer.

Based on this record, we conclude that the officer's former testimony bears the satisfactory indicia of reliability necessary for it to be presented to the trier of fact. Accordingly, the trial court properly admitted the prior testimony.

Affirmed.

/s/ Jane E. Markey

/s/ Janet T. Neff

/s/ Michael J. Smolenski