STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC JAMES McTAGGART,

Defendant-Appellant.

UNPUBLISHED
February 3, 1998

No. 196863
Muskegon Circuit Court
LC No. 96-1-38903

Before: Gribbs, P.J., and Murphy and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right from his conviction of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to twenty to forty years' imprisonment. We affirm defendant's conviction and sentence.

I

Defendant first argues that the trial court clearly erred in denying his motion to suppress the evidence obtained by the police after his vehicle was stopped and searched. Defendant contends that any suspicion the police had that defendant and codefendants were involved in criminal activity was unreasonable and unwarranted by the circumstances. We disagree.

Our review of the record reveals that the trial court did not clearly err in determining that the police had a reasonable suspicion or probable cause to support the warrantless investigatory stop of defendant's vehicle and the subsequent seizure of the three ice scraper handles found therein. *People v Bordeau*, 206 Mich App 89, 92; 520 NW2d 374 (1994).

In *People v Whalen*, 390 Mich 672, 682; 213 NW2d 116 (1973), the Michigan Supreme Court held that "reasonableness" was the test to be applied to both the investigatory stop by the police of a moving motor vehicle and their subsequent search of the vehicle. Reasonableness is to be determined on a case-by-case basis and "is judged on an objective standard which hinges upon whether specific, articulable facts, together with rational inferences from those facts, reasonably warrant

the stop." *People v Martin*, 99 Mich App 570, 575-576; 297 NW2d 718 (1980). Once lawfully stopped, a vehicle may be searched without a warrant where there is probable cause to believe that evidence of a crime will be found. *United States v Ross*, 456 US 798, 807-808; 102 S Ct 2157, 2163-2164; 72 L Ed 2d 572 (1982).

Here, the police received a report from the victim indicating that he had been assaulted and robbed by two or more white males near the corner of Lakeshore Drive and Sampson Avenue in Muskegon, and he had watched them drive away in what appeared to be a "light colored" vehicle. Approximately ten to fifteen minutes after the robbery complaint was made, defendant's vehicle was seen pulling out of a boat launch that was only used by ice fishermen at that time of the year and typically not used at all during that time of day. The responding officer noted that the vehicle contained three white males, and, although it was dark blue, it appeared lighter because it was heavily covered with road salt. The boat launch was just one block from where the assault took place, and the officer observed no other traffic in that area. Finally, after stopping the vehicle, officers observed three separate black "clubs" inside the automobile, one within reach of each of the three occupants.

We agree with the trial court's ruling that the investigatory stop was warranted by the appearance of defendant's vehicle, the number of occupants, its location, the time at which it was observed, and the absence of any other traffic in the area. *Martin*, *supra* at 575-576. Accordingly, there was no reason to suppress evidence obtained as a result of the stop.

II

Defendant next argues that he was denied effective assistance of counsel because his trial counsel failed to move to suppress his confession as a fruit of the unlawful investigatory stop of his vehicle. Because defendant failed to move for a new trial or request an evidentiary hearing, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sharbnow*, 174 Mich App 94, 105-106; 435 NW2d 772 (1989). To succeed on a claim of ineffective assistance of counsel, a defendant must overcome the presumption that defense counsel was effective by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant. *Sharbnow*, *supra* at 106.

Defendant does not contend that his confession was involuntary or otherwise unconstitutionally obtained. Having already determined that the police lawfully stopped defendant's vehicle, we find that defendant cannot show that any alleged failure of his counsel on this issue was prejudicial to him. Therefore his ineffective assistance of counsel argument is without merit.

III

Next, defendant argues that insufficient evidence was presented at trial to support his armed robbery conviction because the evidence did not show that he used a "dangerous weapon" when committing the assault and robbery. We again disagree.

To obtain an armed robbery conviction, the prosecution must prove, among other things, that defendant possessed or was armed with either (1) a weapon designed to be dangerous and capable of causing death or serious injury; (2) an object capable of causing death or serious injury that defendant used as a weapon; or (3) an object used or fashioned in a manner to lead the victim to reasonably believe that it was a dangerous weapon. CJI2d 18.1(3). In *People v Goolsby*, 284 Mich 375, 378; 279 NW 867 (1938), our Supreme Court explained:

> The character of a dangerous weapon attaches by adoption when the instrumentality is applied to use against another in furtherance of an assault. When the purpose is evidenced by act, and the instrumentality is adapted to accomplishment of the assault and capable of inflicting serious injury, then it is, when so employed, a dangerous weapon.

In *People v James Banks*, 454 Mich 469; 563 NW2d 200 (1997), the Supreme Court again explicated the requirements for an armed robbery conviction, including the finding that the perpetrator use a dangerous weapon. The Court noted:

> To constitute armed robbery the robber must be armed with an article which is in fact a dangerous weapon—a gun, knife, bludgeon, etc., or some article harmless in itself, but used or fashioned in a manner to induce the reasonable belief that the article is a dangerous weapon. [Citing *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983).]

At trial, evidence was presented that defendant and codefendants used wooden ice scraper handles to assault the victim before robbing him. The victim testified that the assailants were "beating" on him from head to foot, described the hits as "pretty hard" and like "sharp cracks," and reported that he sustained several bleeding wounds to the back of his head and on his legs. The victim also indicated that when he attempted to shield his head, his hand was hit so hard that he thought it was broken.

We find that such evidence establishes that the ice scrapers were used as weapons in furtherance of an assault, and that they were capable of, and in fact, did cause serious injury. Accordingly, when considering the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could reasonably conclude beyond a reasonable doubt that defendant possessed or was armed with a dangerous weapon. *People v Wolfe*, 440 Mich 508, 515, modified 441 Mich 1201; 489 NW2d 748 (1992).

IV

Finally, defendant argues that when considering the facts surrounding the present offense--including his age, his prior nonviolent property offenses, and the absence of any evidence establishing that he endangered the victim's life in the present case--the sentencing court abused its discretion by imposing a disproportionately harsh sentence. We disagree.

After being convicted by a jury of armed robbery, defendant was sentenced as an habitual offender, fourth offense, to twenty to forty years' imprisonment. We note that when sentencing defendant as an habitual offender, the sentencing court was not restricted by the sentencing guidelines. *People v Cervantes*, 448 Mich 620, 630; 532 NW2d 831 (1995). Moreover, the court could have imposed a life sentence. MCL 750.529; MSA 28.797. This Court reviews sentencing decisions for an abuse of discretion. *Id.* An abuse of discretion will be found where the sentencing cour violates the principle of proportionality. *People v Milbourne*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

We find that based on the seriousness of the present crime and defendant's prior record, the sentence imposed by the lower court does not violate the rule of proportionality. At the time defendant committed the present offense, he was on parole for a 1994 breaking and entering conviction. Although only twenty years old, defendant had already been convicted of four prior offenses and had been subjected to juvenile court probation, a youth home, regular probation, parole, boot camp, and strict tether surveillance. Nonetheless, defendant continued with his criminal endeavors (this time selecting a random victim to physically assault), which indicates, as the sentencing court opined, that defendant is a poor candidate for rehabilitation and, for the protection of society, needed to be given a lengthy sentence. Accordingly, we find that defendant's sentence is proportionate to the offense and the offender.

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Hilda R. Gage