

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD DEE ALLAWAY,

Defendant-Appellant.

UNPUBLISHED

March 20, 1998

No. 196497

Kent Circuit Court

LC No. 95-003468

Before: White, P.J, and Cavanagh and Reilly, JJ.

PER CURIAM.

Defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798, and possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). After establishing defendant's status as an habitual offender, fourth offense, and an habitual drug offender, second offense, the court sentenced defendant to ten to twenty years for the unarmed robbery conviction and four to eight years for the possession of cocaine conviction. Defendant appeals as of right. We affirm.

Defendant first asserts that the trial court committed error requiring reversal in denying his motion to suppress the victim's eyewitness identification, where the police conducted an allegedly improper on-the-scene identification without presence of counsel. Defendant argues that on-the-scene identifications are prohibited where the police have very strong evidence that the defendant is the perpetrator at the time the identification takes place. *People v Turner*, 120 Mich App 23; 328 NW2d 5 (1982). The prosecution urges us to abandon the rule stated in *Turner, supra*, and adopt the rationale of *People v Marks*, 155 Mich App 203; 399 NW2d 469 (1986), requiring that an on-the-scene identification satisfy due process requirements and conform with reasonable police practice.

We conclude that the evidence of defendant's guilt, even without the identification testimony, was so overwhelming that it is unnecessary to address the question whether *Turner* or *Marks* should be followed. Even if we were to agree that the identification procedure was improper, we would find the error harmless.

There was testimony that defendant was apprehended in a vehicle matching the description of the vehicle in which the perpetrator fled. The victim testified that the perpetrator took a Crown Royal bag with a white stain in the corner; defendant was found with such a bag in his possession. The driver of the car in which defendant was apprehended testified that she picked him up near the scene of the robbery. Before the car was stopped by police, she drove defendant to a house where he went inside briefly and changed his clothes. A plaid shirt/jacket identified by the victim as the one worn by the robber was found in defendant's room. Defendant gave a statement that admitted that he was in the area of the crime and had gotten into a stranger's car.¹ We conclude that the circumstantial evidence was overwhelming.

Defendant next argues that the trial court erred in not suppressing the in-court identification of defendant by the victim, where it was irreparably tainted by the earlier on-the-scene show-up. While the court made no findings regarding the existence of an independent basis for an in-court identification, we observe that such a finding would have been supported by the record, especially in light of the testimony regarding the victim's identification based on defendant's voice. In any event, as discussed above, the circumstantial evidence was overwhelming, even without the victim's identification testimony.

Affirmed.

/s/ Helene N. White

/s/ Mark J. Cavanagh

/s/ Maureen Pulte Reilly

¹ Defendant stated he was high on crack at the time. He did not admit committing the robbery, and stated there was a man as well as a woman in the car.