

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN PAIGE,

Defendant-Appellee.

UNPUBLISHED

July 28, 1998

No. 198180

Recorder's Court

LC No. 96-000640

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

MEMORANDUM.

The prosecution appeals as of right an order dismissing charges of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), against defendant. In light of a recent decision by our Supreme Court, we reverse and remand for further proceedings.

In *People v Bender*, 452 Mich 594, 597; 551 NW2d 71 (1996), the Court held that the police must inform a suspect that a retained attorney is immediately available for consultation, and the failure to do so per se, before a confession is obtained, precludes a knowing and intelligent waiver of the rights to remain silent and to counsel. Applying *Bender* retroactively to the events surrounding defendant's November 1995 statement to police, the trial court in the instant case suppressed defendant's incriminating statement and dismissed the charges on the basis that the statement was not given knowingly and intelligently because the police did not tell defendant that a retained attorney had contacted the police and was available for defendant to consult.

However, our Supreme Court's recently released decision in *People v Sexton*, ___ Mich ___; ___ NW2d ___ (1998) (Docket Nos. 108195, 108749, 109143, rel'd 7/1/98), mandates reversal of the trial court's suppression order. In *Sexton*, the Court held that the *Bender* rule does not implicate a defendant's constitutional rights but is a prophylactic rule aimed at deterring police misconduct and, by its nature, can only have prospective effect on police conduct. The *Sexton* Court therefore held that the *Bender* rule should not be applied retroactively but instead applies only to interrogations that occurred after the date on which the *Bender* decision was issued, July 23, 1996.

Because the present defendant's interrogation occurred prior to the effective date of the *Bender* rule, the resultant inculpatory statement should not have been suppressed on the basis of *Bender*. We therefore reverse the decision of the trial court and remand the case for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Richard Allen Griffin

/s/ Robert P. Young, Jr.