STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELVIN LITTLEJOHN,

Defendant-Appellant.

UNPUBLISHED
September 11, 1998

No. 195286
Saginaw Circuit Court
LC No. 96-011683 FH

Before: Saad, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction for (1) possession with intent to deliver under fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), (2) felon in possession of a firearm, MCL 750.224f; MSA 28.421(6), and (3) two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). The court sentenced defendant to five- to twenty-years' imprisonment for the possession with intent to deliver conviction, two and one-half to five-years' imprisonment for the felon in possession conviction, and the mandatory two-year consecutive term for the felony-firearm convictions. We affirm.

Defendant argues that the trial court erroneously admitted into evidence statements that he had made to a parole officer who failed to advise him of his *Miranda* warnings. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The trial court conducted a *Walker*[1] hearing prior to trial and concluded that the statements were admissible. This Court reviews a trial court's ruling on a motion to suppress evidence on legal grounds for clear error. *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996). The trial court's findings will not be reversed unless they are clearly erroneous. A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *Id*.

Prior to interrogating an individual who is in custody, police officers must inform him of his right to remain silent and to consult an attorney. The officer must secure a knowing and intelligent waiver of those rights. *Miranda, supra* at 478-479. *Miranda* rights are triggered when: (1) the defendant is in

custody; (2) there is interrogation; and (3) the questioning is conducted by a law enforcement officer. *Miranda*, *supra* at 444.

Defendant's *Miranda* claim fails for two reasons. One, there was no interrogation. Interrogation "refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *People v Anderson*, 209 Mich App 527, 532-533; 631 NW2d 780 (1995) (citation omitted). The parole officer testified that "in response to the [information she gave him regarding the parole violation], [defendant] just started talking, he started telling me all this stuff." Because on the present record it appears that defendant's statements were volunteered and were not the result of questioning or of behavior calculated to elicit an incriminating response, we hold that the statements were admissible because he was not subjected to interrogation.

Two, the "questioning" was not done by a police officer. "A person who is not a police officer and is not acting in concert with or at the request of the police is not required to give *Miranda* warnings before eliciting a statement." *Anderson, supra*, 533. This Court has previously held that neither a Department of Social Services caseworker, *People v Porterfield*, 166 Mich App 562, 567; 420 NW2d 853 (1988), nor a juvenile corrections officer, *Anderson, supra*, 533-534, are law enforcement officials for the purposes of *Miranda*. Without directly ruling on this question, in *Minnesota v Murphy*, 465 US 420; 104 S Ct 1136; 79 L Ed 2d 409 (1984), the United States Supreme Court upheld the admission of a defendant's statements to a probation officer at a subsequent trial on charges unrelated to the statements.

At defendant's *Walker* hearing, the parole officer testified that she was not a police officer or a certified law enforcement official, and that she was not defendant's regular parole officer, but was interviewing defendant at the request of his regular parole officer who was in Detroit. She said that she was acting independently from the police, and that her only reason for speaking to defendant was to advise him of parole violation charges, to advise him of his right to a preliminary hearing on those charges, and to determine if he would agree to waive the hearing. Under these circumstances, we conclude that the parole officer was not a law enforcement official.

Defendant also claims that the trial court clearly erred in admitting his confession to the police because the police failed to readvise him of his *Miranda* rights before taking his taped confession. This Court reviews the entire record de novo to determine, under the totality of the circumstances, whether a suspect has validly waived his *Miranda* rights. *People v Cheatham*, 453 Mich 1, 27-30; 551 NW2d 355 (1996). This Court will give deference to a trial court's findings of fact at a suppression hearing, and will not disturb those factual findings unless the trial court's ruling is determined to be clearly erroneous. *Id*.

A police detective testified that defendant was given his *Miranda* warnings at the scene when he was arrested. Subsequently, the detective testified, he readvised defendant of his rights at the jail and obtained a waiver before conducting an initial interview. Prior to the next interview, which was tape recorded, the detective asked defendant if he remembered being advised of his rights, if he had understood them, and if he remembered being read the waiver. Defendant responded affirmatively.

Defendant testified that he was never given the *Miranda* warnings and claimed that his responses in the taped interview resulted from his belief that the detective was referring to information about a search warrant that he had been given at the scene of the arrest. The trial court concluded that defendant's testimony was not credible and ruled that defendant had been advised of his constitutional rights. This Court cannot conclude that this finding was clearly erroneous.

This Court has previously held in *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992), and *People v Godboldo*, 158 Mich App 603, 605-607; 405 NW2d 114 (1986), that where there had been an initial advisement and waiver of rights, the police were not required to readvise a defendant of his rights prior to each successive interview. Instead, a factual question is presented as to whether the statements were voluntary. *Id*. at 607. As to the voluntary nature of the statement, this Court stated in *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997):

> With regard to the voluntariness of defendant's statements to the police officers, we examine the entire record and make an independent determination of voluntariness. However, we also defer to the trial court's superior ability to view the evidence and witnesses and will not disturb its factual findings unless they are clearly erroneous. *People v Krause*, 206 Mich App 421, 423; 522 NW2d 667 (1994). Use of an involuntary statement in a criminal trial violates due process. *People v Cipriano*, 431 Mich 315, 331; 429 NW2d 781 (1988). The test of voluntariness is whether "considering the totality of all the surrounding circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired.'" [*Id*. at 333-334 (citations omitted).]

Our Supreme Court in *Cipriano*, *supra* at 334 detailed the factors to be considered in determining whether a statement is voluntary:

> . . . the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [Citations omitted.]

Here, the trial court assessed some, but not all, of these factors. The court found that defendant was twenty-six years old and that he had obtained a ninth grade education. The court further found that defendant had a prior conviction for delivery of cocaine. The trial court also determined that defendant had been advised of his constitutional rights. The record indicates that prior to the tape-recorded interview, defendant had been incarcerated for approximately twelve hours. Defendant was questioned once prior to the tape-recorded interview; that prior questioning had taken approximately ten minutes.

There is no testimony regarding when defendant was taken before a magistrate. In any event, it does not appear that whatever delay occurred was used as a device to obtain the statements.[2] The detective testified that defendant was not under the influence of alcohol or drugs, that he had not been physically abused or threatened with physical abuse, and that he did not complain of illness, lack of sleep, hunger, or thirst. Defendant never disputed this testimony or offered any contrary evidence. Considering these factors in totality, the trial court did not clearly err in finding that defendant's statements to the police were voluntary.

Defendant also contends that the trial court erred in scoring the sentencing guidelines. Our Supreme Court held in *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997), that a trial court's scoring of the sentencing guidelines does not present an appealable issue. See also *People v Raby*, 456 Mich 487, 499; 575 NW2d 644 (1998). Accordingly, we decline to review this issue.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] The tape-recorded statement was taken within twelve hours of defendant's incarceration. This is well within the forty-eight hour limit established by the United States Supreme Court in *Riverside v McLaughlin*, 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991). Defendant thus bore the burden of establishing that the delay was unreasonable. Defendant failed to present any evidence on this point other than his own claim that "it was three days before we was tooken [sic] upstairs and booked."