

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM A. ALLEN,

Defendant-Appellant.

UNPUBLISHED

September 22, 1998

No. 198417

Recorder's Court

LC No. 95-012669 FY

Before: Hood, P.J., and Griffin and O'Connell, JJ.

MEMORANDUM.

Following a bench trial, defendant was convicted of four counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant received four concurrent ten to fifteen year-terms of imprisonment for his assault convictions and to a consecutive two-year term of imprisonment for his felony-firearm conviction. Defendant appeals as of right. We affirm.

The case was dismissed without prejudice on defendant's motion when one of the prosecution's witnesses failed to appear. An hour later, the witness appeared, the dismissal was vacated, and trial proceeded.

On the instant record, the prosecutor took no action to discontinue or abandon the prosecution. MCL 767.29; MSA 28.969; *People v McCartney*, 72 Mich App 580, 585; 250 NW2d 135 (1976). Instead, the dismissal was entered on defendant's motion without concurrence by the prosecutor. Accordingly, the factual predicate for defendant's claimed error, that being the prosecutor's seeking and securing an order of nolle prosequi, is not present in the record. Moreover, defendant has failed to argue under the circumstances presented in this case that the trial court lacked the authority to revisit its ruling and vacate its order of dismissal within an hour of its entry. Under these circumstances, defendant's claimed error must fail.

Defendant's failure to provide the transcript of the second day of the evidentiary hearing, which is necessary to resolve defendant's claim of ineffective assistance of counsel, constitutes an

abandonment of his claims on appeal. *People v Johnson*, 173 Mich App 706, 707; 434 NW2d 218 (1988).

Affirmed.

/s/ Harold Hood

/s/ Richard Allen Griffin

/s/ Peter D. O'Connell