STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2001
v	No. 222655 Oakland Circuit Court
MARVIN A. DAVIS, JR., Defendant-Appellant.	LC No. 96-146538-FC

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, felon in possession of a weapon, MCL 750.224f, unlawfully driving away an automobile (UDAA), MCL 750.413, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.10, to concurrent terms of fifteen to thirty years for the armed robbery conviction, 3 to 7-1/2 years each for the felon in possession and UDAA convictions, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right the denial of his motion for new trial. We affirm.

The jury convicted defendant after a one-day trial on October 8, 1996. On November 14, 1996, new counsel for defendant timely filed a motion for new trial, which stated in its entirety:

> 1. That upon information and belief, defendant was denied his right to a fair trial based upon insufficient evidence of his guilt as well was ineffective assistance of counsel.
>
> 2. That the memorandum and brief in support of Defendant's Motion shall be supplied to the court upon receipt of the transcript of record of the proceedings, which has been ordered and paid for by Defendant.

Plaintiff filed a response to defendant's motion for new trial on November 22, 1996 stating:

> 1. The People deny the allegations as contained in Paragraph 1 as untrue.
>
> 2. The People neither admit nor deny the allegations as contained in Paragraph 2, but leave the defendant to his proofs.

3. The evidence of Defendant's guilt was overwhelming as evidenced by the fact that it took the jury one hour to convict Defendant of every charge.

Defense counsel did not file a memorandum or brief and did not notice the motion for hearing. At some later point the trial judge, Honorable Robert Anderson, died. Neither party provides a date for Judge Anderson's death and defendant does not claim the death had bearing on his failure to notice the motion for hearing.

Several years later, on May 25, 1999, defendant's same counsel filed a "Brief in Support of a Motion for New Trial" before the successor judge, Judge Colleen A. O'Brien, and a notice of hearing for June 16, 1999. Defendant's brief set forth a statement of facts citing primarily to the preliminary examination transcripts, which had been filed with the court before trial, and briefly to trial transcripts, and argued the merits of his claims of ineffective assistance of counsel and insufficient evidence regarding the armed robbery conviction. Defendant attached to his brief an affidavit of Roy Davis, the victim, dated May 20, 1999 and stating:

1. That he is the complaining witness in the above-captioned case and makes this Affidavit upon personal knowledge.

2. That on April 25, 1996 I made a written statement to the police concerning my being assaulted in my apartment on that evening.

3. That I was prompted by the police to identify the Defendant as the person who assaulted me.

4. That I never saw the person who assaulted me, nor could I recognize his voice, therefore I cannot identify said person.

5. Immediately after the incident occurred, I was under tremendous stress and I assumed that the Defendant may have been my assailant even though I did not see him. This assumption was based on the fact that he (the Defendant) resided with me.

6. That despite what I told the police, no money was taken from me, as I had forgotten that the money which I reported taken was in the pocket of a pair of pants I had worn earlier that day.

This affidavit was consistent with Davis' preliminary examination and trial testimony and did not purport to provide new evidence.

At the June 23, 1999, motion hearing, an attorney from the firm for which defense counsel was employed argued on defendant's behalf that "this is our Motion for New Trial, and I would note from the outset that the People have not responded to this motion, that despite the fact it's been up twice. This is the second time it's up." The prosecutor corrected defense counsel, stating that "this motion was filed back on 11-22 1996," that the court file showed that plaintiff filed a response in November 1996 and that the motion "was never praeciped up." At the hearing, in addition to arguing the merits of defendant's motion, the prosecutor argued that

defendant had abandoned his motion by not pursuing it in 1996. After taking the motion under advisement, the trial court issued an opinion and order concluding that "based on the fact that defendant's earlier Motion for New Trial was filed, but was never noticed for hearing nor heard, such motion is to be considered as abandoned," and denied defendant's motion as improperly brought under MCR 6.431. The trial court relied in part on the similar situation discussed in the concurring opinion of *People v Kowalski*, 230 Mich App 464, 484-489; 584 NW2d 613 (1998), which is not binding authority.

We review the trial court's denial of defendant's motion for new trial for abuse of discretion and the court's factual findings for clear error. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). We review questions of law de novo. *In re Contempt of Tanksley*, 243 Mich App 123, 127; 621 NW2d 229 (2000).

A motion for new trial can be filed "within 42 days after entry of the judgment." MCR 6.431(1). Contested motions "should be noticed for hearing at the time designated by the court for the hearing of motions." MCR 2.119(E)(1).

Defendant's counsel who filed both the original motion for new trial in 1996, and the brief in support of the motion in 1999, provided no explanation for the failure to notice the motion for hearing until 1999. Under these circumstances, we cannot conclude that the trial court abused its discretion in concluding that the motion had been abandoned.[1]

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Henry William Saad

[1] We further note that while the merit of defendant's motion is doubtful, he is free to pursue his arguments by way of a motion under MCR subchapter 6.500.