

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CASEY DOW WARD,

Defendant-Appellant.

UNPUBLISHED
February 15, 2002

No. 225284
Saginaw Circuit Court
LC No. 98-015157-FH

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant appeals by right his December 10, 1999 jury trial conviction of two counts of operating a motor vehicle under the influence causing death, MCL 257.625(4). We affirm.

Defendant first contends that the trial court abused its discretion in finding him competent to stand trial. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990); *People v Groeneveld*, 54 Mich App 424, 426; 221 NW2d 254 (1974). We disagree. An abuse of discretion exists when a neutral person would consider the trial court's decision to be without justification or excuse. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998).

A criminal defendant is presumed competent to stand trial. MCL 330.2020. Michigan case law uses the following test to establish competence to stand trial: (1) whether the defendant has a sufficient present ability to consult with his attorney with a reasonable amount of rational understanding; and (2) whether the defendant has a rational and factual understanding of the proceedings against him. *People v Belanger*, 73 Mich App 438, 447; 285 NW2d 472 (1972).

Under this test, amnesia can prejudice a defendant and render him incompetent to stand trial. *People v Stolze*, 100 Mich App 511, 515; 299 NW2d 61 (1980). In *Stolze, supra* at 515-516, however, amnesia did not render the defendant incompetent to stand trial. The defendant's memory was held to be of limited help to his attorney. *Id.* Defendant was "able to consult with and assist his lawyer subject to the limitations imposed by the amnesia." *Id.* at 516. According to the competency evaluation, defendant understood the nature and object of the proceedings against him and was, aside from the accident and surrounding events, able to assist his attorney. Under *Stolze, supra* at 515-516, the trial court's decision that defendant was competent to stand trial was not an abuse of discretion.

Defendant next contends that the trial court abused its discretion in not granting him a continuance or adjournment to present an expert witness. A trial court's grant or denial of a continuance is reviewed for an abuse of discretion. *People v Wilson*, 397 Mich 76, 77; 243 NW2d 257 (1976). We employ a four factor test to determine if the trial court abused its discretion in not granting a continuance. *Wilson, supra* at 81; *People v Holleman*, 138 Mich App 108, 112; 358 NW2d 897 (1984). First, the nature and origin of the right asserted. *Id.* Second, the defendant's reasons for asserting the right. *Id.* Third, the defendant's negligence or untimely assertion of the right. *Id.* Fourth, the extent to which previous delays can be attributed to the defendant. *Id.* Furthermore, the defendant must also demonstrate prejudice resulting from the error. *Wilson, supra* at 81.

We find that defendant was negligent to assert his right on the first day of trial. *People v Eddington*, 77 Mich App 177, 188; 258 NW2d 183 (1977); *People v Hill*, 88 Mich App 50, 57; 276 NW2d 512 (1979) Moreover, defendant had over two years to seek expert opinions and to investigate the physical evidence. He failed to do so. Under *Hill, supra* at 57-58, he was negligent in asserting his right.

Defendant next argues that the prosecution's efforts to locate a missing witness did not constitute due diligence, and therefore his preliminary examination testimony should not have been admitted into evidence. We review a trial court's determination that a witness is unavailable to testify at trial for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). When the declarant is unavailable and due diligence has been shown, the declarant's former testimony is admissible if the adverse party had a similar motive or opportunity to cross-examine or otherwise develop the declarant's former testimony. MRE 804(b)(1). Due diligence requires the prosecutor to make good faith efforts to locate witnesses and secure their testimony, regardless of whether greater efforts would have been successful. *Bean, supra* at 684.

Due diligence means taking all reasonable steps to secure a witness' presence, not all possible steps. *People v Simon*, 174 Mich App 649, 657; 436 NW2d 695 (1989). Lesser efforts than those presently reviewed have been found to constitute due diligence. *People v Sanford*, 68 Mich App 168, 173; 242 NW2d 56 (1976); *People v Harringer*, 65 Mich App 649, 651-652; 237 NW2d 598 (1975). Furthermore, the preliminary examination testimony was reliable because defendant had an opportunity and similar motive to develop the testimony through cross-examination. MRE 804(b)(1); *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998), reh den 459 Mich 1234 (1999). We find that the prosecution exercised due diligence in attempting to locate the witness and that no abuse of discretion occurred in admitting the witness' preliminary examination testimony as evidence.

Defendant finally argues that the trial court abused its sentencing discretion and considered improper factors. We find these arguments to be without merit. The sentence imposed by a trial court is reviewed for an abuse of discretion. *People v Poppa*, 193 Mich App 184, 189; 483 NW2d 667 (1992). The sentencing guidelines do not apply to habitual offenders, *People v Cervantes*, 448 Mich 620, 625-626; 532 NW2d 831 (1995). The trial court, in imposing a maximum term of twenty-two and one-half years imprisonment, was within the discretion vested by the legislature for operating a motor vehicle under the influence causing

death, MCL 257.625(4)(a), as a habitual offender¹, MCL 769.10(a). *People v Merriweather*, 447 Mich 799, 809; 527 NW2d 460 (1994). Defendant's sentence is therefore proportionate. *Id.*

Defendant alleges that the trial court made several errors at sentencing. The trial court did not commit error by allowing a member of the victim's family to speak at sentencing and considering the impact on the victim's in determining the proper sentence. *People v Jones*, 179 Mich App 339, 342; 445 NW2d 518 (1989). Although a trial court cannot impose a sentence based on the defendant's refusal to admit guilt, *People v Perryman*, 89 Mich App 516, 524; 280 NW2d 579 (1979), we find no evidence that the trial court based its sentence on this consideration. It is error for a trial court to state that the maximum penalty is mandatory and the imposition of a shorter term is beyond its authority. *People v Mauch*, 23 Mich App 723, 730; 179 NW2d 184 (1970). The *Mauch*, *supra* at 730, holding does not apply here, however, because the trial court did not indicate that it had no discretion in determining what sentence to impose.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer

¹ Defendant has a prior conviction of fourth degree criminal sexual conduct, MCL 750.520e(1)(a)