

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENDALL RAY KIMMEL,

Defendant-Appellant.

UNPUBLISHED

December 18, 2003

No. 249385

Saginaw Circuit Court, Family
Division

LC No. 03-028278-DL

Before: Talbot, P.J., and Owens and Hood, JJ.

PER CURIAM.

In this case involving a police speed chase, defendant was charged with unlawfully driving away an automobile, MCL 750.413; third-degree fleeing and eluding a police officer, MCL 750.479A(3), and operating a motor vehicle while under the influence of intoxicating liquor, MCL 257.625(1). Defendant appeals as of right from the decision of the Saginaw Circuit Court Family Division to waive jurisdiction over defendant, a juvenile, so that he could be tried as an adult offender in the court of general criminal jurisdiction. We affirm.

I. Waiver of Jurisdiction

Defendant argues that the trial court erroneously allowed the prosecutor's waiver motion to proceed when the motion was filed eighteen days before the charging petition against him was filed in violation of MCR 3.950(C)(1).

Defendant did not raise this issue before the trial court. He made no reference to the fact that the motion was filed eighteen days before the filing of the petition. Instead, he argued that the charging petition was untimely filed eight months after the officer's complaint in this case was issued. That argument was brought as part of defendant's assertion that the prosecutor deliberately delayed the filing of the petition until after defendant turned 17 ½ years of age so that he could be tried as an adult. Thus, the issue defendant now raises is not preserved. Consequently, review of the issue on appeal is limited to whether plain error affecting substantial rights occurred. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Generally, the interpretation of a

court rule is a question reviewed de novo. *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002).

MCR 3.950(C)(1)¹ provides in pertinent part:

A motion to waive jurisdiction of the juvenile must be filed within 14 days after the petition has been authorized to be filed. Absent a timely motion and good cause shown, the juvenile shall no longer be subject to waiver of jurisdiction on the charges.

“Petition authorized to be filed” is defined as the “written permission given by the court to file the petition containing the formal allegations against the juvenile or respondent with the clerk of the court.” MCR 3.903(20). The language of the court rule at issue is clear: a prosecutor must file a motion to waive jurisdiction within fourteen days after the court authorizes the petition to be filed.

It is undisputed in this case that the filing of the petition was authorized on March 25, 2003, while the motion to waive jurisdiction was filed eighteen days earlier, on March 7, 2003. Defendant asserts that such an early filing requires an automatic reversal of the trial court’s decision. We conclude that it does not. The purpose of the time limit for filing a waiver motion is to ensure the defendant will have at least fourteen days notice that the defendant will have to defend against waiver. As this Court held in *People v McCoy*, 189 Mich App 201, 204; 471 NW2d 648 (1991), the purpose of the rule “is to ensure waiver motions are made and resolved soon after the petition is filed.” Although *McCoy* discussed former MCR 5.950(A)(1), that decision remains valid with respect to the new court rule, MCR 3.950(C)(1), which made no substantive change to the former court rule. In *McCoy*, this Court found that the prosecution could reinitiate a juvenile proceeding where a prior juvenile proceeding raising the same charges was dismissed because the prosecution was not prepared to proceed with the probable cause hearing within twenty-eight days as required by former MCR 5.950(B)(1)(a), (MCR 3.950(D)(1)(a)). This Court held that “[i]f the court believes that the prosecutor is acting in bad faith, or that defendant’s due process rights have been violated, then the waiver motion should be denied.” *Id.* at 205. We find that this standard is applicable to the early filing in this case.

Defendant fails to establish prejudice resulting from the unpreserved claim. He does not assert that the early filing of the motion hindered the prompt resolution of the matter. Rather, the early filing afforded defendant with ample time to prepare for his defense. There is nothing to establish that the prosecutor acted in bad faith when he filed the early motion. Defendant does

¹ The court rule in effect at the time the prosecutor filed the motion for waiver was former MCR 5.950(A)(1), which provided in pertinent part that “[a] motion to waive jurisdiction of the juvenile must be filed within 14 days after the filing of the petition.” However, the trial court determined the issue under the new court rule, MCR 3.950(C)(1), effective on May 1, 2003. We agree with the trial court and the parties that MCR 3.950(C)(1) did not make any substantive changes to the former court rule. Rather, the new rule is intended to clarify that a petition is ‘filed’ only when the court authorizes it to be filed. Accordingly, we decide this issue according to the new court rule.

not even allege prejudice on appeal, and we find nothing in this record to show that defendant's due process rights were prejudiced in any manner. *McCoy, supra* at 205-206. Accordingly, defendant's claim fails.

B. The Best Interests Criteria

Defendant argues that the court's findings were not supported by the evidence and that the court gave inappropriate weight to some of the six criteria the court was required to consider under MCR 3.950(C)(2)(d) and MCL 712A.4(4). Specifically, defendant argues that the court failed to consider the prejudice that the prosecutor created by deliberately waiting to bring the charges against him until he was almost 17 ½ years old to preclude the court's jurisdiction, and that the court failed to determine whether it would be in his best interests to waive jurisdiction.

The decision to waive jurisdiction consists of two phases: the first phase involves a determination that "there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony" and that there is probable cause to believe the juvenile committed the offense, which was conducted in this case; while the second phase involves a determination that "the interests of the juvenile and the public would best be served" by waiving jurisdiction. MCR 3.950(D)(1) and (2). We review a trial court's findings of fact for clear error. MCR 2.613(C); MCR 3.902(A). "In application of this principle [the clearly erroneous standard of review], regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

The six criteria that the trial court is required to consider in making its second-phase determination are as follows:

- (i) the seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim;
- (ii) the culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines;
- (iii) the juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior;
- (iv) the juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming;
- (v) the adequacy of the punishment or programming available in the juvenile justice system;
- (vi) the dispositional options available for the juvenile. [MCR 3.950(D)(2)(d).]

In considering and making findings on the above criteria, the trial court is mandated to give “greater weight to the seriousness of the alleged offense and the juvenile’s prior record of delinquency than to the other criteria.” MCR 3.590(D)(2)(d).

Defendant first asserts that the trial court failed to consider the fact that the charges were brought when he was almost 17 ½ years of age, limiting his chances for meaningful rehabilitation in the juvenile system, as they relate to the fifth and sixth criteria.

There is nothing in this record for this Court to review with respect to the reasons why the charges were brought against defendant eight months after the alleged crime was committed. Defendant failed to properly raise this issue below and did not present anything at the second-phase hearing to support his claim. Further, there is nothing in this record to establish that an earlier timing of the charges would have made a difference. On the contrary, the evidence establishes that the Saginaw County prosecutor was unaware that defendant’s probation officer in Bay County had attempted to arrange suitable programming for defendant while defendant waited for the charges to be filed. The evidence shows that one program which the probation officer secured for defendant may have been the single meaningful dispositional alternative available to him at the time. However, it was unlikely that defendant could have joined that program in the event the charges were brought earlier. His participation in that program was contingent upon two matters: that the venue for the instant case be moved from the family division of Saginaw County circuit court to the family division of Bay County circuit court and that the Bay County family court maintain jurisdiction over defendant. With respect to the former, the record does not establish even the slightest possibility that the venue would have been moved to the Bay County family court. With respect to the latter, the Bay County family court did not maintain jurisdiction over defendant. Defendant had been charged for committing the offense of attempted larceny in a building a few months after he allegedly committed the instant offense. According to the evidence presented in this case, the offense that defendant allegedly committed in Bay County automatically removed defendant from the Bay County juvenile system and subjected him to the court of general criminal jurisdiction in that county. Thus, defendant cannot establish that the eight month delay in bringing the charges in the instant case deprived him of meaningful rehabilitation. We find no error.

Defendant next asserts that the trial court failed to consider that he had participated in the juvenile system with some success and that his actions may have been attributable to the new medication that he had been taking at the time of the offense. He also claims that, a few days following the date of the instant offense, he was diagnosed with bipolar disorder and attention deficit disorder. He argues that placing a child with unresolved mental health issues into the adult court system was not in his or the public’s best interest. We disagree. A review of the trial court’s findings indicates that the court considered and weighed the successes and the failures that defendant achieved in the juvenile system. We find no error in the court’s determination that the nature of defendant’s subsequent recidivism merely escalated to the point where it was evident that defendant would not benefit from further programs. Further, there was some testimony at the second hearing on the prescription medicine defendant was using at the time of the instant offense and that he was subsequently diagnosed with bipolar disorder. However,

there was no evidence whatsoever to establish that such medication or disorders had any affect on defendant's culpability in committing the instant offense. We find no error on this record.

Affirmed.

/s/ Michael J. Talbot

/s/ Donald S. Owens

/s/ Karen M. Fort Hood