STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2009
v	No. 285475 Wayne Circuit Court
DONNELL LEMAN SIMS, Defendant-Appellant.	LC No. 07-024242-FC

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of carjacking, MCL 750.529a, two counts of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of nine to 20 years each for the carjacking and assault convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction.[1] Because the trial court did not err in denying defendant's motion to suppress a statement he made during a custodial interrogation, and the trial court recognized that it had discretion and clearly exercised that discretion during sentencing, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that his inculpatory custodial statement was taken in violation of his Fifth Amendment right to counsel and, accordingly, the trial court erred in denying his motion to suppress. Defendant was interviewed shortly after his arrest, at which time he denied participation in the offense, and again approximately 14 hours later, at which time he admitted participation in the offense. The trial court ruled that even if it credited defendant's testimony, that testimony did not establish an unequivocal request for counsel. In reviewing a trial court's determination on a motion to suppress a confession, this Court reviews the record de novo but will defer to the trial court's factual findings unless they are clearly erroneous. *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004); *People v Adams*, 245 Mich App 226, 235; 627 NW2d 623 (2001). The trial court's factual findings are clearly erroneous if, after review of the

[1] The instant sentences were to run consecutively to a two-year sentence defendant was serving for an earlier offense for which he was awaiting disposition when he committed the instant offenses.

record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. *Edwards v Arizona*, 451 US 477, 481-482; 101 S Ct 1880; 68 L Ed 2d 378 (1981). A defendant who is in custody and who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the [defendant] himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485.

A defendant's unequivocal invocation of the right to remain silent must be scrupulously honored. *People v Catey*, 135 Mich App 714, 722-726; 356 NW2d 241 (1984). However, if a defendant makes only an ambiguous or equivocal reference to an attorney, questioning may continue. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). In other words, the invocation of a defendant's right to counsel requires a statement that can "reasonably be construed to be an expression of a desire for the assistance of an attorney." *Davis v United States*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994). If the defendant makes an ambiguous reference to an attorney "that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," the officer need not cease his interrogation. *Id*. (emphasis in original). The trial court's determination whether the defendant actually invoked his right to counsel is an objective inquiry. *Id.* at 458-459.

Defendant testified that when informed of his right to counsel at the first interview, he requested counsel by asking a question pertaining to counsel, which question was phrased in one of three ways: (1) "Is my lawyer suppose[d] to be here?" or (2) "Is my lawyer suppose[d] to be here because if he is can I have a lawyer?" or (3) "[D]o I need an attorney present right now while you're asking me these questions[?]" Questions such as "[A]m I supposed to have a lawyer?" or "Do I need a lawyer?" are not unequivocal requests for counsel. *People v McBride*, 273 Mich App 238, 243, 259; 729 NW2d 551 (2006), rev'd in part on other grounds 480 Mich 1047 (2008). Therefore, the trial court did not clearly err in finding that the first and third versions were equivocal and ambiguous. The second version contained a request for counsel, but it was conditional – defendant asked for a lawyer if a lawyer was supposed to be there. Because a lawyer is not required to be present during questioning unless a defendant clearly and unambiguously asks for one, the trial court did not clearly err in finding that the second version also was not an unequivocal and unambiguous request for counsel.

Defendant testified that when informed of his right to counsel at the second interview, he responded, "I think I should have an attorney here, you know." Similar statements have been held to be equivocal or ambiguous. See *Clark v Murphy*, 331 F3d 1062, 1070-1072 (CA 9, 2003); *Burket v Angelone*, 208 F3d 172, 198 (CA 4, 2000). Therefore, the trial court did not clearly err in so holding. Because defendant did not unequivocally invoke his right to counsel, the trial court properly denied his motion to suppress.

Defendant next argues that the trial court failed to recognize and exercise its discretion whether to impose consecutive or concurrent sentences under MCL 768.7b(2). "[A] trial judge commits reversible error if he or she does not recognize that he or she has discretion and therefore fails or refuses to exercise it." *People v Merritt*, 396 Mich 67, 80; 238 NW2d 31 (1976). Thus, if a court fails to exercise its discretion in passing sentence due to a mistaken

belief that the law requires a particular sentence, the defendant is entitled to resentencing. *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994); *People v Daniels*, 69 Mich App 345, 350; 244 NW2d 472 (1976). However, "absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001).

Defendant committed the instant offenses while awaiting disposition of a previous charge of first-degree home invasion. After the trial court passed sentence, defendant raised the issue of consecutive or concurrent sentences, specifically requesting that the felony-firearm sentence alone be made concurrent to the home invasion sentence. Defendant's initial position at sentencing was that the trial court was obligated to sentence on the instant convictions concurrently with the sentence on the earlier conviction. Defense counsel finally acceded that under the present circumstances the trial court was vested with discretion to sentence on the instant convictions consecutive to, or concurrently with, the sentence on the earlier conviction. After further argument, the trial court considered the positions of defense counsel and the probation officer and ruled that all sentences imposed in this case were to run consecutively to the home invasion sentence that defendant was already serving. Clearly, the record discloses that the trial court recognized and exercised its discretion, and accordingly, defendant has not established error.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio