# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 19, 2011 |
| v | No. 298087<br>Wayne County Circuit Court |
| KARON MORRIS,<br><br>Defendant-Appellant. | LC No. 09-026241-FC |

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] He received a sentence of 135 months' to 25 years' imprisonment for the carjacking conviction and a consecutive term of two years' imprisonment for the felony-firearm conviction.[2] We affirm.

On the night of September 14, 2009, James Taylor was carjacked by a man alleged to be defendant, who was unmasked and wielded a gun, and two masked accomplices in the parking lot of a Detroit liquor store. Defendant told Taylor to "drop your keys and walk away," and Taylor did so, leaving his fiancée's car to be stolen. Nearly six hours after the original incident, defendant was apprehended following a high-speed police chase in Dearborn Heights after the police had run Taylor's fiancée's car through the stolen-vehicle database. The chase reached speeds of over 100 miles an hour and ended when the vehicle crashed into a building and defendant attempted to evade capture on foot. The police found defendant in a field not far from the crash. The officers recovered the vehicle and the two masks allegedly worn by defendant's accomplices during the carjacking.

[1] The jury also convicted defendant of unlawful driving away of an automobile, MCL 750.413, and fourth-degree fleeing and eluding, MCL 257.602a(2).

[2] Although the record is not entirely clear on this point, it appears that defendant received sentences of 11 months' to five years' imprisonment for the UDAA conviction and two years' imprisonment for the fleeing and eluding conviction, both to run concurrently with the sentence for carjacking.

Defendant was initially charged in two separate cases: one for the carjacking and felony-firearm charges and another for the charges of fleeing and eluding and unlawful driving away of an automobile (UDAA). The trial court later granted the prosecutor's motion to consolidate, and the cases proceeded to a joint trial. Defendant argues that the trial court erred in granting the motion to consolidate. We disagree.

"[T]he court may join offenses charged in two or more informations or indictments against a single defendant . . . when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B). "Joinder is appropriate if the offenses are related." MCR 6.120(B)(1). The determination whether two offenses are related for the purposes of joinder is a mixed question of fact and law. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). Factual findings essential to the issue of joinder are reviewed under a clear-error standard. See *id*. The interpretation of the court rules is subject to de novo review. *Id*.

In order to be related for the purposes of MCR 6.120(B), offenses must be either part of "the same conduct or transaction," MCR 6.120(B)(1)(a), "a series of connected acts," MCR 6.120(B)(1)(b), or "a series of acts constituting parts of a single scheme or plan," MCR 6.120(B)(1)(c). If the offenses are not related, the court must grant a motion by the defendant to sever the charges. MCR 6.120(C). In this case, the offenses committed in the parking lot of the liquor store in Detroit and those committed during the high-speed chase in Dearborn Heights were related under the plain language of 6.120(B).

In *Williams*, 483 Mich at 228-229, the defendant was charged with two narcotics offenses that were allegedly committed approximately three months apart. The Supreme Court held that the plain, unambiguous language of MCR 6.120(B)[3] had superseded the Court's previous decision in *People v Tobey*, 401 Mich 147; 257 NW2d 537 (1977), by increasing the number of situations where joinder is appropriate. *Williams*, 483 Mich at 238. The *Williams* Court held that the defendant had no right to sever the charges stemming from the two separate events because "[i]n both cases, defendant was engaged in a scheme to break down cocaine and package it for distribution." *Id*. at 234. Here, defendant and his accomplices participated in a common scheme that included stealing the vehicle and then attempting to elude police capture. The events were also "connected" and part of "the same conduct or transaction" because the police chase directly resulted from the fact that defendant was driving a stolen car.

The acts fit clearly into the plain language of each of the three subsections of MCR 6.120(B)(1), the charges were related, and the trial court did not err in granting the prosecutor's motion to consolidate.

Defendant next argues that his due-process rights were violated and that the trial court erred in refusing to grant an adverse-inference instruction because of the loss of a store-surveillance videotape that he claims had exculpatory potential. The applicability of a specific

[3] The version of MCR 6.120 analyzed in *Williams* was slightly different from that in effect now, but the change to the court rule does not affect our analysis today.

jury instruction is a question of law and thus is reviewed de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655, 657 (2004). Constitutional issues are also reviewed de novo. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001).

To establish a due-process violation on the basis of the loss of only potentially exculpatory evidence, bad faith on the part of the police must be shown. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989). The *Youngblood* Court clarified the holding in *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), which held that the bad faith of the police in handling evidence is immaterial if the evidence is "material either to guilt or to punishment." If the evidence is only potentially exculpatory, the bad faith of the police is not only relevant to a due-process inquiry, it is *necessary* to prove a due-process violation. *Youngblood*, 488 US at 57.

The surveillance videotape was only potentially exculpatory,[4] because both people who viewed it believed that it provided no help in the identification process. Taylor eventually admitted that he could not make out a perpetrator's face on the surveillance tape, and Officer Randall Overton called the tape "inconclusive." Therefore, if the evidence tended to be exculpatory at all, it was only potentially so and a bad-faith inquiry is relevant.

Officer Overton did not act in bad faith by failing to call in another officer to preserve the videotape before it was deleted by the store. He merely acted negligently by neglecting to communicate the request. The police never possessed the tape; instead, it remained on the store's computer after Officer Overton left the store initially. On the day of the preliminary examination, the trial court ordered its production. Soon after, Officer Overton returned to the store to attempt to retrieve the tape and found that it was already deleted. The trial court found that the police had played no part in the videotape's destruction.

"Where evidence is suppressed, the proper considerations are whether (1) suppression was deliberate, (2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence." *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). In this case, the suppression was not deliberate, the evidence was not requested until after it was deleted by a private citizen, and it is doubtful that the videotape could have been significantly helpful to the defense.[5] There was no due-process violation and the trial court did not err by refusing to give an adverse-inference instruction. See *id*. at 514-515.

---

[4] Defendant himself states in his appellate brief that the videotape was "potentially exculpatory."

[5] The cases defendant cites—*California v Trombetta*, 467 US 479; 104 S Ct 2528; 81 L Ed 2d 413 (1984), and *Killian v United States*, 368 US 231; 82 S Ct 302; 7 L Ed 2d 256 (1961)—in arguing that gross negligence can suffice to show bad faith do not in fact stand for this proposition. Defendant cites language in *Killian* that officers must act "in good faith and in accord with their normal practice." *Id*. at 242. In *Trombetta*, the Court held that the state's failure to retain breath samples was not enough to evidence a failure to meet this standard because the authorities "did not destroy respondent's breath samples in a calculated effort to circumvent the disclosure requirements established by *Brady v Maryland* and its progeny."

Finally, defendant argues that the trial court erred in scoring Offense Variable (OV) 14 and OV 19 at ten points each. We disagree. This Court reviews the scoring of the sentencing guidelines for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). We must uphold a trial court's scoring decision if there is "'*any* evidence in support' of the decision" in the record. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003) quoting *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996) (emphasis in *Witherspoon*).

OV 14 requires that ten points be added to defendant's score if he was "a leader in a multiple offender situation." MCL 777.44(1)(a). The trial court noted that defendant was the one who carried the gun, spoke out, and demanded that Taylor drop his keys. The other two perpetrators did not take such action, and thus the record does provide evidence that defendant was the leader for the purposes of OV 14. Therefore, the trial court scored OV 14 correctly.

OV 19 requires that ten points be added to defendant's score if he "otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Defendant argues that OV 19 should not apply because the OVs are generally offense-specific and OV 19 cannot encompass later acts such as the fleeing and eluding that occurred here. This argument is unavailing because the events pertaining to defendant's interference with justice were related to the underlying offense (the carjacking). In *People v Sargent*, 481 Mich 346, 349; 750 NW2d 161 (2008), the Michigan Supreme Court stated that "only conduct 'relating to the offense' may be taken into consideration when scoring the offense variables." "'[T]he general rule is that the relevant factors are those relating to the offense being scored . . . .'" *People v McGraw*, 484 Mich 120, 125; 771 NW2d 655, 658 (2009), quoting *Sargent*, 481 Mich at 349. Here, the high-speed chase initiated by defendant hours after the carjacking met this criteria, because defendant was found with the same car that was stolen from Taylor and defendant likely sped up to avoid detection because he was worried about being arrested for carjacking.

Even assuming that the principles from *McGraw* and *Sargent* were *not* supportive of the prosecutor's position here, reversal would nonetheless not be warranted. Indeed, the Michigan Supreme Court recently held: "Because OV 19 specifically provides for the 'consideration of conduct after completion of the sentencing offense,' conduct that occurred after an offense was completed may be considered when scoring the offense variable." *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010), quoting *McGraw*, 484 Mich at 133-134. The trial court's scoring of OV 19 was proper.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro

---

*Trombetta*, 467 US at 488. Similarly, Officer Overton in this case did not forget about the tape in a "calculated effort" to deprive defendant of his rights.

These cases simply do not support defendant's argument that gross negligence may substitute for bad faith. Even assuming, for purposes of argument, that gross negligence could be used to satisfy the bad-faith standard, there is no evidence of gross negligence on the record.