STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DEMETRIUS MONTEZ WILSON, Minor

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner–Appellee,

v

DEMETRIUS MONTEZ WILSON,

Respondent–Appellant.

UNPUBLISHED
August 6, 1996

No. 179868
LC No. 94-314394

Before: Marilyn Kelly, P.J., and MacKenzie and R.J. Ernst*, JJ.

PER CURIAM.

Respondent was found guilty of felonious assault, MCL 750.82; MSA 28.277, and carrying a concealed weapon, MCL 750.227; MSA 28.424, following a bench trial before visiting Referee Allan Schaerges. Referee Betty Harris subsequently issued a dispositional order committing respondent to the custody of the Michigan Department of Social Services (DSS). Respondent appeals as of right. We affirm in part and vacate in part.

Respondent was originally charged with assault with intent to commit murder based on a March 6, 1994 altercation between respondent and Aaron Hatchet, Hatchet's brother, Kevin, and several of the Hatchets' friends. At some point during the confrontation, respondent, age fourteen, produced a pistol and shot Aaron in the chest and stomach. At trial, respondent claimed he shot Aaron in self-defense. At the close of proofs, over respondent's objections, petitioner was permitted to amend the petition to include a charge of carrying a concealed weapon. Respondent was found guilty of that charge, as well as of felonious assault.

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* Circuit judge, sitting on the Court of Appeals by assignment.

In his first issue on appeal, respondent claims that his due process rights were violated when, at the close of the adjudicative hearing, the probate court permitted an amendment to the petition to add the charge of carrying a concealed weapon. We agree.

MCL 712A.11(7); MSA 27.3178(598.11) allows for the amendment of a petition charging a juvenile at any stage of the proceedings, as justice may require. Similarly, a criminal information may be amended "at any time before, during or after the trial . . . with respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." MCL 767.76; MSA 28.1016. Consistent with due process, this statute authorizes amendments to cure errors in an information filed following a preliminary examination, but does not authorize an amendment for the purpose of adding a new charge. *People v Price*, 126 Mich App 647, 651-652; 337 NW2d 614 (1983); *People v Erskin*, 92 Mich App 630, 637-638; 285 NW2d 396 (1979) and cases cited therein.

In the instant case, respondent was charged with assault with intent to commit murder, MCL 750.81; MSA 28.278. The elements of this crime are "(1) an assault, (2) with an actual intent to kill (3) which, if successful, would make the killing murder." *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). The amended petition charged respondent with carrying a concealed weapon. MCL 750.227(2); MSA 28.424(2) prohibits persons from carrying a concealed pistol on or about his or her person except in his or her own dwelling house, place of business, or other property owned by the person, unless licensed to do so. A weapon is considered concealed if it is "not discernible by the ordinary observation of persons coming in contact with the person carrying it, casually observing him, as people do in the ordinary and usual associations of life." *People v Kincade*, 61 Mich App 498, 502; 233 NW2d 54 (1975) (quoting *People v Jones*, 12 Mich App 293, 296; 162 NW2d 847 [1968]). The carrying a concealed weapon charge was distinct in character from the assault charge. Respondent was therefore not put on notice that he would have to defend the concealed weapon charge, and the trial court erred in permitting the amendment of the petition. *Price, supra*, pp 650-655. Accordingly, we vacate the court's determination that respondent was guilty of carrying a concealed weapon. Because the record establishes that the adjudication on the CCW offense was not a factor in the court's dispositional order, however, respondent is not entitled to further relief.

Respondent next argues that the evidence established that he shot Aaron in self-defense, and therefore cannot support a finding of felonious assault. A person is justified in using deadly force if that person honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). However, unless a threatened person is in his own dwelling, he has a duty to retreat from an altercation if possible, rather than to use deadly force. *People v Kulick*, 209 Mich App 258, 264-265; 530 NW2d 163, remanded for reconsideration 449 Mich 851 (1995).

Here, there was testimony that Aaron, Keith, and their friends cornered respondent between a car and a house. A reasonable trier of fact could conclude that respondent felt threatened when he was confronted by the group, and reasonably feared that he was in danger of great bodily harm. However, Keith testified that respondent was able to escape by running around the car. Although respondent

testified that his flight was impeded by a garbage can, Referee Schaerges apparently gave credence to Keith's testimony. This Court will not set aside a trial court's findings of fact unless clearly erroneous, giving due deference to the trial court's opportunity to make judgments of witnesses' credibility. MCR 2.613(C). Petitioner established that respondent failed to comply with the duty to retreat, and that his use of deadly force was not justified. The adjudication was therefore supported by sufficient evidence.

Finally, respondent argues that Referee Harris was unable to recommend an appropriate punishment for respondent because she had not heard the adjudicative phase of the proceedings. However, respondent was given the option of having Referee Schaerges conduct the dispositional phase of this case, and declined to exercise this option. We therefore conclude that respondent waived this issue for appellate review. Moreover, we find no abuse of discretion in the decision to commit respondent to the custody of DSS. The probation officer testified that respondent was in need of more intensive counseling than he was likely to receive in ordinary probation. Given respondent's violent behavior on the day of the incident, we find that the probation officer's recommendation was sensible under the circumstances and was in respondent's best interests.

Affirmed in part and vacated in part.

/s/ Marilyn Kelly
/s/ Barbara B. MacKenzie
/s/ Richard J. Ernst