

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD TOWNSEND,

Defendant-Appellant.

UNPUBLISHED

January 14, 2010

No. 288389

Wayne Circuit Court

LC No. 07-011060-FC

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant Richard Townsend of armed robbery,¹ first-degree home invasion,² unlawful imprisonment,³ felon in possession of a firearm,⁴ two counts of felonious assault,⁵ and possession of a firearm during the commission of a felony, second offense.⁶ The trial court sentenced Townsend to concurrent prison terms of 140 to 280 months for the robbery conviction, 5 to 20 years for the home invasion conviction, 10 to 15 years for the unlawful imprisonment conviction, two to three years for the felon in possession conviction, and two to four years for each felonious assault conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction. Townsend appeals as of right. He asserts that the trial court improperly denied his request to represent himself and that he was denied his right to confrontation or to a fair trial because the trial court reviewed a witness's preliminary examination testimony. We affirm. We decide this appeal without oral argument.⁷

¹ MCL 750.529.

² MCL 750.110a(2).

³ MCL 750.349b.

⁴ MCL 750.224f.

⁵ MCL 750.82.

⁶ MCL 750.227b(1).

⁷ MCR 7.214(E).

I. Basic Facts And Procedural History

Townsend's convictions arise from an incident that occurred in June 2007. In January of that year, Latonya Hicks had ended her ten-year romantic relationship with Townsend. Despite the fact that Townsend then threatened to kill Hicks and Earl Smith, a former boyfriend with whom she resumed a relationship, by June 2007, Hicks and Townsend had again resumed sexual relations. According to Hicks, Townsend told her that "[h]e was not going to try to hurt me. He was not going to try to hurt Mr. Smith. So we start back talking again."

Hicks testified that on June 17, 2007, she was out with Smith. They returned to his house around 11:00 p.m., and Hicks planned to spend the night. Smith left in Hicks's car around midnight to visit a friend. Around 2:00 a.m., Hicks was up watching television in an attic bedroom. Hicks testified that she suddenly noticed "a person at the top of the steps in all black with a mask on with a gun pointed at me." Hicks explained that the man "came over to me and pulled me up and gestured for me to go down the steps." Hicks walked downstairs, where the man gestured for her to go down to the basement. Hicks started down the basement steps. Believing that the gunman could be Townsend acting on his prior threat, Hicks stopped and said, "Richard, you don't have to do this." Hicks then grabbed for the gun and they struggled, but the man was able to maintain possession. The man then pulled off his mask, revealing that he was Townsend, and told Hicks, "Get in the basement."

Once Hicks and Townsend were in the basement, Townsend hit Hicks in the head with the gun, knocking her to the floor. Following Townsend's orders, Hicks then got up and went back upstairs. Townsend and Hicks then went outside, where Townsend again hit Hicks in the head with the gun, which discharged. Hicks was not shot but was knocked to the ground. Townsend then ordered Hicks to get on the floor in the back of his car and told her to put her head down. Once she did so, Townsend got in the car and started to drive.

According to Hicks, Townsend drove her to his neighbor's house. He took her down into the basement and told her, "This is where you're going to die at." He then began to beat her up, kicking and punching her. However, after the neighbor told Townsend that he needed to leave, Townsend took Hicks to his own garage, where he resumed beating her up.

After a time, Townsend led Hicks from the garage to the basement of his own house. He ordered Hicks to the floor and then bound her hands and feet, tied her hands to her ankles, and tied a rag around her mouth. After asking Hicks where Smith was, Townsend told her, "I'm going to go find him, kill him, and then I'm going to come back and I'm going to kill you." Townsend then left. Hicks was eventually able to free herself and leave the house. Townsend was later arrested.

II. Self-Representation

A. Standard Of Review

Townsend argues that the trial court improperly denied his request to represent himself at trial. This Court reviews for clear error the trial court's factual findings surrounding a

defendant's waiver of Sixth Amendment rights.⁸ However, to the extent that the trial court's waiver ruling "involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo."⁹ We review for an abuse of discretion the trial court's ultimate decision whether to allow a defendant to proceed without counsel.¹⁰

B. Underlying Facts

Attorney Mack Carpenter initially represented Townsend, but Carpenter apparently sought leave to withdraw on or about September 7, 2007, and the trial court appointed attorney Capers Harper in his stead. That same day, Townsend wrote to the trial court to object to Carpenter's removal. Townsend asserted that regardless of anything Carpenter may have said to the contrary, the attorney-client relationship had not broken down. Townsend asked that Carpenter be allowed to remain on the case.

At the September 12, 2007 pretrial hearing, Harper indicated that he had met with Carpenter and obtained various records from him. Carpenter was willing to "continue to assist me in preparing for the case and even, if necessary, to sit in a second chair if Townsend agreed to that." Regarding his letter, Townsend explained that he trusted Carpenter and "didn't know the reason why he asked to be off my case." The following exchange then occurred:

The Court: And I didn't ask for a reason. . . . I got two choices. I can say no, stay on the case, or I can say, okay, that's fine, I'll give it to somebody else who I believe will represent the man just as zealously. And, so, that's his wish, that's his desire, I'm a [sic] grant him his wish I'm not gonna make him represent you.

Defendant: So can I represent myself? I wanna represent myself because—

The Court: Ask him if that's a good idea.

Defendant: It might not—

The Court: No, no, no, just ask him.

Defendant: It might not be a good idea, but—

The Court: Ask him his opinion.

* * *

Defendant: What's your opinion?

Mr. Harper: No, you should not represent yourself.

⁸ *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004).

⁹ *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004).

¹⁰ *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

The Court: Ask him how long have you been a lawyer.

Defendant: How long have you been a lawyer?

Mr. Harper: Thirty-two years.

Defendant: Okay. Then, well—

The Court: Okay. Ask me if it's a good idea to represent yourself.

Defendant: Is it a good idea to represent myself?

The Court: No. Ask me how long I've been a lawyer.

Defendant: How long have you been a lawyer?

The Court: Twenty-seven years. So that's 27 plus 32—man, that's 59 years right there. Fifty-nine years of experience saying oh, heck no, not even if all the jurors were drunk.

Defendant: Bad idea.

The Court: It's never a good idea. I can say that it's never a good idea. . . . The law is difficult, Mr. Townsend, I wouldn't want to put you in that kind of position. So this is what we do, we work with him. Mr. Carpenter said he'll hang around and give you some advice, so I'm gonna give you the best of both worlds.

Defendant: Can Mr. Carpenter have the second seat like he requested?

The Court: If he would like to.

Defendant: Because I feel comfortable with him representing me and that way—you know—

The Court: I understand.

Defendant: I put my trust in him. It's hard for me to put my trust in someone else, even my wife—

The Court: No, no. It's always easy to find a second wife.

C. Legal Standards

A criminal defendant has a right to represent himself,¹¹ although there is a presumption against the waiver of counsel.¹² A defendant seeking to proceed in propria persona must make

¹¹ US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1; *People v Kevorkian*, 248 Mich App 373, 417; 639 NW2d 291 (2001).

an unequivocal request for self-representation.¹³ The purpose of this requirement is to “abort frivolous appeals by defendants who wish to upset adverse verdicts after trials at which they had been represented by counsel.”¹⁴ Once a defendant makes an unequivocal request to represent himself, the trial court must determine that the defendant’s assertion of his right to self-representation is knowing, intelligent, and voluntary by informing the defendant of the potential risks.¹⁵ The trial court is to make every reasonable presumption against the waiver of the right to counsel.¹⁶

D. Applying The Standards

Here, as noted above, after the trial court explained that it was not going to force Carpenter to remain on the case, Townsend asked to represent himself. The trial court then attempted to determine whether the waiver was knowing and intelligent by advising Townsend of the risks of self-representation. Townsend then agreed that self-representation was a “[b]ad idea” and asked instead if Carpenter could continue to represent him in a “second seat” capacity, which Carpenter apparently was willing to do. The trial court agreed with this arrangement. The record thus shows that Townsend ultimately chose not to represent himself, and the trial court did not abuse its discretion in denying his request to represent himself at trial.

III. Confrontation

A. Standard Of Review

Townsend argues that he was denied his right to confrontation or to a fair trial because the trial court reviewed a witness’s preliminary examination testimony. Townsend did not preserve this issue for appeal by objecting or raising it below; thus, we review it for plain error affecting substantial rights.¹⁷

B. Underlying Facts

Buford Patrick was one of the witnesses at trial. Patrick lived with his son, Earl Smith, and Smith’s two children. Patrick testified that he went to work at 1:00 p.m. on June 17 and returned home around 1:45 a.m. on June 18. According to his testimony at trial, when Patrick entered the house, he noticed a hole in the wall by the bathroom beneath the thermostat. However, during Townsend’s preliminary examination, Patrick had testified that the hole had gone right through the bathroom wall and “appeared to be a shotgun blast.”

(...continued)

¹² *People v Belanger*, 227 Mich App 637, 641; 576 NW2d 703 (1998).

¹³ *Russell*, 471 Mich at 190; *Williams*, 470 Mich at 642.

¹⁴ *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976).

¹⁵ *Williams*, 470 Mich at 642; see also MCR 6.005(D)(1).

¹⁶ *Russell*, 471 Mich at 188, 193.

¹⁷ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

During his closing, defense counsel argued that there was a lack of evidence to support the charges. During that argument, the following exchange occurred:

Mr. Harper: The home of Mr. Smith and Mr. Patrick, there was damage to that home, but the victim, Ms. Hicks, never testified that there was any damage that occurred in that house. No gunshot hole that Mr. Patrick testified to—

The Court: I think that's a little confusing. He testified to a gunshot hole, which was objected to at the Preliminary Examination, but during this trial, he said it was just a hole underneath the thermostat. He didn't say it was a gunshot hole.

Mr. Harper: All right. But he didn't indicate that hole existed other than he came home and saw there was something different about the house. He didn't indicate that he had smelled any cordite, . . . anything like that that would have surely been present if a gun had been discharged in the house.

From the foregoing, it is clear that the trial court was aware of Patrick's preliminary examination testimony.

C. Patrick's Testimony

During closing argument, as noted above, defense counsel attempted to discredit Hicks, by pointing out that her testimony was not consistent with Patrick's regarding a gunshot hole in a wall. The trial court then pointed out that Patrick had described the hole as looking like "a shotgun blast" during his preliminary examination testimony but not during his trial testimony. In *People v Ramsey*,¹⁸ the Court held that it is error requiring reversal for the trial court to review the preliminary examination transcript during a bench trial when the transcript had not been admitted into evidence. However, in *People v Dixon*,¹⁹ the Court held that the rule in *Ramsey* does not preclude a judge who has read the preliminary examination transcript for purpose of ruling on a defendant's motion to quash from later sitting as the trier of fact when the defendant subsequently waives a jury trial.

The record here shows that the trial court had ruled on Townsend's motion to quash a little more than a month before trial. As a result, the trial court reviewed the entire record of the preliminary examination to determine whether the district court abused its discretion in binding Townsend over for trial.²⁰ There is nothing in the record to indicate that the trial court requested or reviewed the preliminary examination transcript during trial, as occurred in *Ramsey*, or that the trial court otherwise reviewed the transcript in preparation for conducting the trial. Rather, it appears that the trial court recalled Patrick's testimony from reviewing the transcript in connection with Townsend's motion to quash and reminded counsel that such evidence had not been introduced at trial and could not be considered. Under the circumstances, Townsend has

¹⁸ *People v Ramsey*, 385 Mich 221, 225; 187 NW2d 887 (1971).

¹⁹ *People v Dixon*, 403 Mich 106, 107, 109; 267 NW2d 423 (1978).

²⁰ *People v Green*, 260 Mich App 710, 713-714; 680 NW2d 477 (2004).

not overcome the presumption that the trial court followed the law and predicated its verdict only on admissible evidence.²¹ Accordingly, Townsend has failed to establish a plain error.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

²¹ *People v Payne*, 37 Mich App 442, 445; 194 NW2d 906 (1971); *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971).