STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DeWayne Carlos Smith,

Defendant-Appellant.

UNPUBLISHED
July 12, 1996

No. 181641
LC No. 94-1193-FH

Before: Hood, P.J. and Markman and A. T. Davis*, JJ.

PER CURIAM.

Defendant, an inmate at Alger Maximum Security Correctional Facility, was convicted by a jury of assaulting a corrections officer, MCL 750.167c; MSA 28.394(3), pleaded guilty to an habitual offender-third offense, MCL 769.11; MSA 28.1083, and was sentenced to a term of two to eight years' imprisonment. Defendant appeals as of right and we affirm.

On April 18l, 1994, a number of inmates of Alger, defendant among them, became unruly after dinner. The facility's surveillance system captured some of the incidents on videotape. Several corrections officers were assaulted by inmates, but the disturbance was quickly contained. As one of the assaulting inmates was being taken to segregation, defendant ran toward him, passed Sergeant Grant Hill and was tackled by corrections officer Dennis Helt. Defendant was charged with assaulting both Hill and Helt but was convicted only of assaulting Helt.

Defendant first argues that the trial court erred in denying his motion for mistrial where the prosecutor failed to discover and identify four res gestae witnesses. Twenty corrections officers testified at defendant's trial. The names of four of those officers, who had been present during the altercations and who were on the videotape, had not been listed on the prosecution's witness list. Although the prosecutor advised defense counsel that all the people on the tape would be called as res gestae witnesses, defense counsel was not informed until trial that those officers would testify. However,

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

defense counsel had reviewed the videotape and the witness list filed with the information, and therefore should have been alerted that some witnesses visible on the tape were not on the list.

The trial judge allowed the late endorsement and denied the motion for mistrial, finding no lack of diligence on the prosecution's part, given these officers' failure to file incident reports pertaining to defendant. He also found that preparation for cross-examination would not have been greatly affected given the similarity of their testimony to that of other corrections officers. We find no abuse of discretion in the denial of the motion for mistrial or in the late endorsement of witnesses because under the amended res gestae witness statute, MCL 767.40a; MSA 28.980(1), the prosecutor no longer has a duty to "discover, endorse, or produce" unknown witnesses. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). The prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses, provide notice of witnesses that may be called at trial, and provide reasonable assistance to locate witnesses on defendant's request. *Id*. The trial court cannot be said to have abused its discretion in making a ruling based on a finding that the prosecutor had fulfilled a duty it was no longer required to fulfill.

Next, defendant asserts that his two- to eight-year sentence was disproportionate. Defendant's sentence should be proportionate to the offense and to the offender. *People* v *Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). Here, the permissible maximum sentence was ninety-six months, which means defendant could have been sentenced to a minimum of sixty-four months under *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972) and *People* v *Wright*, 432 Mich 84, 85-86; 437 NW2d 603 (1989) (extending the *Tanner* two-third rule). Although the offense in this case appears to have been minor, defendant's minimum sentence of twenty-four months appears to be proportionate as defendant has an extensive record of misconduct while incarcerated, having received approximately sixty-five major misconduct tickets, and having escaped from custody for twelve days in 1991. Furthermore, defendant's instant conduct is made worse by the fact that it occurred in the tinderbox situation of a prison disturbance.

Finally, defendant asserts that his conviction was obtained through the use of perjured testimony. A comparison of the trial testimony with that given at the preliminary examination reveals no discrepancies that support defendant's allegation. The trial testimony reveals the sort of discrepancies that one would expect to find in twenty-three witnesses' accounts of startling events that occurred in rapid succession.

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Alton T. Davis