

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

VICTOR GUERRA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Nos. 4D15-1235 and 4D15-1328

[February 8, 2017]

Consolidated appeals from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Barbara McCarthy, Judge; L.T. Case Nos. 13-7733CF10A and 14-6637CF10A.

Carey Haughwout, Public Defender, and Mara C. Herbert, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Anesha Worthy, Assistant Attorney General, West Palm Beach, for appellee.

GROSS, J.

We reverse appellant's sentence of 45 years for solicitation to commit murder, armed home invasion robbery, and refusal to submit a DNA sample, because the trial judge erred in forcing appellant to be sworn during his allocution at the sentencing hearing and subjecting him to cross-examination. We remand for resentencing before a different judge.

Appellant entered an open plea to the court. During the plea colloquy, the trial judge asked no questions concerning appellant's codefendants. Appellant did not dispute the prosecutor's description of the crime, which involved codefendants. The trial court accepted the plea, ordered a presentence investigation, and set a sentencing hearing for a later date.

Three months later, at the sentencing hearing, the court required that appellant be sworn in before his allocution. When appellant finished, the state was permitted to cross-examine him. Over objection, both the state and the trial judge repeatedly asked appellant whether a codefendant was present with him at the home invasion, but appellant refused to answer.

On multiple occasions the judge voiced her exasperation, asking how appellant could seek the court's mercy while refusing to confirm a codefendant's involvement in the criminal conduct. Ultimately, the court sentenced appellant to 30 years for the robbery and 15 years for solicitation to commit murder, to run consecutively, followed by 10 years of probation.

Florida Rule of Criminal Procedure 3.720(b) requires the court to entertain submissions and evidence from the parties that are relevant to sentencing. In *Jean-Baptiste v. State*, we construed this rule to mean that "a criminal defendant prior to sentencing has the opportunity to make an unsworn statement to the sentencing judge in allocution," not subject to cross-examination. 155 So. 3d 1237, 1242 (Fla. 4th DCA 2015); *see also Chillingworth v. State*, 846 So. 2d 674, 676 (Fla. 4th DCA 2003). The trial court erred by forcing appellant to allocute under oath and be subject to cross-examination. Appellant's responses to questions on cross-examination obviously influenced the trial judge in sentencing.

Reversed and remanded.

WARNER and MAY, JJ., concur.

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Not final until disposition of timely filed motion for rehearing.