

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARSHA LEE DENMAN,

Defendant-Appellant.

UNPUBLISHED

April 4, 1997

No. 190811

Jackson Circuit Court

LC No. 95-071323-FH

Before: D.F. Walsh,* P.J., and R.P. Griffin** and W.P. Cynar,* JJ.

MEMORANDUM.

Defendant pleaded nolo contendere to larceny by false pretenses over \$100, MCL 750.218; MSA 28.415, and was sentenced to four to ten years' imprisonment. She appeals as of right. We remand. This case has been decided without oral argument pursuant to MCR 7.214(A).

The trial court erred in refusing to consider defendant's motion to withdraw her plea as one brought before sentencing under MCR 6.310(B). Under the facts of this case, sentencing did not occur at the time the court presented the alternative judgments of sentence, but rather when it finally entered the judgment of sentence imposing the four- to ten-year sentence. MCR 2.602(A); *People v Leonard*, 144 Mich App 492, 495; 375 NW2d 745 (1985). We therefore remand the matter to give the trial court an opportunity to consider defendant's motion to withdraw her plea as one brought before sentencing. To preserve the appearance of justice, we direct the proceedings on remand to be conducted by a different judge. *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986).

*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

**Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

Defendant did not request an evidentiary hearing before sentencing to determine her ability to pay the restitution ordered so this issue is not preserved for appellate review. *People v Griffis*, 218 Mich App 95; 553 NW2d 642 (1996).

Finally, the trial court also erred by refusing to allow defendant her right to allocution at sentencing. MCR 6.425(D)(2)(c). In the event that defendant's motion to withdraw her plea is denied on remand, she shall be entitled to resentencing. *People v Coles*, 417 Mich 523, 532; 339 NW2d 440 (1983), overruled in part on other grounds in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Daniel F. Walsh

/s/ Robert P. Griffin

/s/ Walter P. Cynar