

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN CHANDLER EWING,

Defendant-Appellant.

UNPUBLISHED

June 3, 1997

No. 188587

Jackson Circuit Court

LC No. 84-35416 FC

Before: Saad, P.J., and Hood and McDonald, JJ.

MEMORANDUM.

On a third remand for evidentiary hearing concerning disputed factual issues surrounding defendant's original 1985 sentencing to life imprisonment following a jury conviction for first degree criminal sexual conduct, a successor circuit judge determined that the sentencing judge had not relied on materially inaccurate information in imposing sentence, and therefore that resentencing, pursuant to the order of remand in *People v Ewing*, 435 Mich 443; 458 NW2d 880 (1990), is not warranted. Defendant appeals by right. This case is being decided without oral argument pursuant to MCR 7.214(E).

This Court agrees with the successor trial judge that no material factual inaccuracy which would render defendant's sentence invalid or warrant resentencing has been established on this record. Defendant's contentions about the "*Moran* case" are without merit, in light of the trial judge's 1991 written opinion, noting that the facts of the incident were undisputed, and gave rise to an inference that the situation was not an innocent encounter, but rather an unsuccessful example of defendant's modus operandi. Such a view of the undisputed evidence does not reflect any sentencing consideration which is based on an "extensively and materially false" foundation, prerequisite to a finding that a sentence is invalid or that inaccurate information requires a resentencing. *People v Mitchell*, 454 Mich 145; ___ NW2d ___ (1997). Furthermore, because the sentencing judge, thus apprised of supposed inaccuracies in his view of the matter, stated it would still make no difference to the outcome, resentencing on this basis is plainly unwarranted. *People v Watroba*, 89 Mich App 718, 724-725; 282 NW2d 196 (1979).

With respect to other incidents, one is based on a subsequent conviction, and thus defendant's guilt is established in that respect beyond peradventure. As to the disputed matters, the successor trial judge's findings are not clearly erroneous. *People v Swirles (After Remand)*, 218 Mich App 133; 553 NW2d 357 (1996). Additionally, consideration of other incidents, including those which resulted in acquittal, was not improper, since information is satisfactory for sentencing purposes if established by a preponderance of the evidence, whereas for conviction proof beyond a reasonable doubt is a prerequisite. *People v Granderson*, 212 Mich App 673, 679; 538 NW2d 471 (1995); *People v Newcomb*, 190 Mich App 424; 478 NW2d 749 (1991).

Accordingly, this Court agrees with the trial court that no materially inaccurate information was considered in originally imposing a sentence on defendant, and such sentence is not invalid and resentencing is unwarranted. *People v Mitchell, supra*.

Affirmed.

/s/ Henry William Saad

/s/ Harold Hood

/s/ Gary R. McDonald