

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 189107

Recorder's Court

HERBERT DUNNINGS,

LC No. 93-007934

Defendant-Appellant.

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Before: Taylor, P.J., and Griffin and Saad, JJ.

TAYLOR, P.J., (concurring in part and dissenting in part).

I concur with the majority opinion except I would grant defendant's request for a remand.

After being convicted, defendant filed a motion for a new trial and requested an evidentiary hearing asserting he had been denied effective assistance of counsel. The trial court denied the request for an evidentiary hearing and the motion for a new trial. Now this Court is also denying defendant's request for a remand for an evidentiary hearing. This Court's denial of defendant's motion to remand places defendant in a catch 22 situation. As stated in *People v Lawson*, 124 Mich App 371, 373; 335 NW2d 43 (1983):

A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately.

This Court's refusal to grant a remand places defendant in a situation where he is unable to make a record in support of his claim. Without a remand defendant has been unfairly precluded from establishing his claim.

The majority denies defendant's request for a remand, in part, on the basis of the law of the case. As recognized by the majority, the fact that a prior panel denied a motion to remand does not prevent this Court from granting a remand at this time. In criminal cases, the law of the

case doctrine is not inflexible. *People v Cleveland Wells*, 103 Mich App 455, 463; 303 NW2d 226 (1981). Further, this Court has previously granted a remand even after a prior panel denied a motion to remand. *People v Stapf*, 155 Mich App 491, 499, n 1; 400 NW2d 656 (1986).

The majority refuses to grant a remand claiming the voluntariness of defendant's confession was sufficiently examined at a *Walker* hearing. I disagree. Defendant filed an affidavit in support of his motion for a new trial containing assertions which, if believed by the trial court, established that defendant's statement should have been suppressed. Rather than accepting this and granting relief, the majority states that counsel could have called the mental health professionals that defendant wants to call at a remand hearing. This is true, but irrelevant, because defendant is arguing that his trial attorney was ineffective when he failed to call these very witnesses at the *Walker* hearing. Thus, this is not a ground for denying a remand.

I would remand for an evidentiary hearing to allow the trial court to assess the credibility of defendant's claims and would otherwise affirm.

/s/ Clifford W. Taylor