STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN VINCENT HYLAND, JR.,

Defendant-Appellant.

UNPUBLISHED
April 24, 1998

No. 190476
Otsego Circuit Court
LC Nos. 92-001691 FC
92-001692 FC

Before: O'Connell, P.J., and White and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his sentence, which was imposed after a remand for resentencing by this Court following his appeal of the scoring of Offense Variable (OV) 12. Defendant was convicted in separate jury trials of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), against his two daughters who were under thirteen years of age. On remand, defendant was sentenced to concurrent terms of eighteen to twenty-seven and one-half years' imprisonment, the same sentence originally imposed by the trial court before remand. We remand for resentencing.

Defendant first argues that he was denied his right to counsel at his resentencing when the trial court failed to obtain an effective waiver of counsel. The right to defend oneself is implicitly guaranteed by the Sixth Amendment to the United States Constitution. *People v Dennany*, 445 Mich 412, 426; 519 NW2d 128 (1994). However, the right to proceed pro se is not absolute. *Id*. at 427. Pursuant to *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), upon a defendant's initial request to proceed in propria persona, the trial court must determine "(1) that the request is unequivocal; (2) that the right has been asserted knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the disadvantages of self-representation; and (3) that self-representation will not disrupt, unduly inconvenience, or burden the court." *Dennany, supra* at 439. Furthermore, MCR 6.005(D) also provides, in pertinent part:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Trial courts must substantially comply with the requirements of *Anderson* and MCR 6.005(D) for a defendant's initial waiver of counsel to be valid. *People v Adkins (After Remand)*, 452 Mich 702, 726; 551 NW2d 108 (1996). "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Id.* at 726-727.

At defendant's resentencing in this case, the trial court advised defendant that he was entitled to representation by an attorney and confirmed that defendant wished to represent himself. The court subsequently clarified that defendant was entitled to have an attorney appointed if he could not afford to retain one and again confirmed that defendant wanted to represent himself. This constituted the entire colloquy regarding defendant's waiver of counsel. Thus, the trial court did not substantially comply with the requirements of *Anderson* and MCR 6.005(D). The error mandates a remand for resentencing with an attorney or proper waiver of counsel.

Defendant also contends that this case should be remanded to a different judge for resentencing. In determining whether resentencing should occur before a different judge, this Court has developed the following test:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986), quoting *United States v Sears, Roebuck & Co, Inc*, 785 F2d 777, 780 (CA 9, 1986).]

In applying the above considerations to this case, we conclude that resentencing before a different judge is not required. There is no indication that the trial judge would not be able to resentence defendant fairly and accurately.

Defendant argues that it was an abuse of discretion for the trial judge to refuse to disqualify himself from this case because he was biased against defendant. This argument is without merit. A trial judge will not be disqualified absent a showing of actual bias or prejudice. *Band v Livonia Associates*, 176 Mich App 95, 118; 439 NW2d 285 (1989). Repeated rulings against a party, even if erroneous, are not grounds for disqualification, *id*., and neither is the filing of a grievance, *Czuprynski v Bay*

Circuit Judge, 166 Mich App 118, 126; 420 NW2d 141 (1988). There is no evidence in the record from which to even suspect bias. There was no abuse of discretion, and this case should be remanded back to the trial judge to resentence defendant in accordance with this Court's instructions.

Defendant also raises several other arguments on appeal. We need not address the proportionality of defendant's sentence because we are vacating defendant's sentence and remanding for a resentencing hearing. However, because the use of the psychological report may arise upon remand, we will address this issue.

Defendant asserts that the psychological report relied upon by the trial court in sentencing him was privileged. Michigan has codified the law of psychologist-patient privilege in MCL 330.1750; MSA 14.800(750). It provides, in pertinent part:

> (1) Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section.
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> * * *
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> (3) Privileged communications shall be disclosed upon request:
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> * * *
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> (b) When the privileged communication is relevant to a matter under consideration in a proceeding governed by this act, but only if the patient was informed that any communication could be used in the proceeding.
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> * * *
>
> (e) When the privileged communication was made during an examination ordered by a court, prior to which the patient was informed that a communication made would not be privileged, but only with respect to the particular purpose for which the examination was ordered.

MRE 1101 further states that "[t]he rules [of evidence] other than those with respect to privileges do not apply in the following situations and proceedings: . . . sentencing."

Defendant objected to the use of the psychological report, made for a prior divorce or custody hearing, based on its privileged nature, but the court did not respond to the objection and used the report to explain in part its departure from the sentencing guidelines. It is unclear from the record whether this evaluation took place under court order, making the information admissible only for that purpose, or whether defendant waived the privilege in the prior proceeding. Therefore, on remand, the trial court should address this issue, making any findings as necessary to resolve defendant's objection

before resentencing defendant in reliance upon the findings of the psychological report. We also direct the trial court to address any objections defendant may have regarding the scoring of his guidelines.

We vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Richard A. Bandstra