STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN JOHNSON, JR.,

Defendant-Appellant.

UNPUBLISHED
July 24, 1998

No. 190315
Recorder's Court
LC No. 93-007429 FH

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant was convicted following a jury trial in the Recorder's Court of Detroit of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Judge Cynthia Gray-Hathaway presided over the trial. At the sentencing hearing, defense counsel stated that the presentence report was accurate, pointed out that this was defendant's first conviction of an assaultive crime, and requested that the court impose a lenient sentence. He indicated an intent to appeal, but made no motion for new trial. Judge Gray-Hathaway then noted that she had considered several letters from community people who had known defendant for twenty years or more, a letter from an attorney she knew very well, and a recommendation from the Recorder's Court Psychiatric Clinic for leniency. She then indicated that there was no reason to deviate from the guidelines and pronounced a sentence of three to ten years' imprisonment as a fourth habitual offender. At the same time, however, she set aside the sentence and, sua sponte, granted defendant a new trial, stating:

> ". . . so Mr. Johnson, I am going to sentence you to a minimum of three years, maximum of ten years on the underlying offense. I'm going to vacate that on (sic) the habitual fourth, I'm going to sentence you to a period of three years, maximum of ten, and them I'm going to set that aside and I'm going to grant you a new trial."
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> Upon the prosecutor's request for an explanation of the ruling, the court added:
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> "Above, all of the reason's above. And I don't think the ends of justice were met in this matter. I think that there was serious credibility problems on the part of the prosecution witnesses, and this case just does not add up to Mr. Johnson having committed this

> offense. And maybe he did, but I just don't think that the ends of justice were met in this case, and I'm going to grant him a new trial."
>
> No judgment of sentence was entered.

Following the filing of a motion for reconsideration by the prosecutor, Judge Gray-Hathaway, sua sponte, and with no explanation, recused herself from the case. The matter was then reassigned to Judge Wendy M. Baxter. Judge Baxter granted the prosecutor's motion for reconsideration, reversed Judge Gray-Hathaway's order and reinstated the jury's verdict. She then sentenced defendant to four to ten years' imprisonment for the conviction. That sentence was vacated, and defendant was then sentenced to five to twelve years' imprisonment as a fourth habitual offender. Defendant appeals as of right, and we affirm.

First, defendant argues, for several reasons, that Judge Baxter erred in granting the prosecution's motion for rehearing and that reversing the grant of a new trial was an abuse of discretion. We disagree. We note, initially, that Judge Baxter, as a successor to Judge Gray-Hathaway, had the authority to enter whatever orders Judge Gray-Hathaway could have entered had she continued to preside in the case. *People v Herbert,* 444 Mich 466, 471-472; 511 NW2d 654 (1994), overruled in part on other grounds *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); MCR 2.613(B) and MCR 6.440(C). In particular, a successor has authority to reconsider the rulings of her predecessor. *Herbert, supra* at 472; *Harry v Fairlane Club Properties, Ltd,* 126 Mich App 122, 124; 337 NW2d 2 (1983).

Motions for reconsideration are governed by MCR 2.119(F), which provides, in pertinent part:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result form correction of the error. [MCR 2.119(F)(3).]

Although MCR 2.119 is a rule of civil procedure, it applies to criminal cases and permits a court to correct mistakes which would otherwise be subject to correction on appeal. *People v Turner,* 181 Mich App 680, 682-683; 449 NW2d 680 (1989); MCR 6.001(D).

Judge Baxter properly reversed Judge Gray-Hathaway because granting a new trial was improper for several reasons. First, MCR 6.431(B) which was in effect at the time Judge Hathaway acted, provides that the court, *on the defendant's motion,* "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." Because defendant did not move for a new trial, the court was precluded from doing so on its own motion. *People v Torres (On Remand),* 222 Mich App 411, 415; 564 NW2d 149 (1997); *People v McEwan* 214 Mich App 690, 694: 543 NW2d 367 (1995). Second, the record established that Judge Gray-Hathaway's determination that the verdict was against the great

weight of the evidence was based on extraneous and inaccurate information that was never presented to the jury. Finally, Judge Baxter independently concluded that the verdict was not against the great weight of the evidence. We conclude that this was a proper exercise of her discretion pursuant to the provisions of MCR 2.119(F)(3). *Michigan Bank-Midwest v D J Reynaert, Inc*, *165* Mich App *630*, 645-646; 419 NW2d 439 (1988).

Next, defendant argues that because Judge Gray-Hathaway improperly recused herself, all subsequent orders entered by Judge Baxter were invalid. We disagree. MCR 2.003(A) permits a judge to raise the issue of disqualification on his or her own motion. *People v Weathington*, 183 Mich App 360, 362; 454 NW2d 215 (1990). Disqualification is appropriate when a judge cannot impartially hear a case, including when a judge is personally biased or prejudiced for or against a party or attorney. *People v Coones*, 216 Mich App 721, 726; 550 NW2d 600 (1996). Although Judge Gray-Hathaway did not explain the reasons for her self-recusal, there are certain situations where disqualification without a showing of actual bias is warranted because experience teaches that the probability of actual bias on the part of the judge is too high to be constitutionally tolerated. *Meagher v Wayne State University*, 222 Mich App 700, 726; 565 NW2d 401 (1997). Further, disqualification and reassignment, may be appropriate "'to preserve the interests of justice and fairness' where 'it would be unreasonable to expect the trial judge to be able to put out of his mind his previously expressed views and findings without substantial difficulty.'" *Weathington, supra*, at 362.

Judge Gray-Hathaway did not abuse her discretion by recusing herself. Judge Gray-Hathaway had considered extraneous information in making her decision to sua sponte order a new trial at the time of sentencing. She specifically made a finding that the circumstances did not "add up" to defendant having committed the offense. It would have been very difficult for Judge Gray-Hathaway to put out of her mind her previously expressed views. Considering the available record, it does not seem that sua sponte recusal was unwarranted or improper. Therefore, defendant's position that Judge Baxter's subsequent orders were invalid, ab initio, is without merit.

Defendant's next claim of error arises out of Judge Baxter's denial of defendant's request that Judge Gray-Hathaway be asked to explain in more detail the reasons for granting a new trial. We find no error in this ruling. Judge Baxter reversed Judge Gray-Hathaway's grant of a new trial, in part, because she determined that Judge Gray-Hathaway considered improper information when assessing whether the verdict was against the great weight of the evidence. Defendant disputed this finding and requested that Judge Gray-Hathaway be asked to explain her ruling because, according to defendant, the basis for Judge Gray-Hathaway's decision was not adequately explained at the time. We conclude that Judge Baxter properly denied defendant's request because, contrary to defendant's assertions, Judge Gray-Hathaway did fully explain on the record her reasons for granting a new trial which, as we have indicated, were inadequate. Therefore, remand to Judge Gray-Hathaway, who *incidentally* had recused herself, would have been unnecessary as well as improper.

Lastly, defendant contends that Judge Baxter, after reinstating the jury's verdict, was required to reinstate the sentence imposed by Judge Gray-Hathaway as well. We disagree. Aside from a serious question of whether Judge Gray-Hathaway ever actually sentenced defendant in the first instance in the

dialogue that took place at the sentencing hearing, the sentence, if imposed, was invalid. A court may not modify a valid sentence after it has been imposed except as provided by law. MCR 6.429(A). A court may, however, correct an invalid sentence after sentencing. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). The Supreme Court has repeatedly held that a sentence is invalid if it is based on inaccurate information. *Id.* Thus, Judge Baxter had the authority to sentence defendant if Judge Gray-Hathaway's sentence was invalid.

After reviewing the record, we hold that Judge Gray-Hathaway's sentence was invalid because it was clearly based on inaccurate information. When sentencing defendant, Judge Gray-Hathaway considered four character letters and a psychiatric report. At the time of resentencing, Judge Baxter permitted the prosecutor to present testimony that, to some degree, discredited the authenticity of the letters and the reliability of the psychiatric report. Thus, because Judge Gray-Hathaway relied upon inaccurate information, defendant's original sentence was invalid. Therefore, Judge Baxter was permitted to sentence defendant anew.

Affirmed.

/s/ Helene N. White
/s/ Harold Hood
/s/ Hilda R. Gage