

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EUGENE FORD,

Defendant-Appellant.

UNPUBLISHED

December 1, 1998

No. 195964

Recorder's Court

LC No. 95-008616

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of burning a dwelling house, MCL 750.72; MSA, 28.267. We reverse and remand for a new trial before a different judge.

Defendant was denied a fair trial by improper comments of presiding Recorders' Court Judge Warfield Moore, Jr. A defendant in a criminal trial is entitled to a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). The test to determine whether a judge's comments or conduct pierced the veil of judicial impartiality is whether the comments or conduct may well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility and whether partiality quite possibly could have influenced the jury to the defendant's detriment. *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992); *People v Moore*, 161 Mich App 615, 617; 411 NW2d 797 (1987).

Following questioning of Detroit Fire Department Lieutenant Reginald Amos, Judge Moore stated, in the presence of the jury:

He says he's finished with you, Lieutenant. Thanks for coming. You're free to leave. Go back and fight some more fires. Don't do like my man, don't light no fires, fight your fires.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

This statement deprived defendant of a fair and impartial trial because Judge Moore clearly expressed his determination that defendant was in fact guilty. *Conyers, supra* at 405-406. This comment, standing alone, warrants reversal of defendant's conviction.

Nonetheless, we further find that Judge Moore improperly vouched for the credibility of a key prosecution witness, defendant's eight year old son. When Judge Moore questioned the child to determine whether he was competent to testify, the following colloquy occurred:

Q. Before you show me up too much, what day is your birthday, what month were you born in?

A. July.

Q. July. What date?

A. Thirteenth.

Q. Thirteenth. That's my wife's birthday. I'm gonna love you, son.

Then, after examination of the child, the judge stated in the presence of the jury:

THE COURT. So listen, I'm gonna give you something, but you have to ask your mother if you can eat it. They're just Tootsie Rolls, they're a bunch of Tootsie Rolls, but I don't know if your mother will let you eat those. But you make sure it's all right with her first, okay?

THE WITNESS. All right.

THE COURT. You look at me know, I want to tell you something. If anybody chastises you at any time after this day about coming here and testifying, you tell 'em you're gonna come tell me and I'm bigger than all of 'em, okay?

THE WITNESS. Okay.

THE COURT. You tell 'em don't you dare say anything to me about my testifying, I don't care who it is, mother, father, police officer, nobody. You hear?

THE WITNESS. Yes.

THE COURT. You say I'm gonna go tell Judge Moore and he will take care of you. Okay?

THE WITNESS. Okay.

THE COURT. All right, son. Thank you very much. You helped out.

While appearing innocuous on the surface, we believe that these comments showed that Judge Moore had shed his veil of impartiality and improperly vouched for the credibility of the witness.

Further, Judge Moore demonstrated his contempt for the defense in this case and for juries in general when he made the following comments outside the presence of the jury:

I mean, to me it seems to be compelling, you know, evidence, if they believe it. If they don't, then I don't even see what [a missing witness] or anybody else could add to it, unless they don't believe [Lt.] Hood when he says that the fire was, you know, accelerant based, I mean, 'cause, you know, today these jurors don't believe, they don't believe—I mean, I had one juror where they have 650 pounds—the guy delivered 800 grams of cocaine which is almost two pounds of it. I mean, a thousand grams is two point two kilos, almost two pounds, almost a kilo, and the jurors can't decide. One of the jurors says well, how can he know what was in the pouch when he delivered it? Come on. I mean, Jesus, I mean, how did he know what was in the gas can when he stuck the paper in and lit it afire? I mean, for real.

I mean, you know, they can go back there and say that too. I mean, you know, man, I don't know what the hell they want, some jurors, I don't know what they want. They want a movie picture of it I guess, you know.

In sum, although overwhelming untainted evidence was presented to support defendant's conviction of the charged offense, we cannot conclude that Judge Moore's comments were harmless. Cf. *People v Cole*, 349 Mich 175, 196, 200; 84 NW2d 711 (1957); *People v Weathersby*, 204 Mich App 98, 109-110; 514 NW2d 493 (1994).

Finally, we deem it necessary to further order that defendant Ford shall not be admitted to bail either during the pendency of remand proceedings as directed by this Court or prior to the expiration of the time period in which plaintiff may file an application for leave to appeal in the Michigan Supreme Court. MCL 770.9; MSA 28.1106; *People v Sligh*, 431 Mich 673; 431 NW2d 395 (1988). Our decision to peremptorily deny defendant's release on bond is premised on the following factors: (1) reversal of defendant's conviction is solely based on Judge Moore's misconduct, not on the failure of the prosecution to prove defendant's factual guilt beyond a reasonable doubt, *id.* at 681 n 8, (2) the high risk of harm to defendant's children, the children's mother, or to the community if defendant were released, (3) the extremely serious nature of this offense and the resulting lengthy sentence imposed, and (4) the risk that defendant's release might impede the administration of justice. See *id.* at 679 n 5, citing with approval *People v Giacalone*, 16 Mich App 352; 167 NW2d 871 (1969). In the event that jurisdiction of this matter is transferred to the Michigan Supreme Court, defendant may then move for release on bond pending appeal in that Court.

Reversed and remanded for a new trial before a different judge. Defendant shall not be released on bond during the pendency of remand proceedings or during the time period for exhaustion of plaintiff's appellate remedies.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Robert J. Danhof