# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RHONDA LEA BIEHL-BADOUR,

Defendant-Appellant.

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UNPUBLISHED
March 2, 1999

No. 206542
Gratiot Circuit Court
LC No. 97-003423 FH

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction after a jury trial of perjury during a court proceeding, MCL 750.422; MSA 28.664. Defendant had been charged with lying during a parole revocation hearing. The trial court sentenced her to 180 days in jail and two years' probation. We affirm in part, but remand for production of a transcript of jury voir dire.

Defendant first contends that the district court violated her due process rights in failing to advise her that her statements at the probation revocation hearing could be used against her in a later proceeding. Defendant explains that had she known "before getting on the witness stand that she could face a 14-year felony, then she very well might have elected to stand upon her Constitutional right not to testify at the probation revocation hearing." A fundamental right of a witness who fears that her testimony may incriminate her in a proceeding of any kind for which an oath is legally required is the Fifth Amendment privilege against compulsory self-incrimination. *People v McIntire*, 232 Mich App 71, 82 ; ___ NW2d ___ (1998). However, defendant has provided no authority to support the proposition that a judge must anticipate that a witness will lie on the stand, and that he must therefore apprise that witness of the consequences of doing so. Nor is such a proposition supportable. Defendants clearly do not have the right to lie under oath. To do so is a crime. See MCL 750.422; MSA 28.664; *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996). Therefore, we conclude that defendant's argument is without merit.[1]

Defendant next argues that a pretrial newspaper article that referred to the charges against her and indicated that she faced a possible maximum sentence of fourteen years in jail tainted the recently empaneled jury, and that the trial court therefore erred in denying her motion for a continuance.

Whether or not prejudice warranting a new trial results from the reading by jurors of news articles or seeing or hearing broadcasts must turn on the special facts of each case, and the question is left largely to the determination and discretion of the trial court. *People v Grove*, 455 Mich 439, 472; 566 NW2d 547 (1997), quoting 23A CJS, Criminal Law, § 1441, p 386. If the defendant has suffered no prejudice, the defendant is not entitled to a new trial or a mistrial. *People v Flinnon*, 78 Mich App 380, 391; 260 NW2d 106 (1977). Three jurors indicated that they had seen a front-page newspaper article concerning defendant's case. However, we find no prejudice to defendant arising from their viewing of the article. The article stated only that defendant had been charged with perjury, that she was accused of lying during a parole revocation hearing, that she had been accused of drinking in violation of her parole, and that she faced a potential fourteen-year prison term. Other than the information regarding defendant's potential penalty,[2] the article did not contain any information that would not otherwise have been revealed at trial, nor did the article contain any information that would tend to anger the jurors or bias them against defendant. Furthermore, the trial court attempted to ascertain whether the article had any effect on the jurors who had read it, and all three jurors stated that they remained impartial, that they understood that the prosecutor bore the burden of proof, and that they had not discussed the article with the other jurors. The trial court also permitted defense counsel to inquire whether the jurors were affected by the article's statement that defendant would likely have faced only several extra days in jail had she admitted to violating her parole. The jurors all responded that this statement did not affect their ability to remain fair and impartial. In light of this information, we conclude that the trial court did not abuse its discretion in seating the three jurors on the panel and denying defendant's motion for a continuance. *Grove*, 455 Mich 472.

Defendant also claims that the prosecutor improperly suggested defendant's identity during two witnesses' in-court identifications of defendant. Defendant failed to object at trial to these identifications. Where issues concerning identification procedures were not raised at trial, they will not be reviewed by this Court unless refusal to do so would result in manifest injustice. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995), opinion after remand 228 Mich App 659; 579 NW2d 465 (1998). Neither defendant's identity nor her presence at a bar and in Denise Avery's car on the night in question were contested issues at trial. Defendant challenged only that she had consumed alcohol that evening. Because any alleged impropriety regarding the in-court identifications thus did not pertain to a basic and controlling issue in the case, we find no manifest injustice, *Phinney v Perlmutter*, 222 Mich App 513, 557; 564 NW2d 532 (1997), and we decline to further review this issue. *Whitfield*, 214 Mich App 351.

Lastly, defendant contends that the trial court should have ordered that voir dire transcripts be provided to her because she is represented on appeal by a different attorney than the attorney who represented her at trial. Defendant cites MCR 6.425(F)(2)(a)(i). At the time defendant filed her claim of appeal, this provision directed that in the order appointing a lawyer for an indigent defendant, the trial court must direct the court reporter to prepare and file

> the trial or plea proceeding transcript, excluding the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or

shows good cause. [*People v Bass (On Rehearing)*, 223 Mich App 241, 256; 565 NW2d 897 (1997), quoting MCR 6.425(F)(2)(a)(i).][3]

This Court concluded in *Bass* that this court rule improperly interfered with an indigent defendant's right to effective assistance of appellate counsel. *Bass*, 223 Mich App 259-260, holding as interpreted by the Michigan Supreme Court in *People v Bass*, 457 Mich 865; 577 NW2d 667 (1998).[4] This Court therefore required that in all cases where appointed appellate counsel was not the indigent defendant's trial counsel, a transcript of voir dire must be provided. *Bass*, 223 Mich App 260. In *People v Neal*, 459 Mich 72; ___ NW2d ___ (1998), the Supreme Court addressed the issue whether this Court's interpretation of MCR 6.425(F)(2)(a)(i) and the Supreme Court's May 6, 1998 amendments to MCR 6.425(F)(2)(a), which simply directs the trial court when appointing appellate counsel to order transcripts requested by the indigent defendant, had retroactive effect. The Court summarized the history of the *Bass* case, and held that this Court's decision in *Bass*, as clarified by the Supreme Court's 1998 order (457 Mich 865), is to be given limited retroactive effect. *Neal*, 459 Mich 81. In cases in which a transcript was ordered before May 6, 1998, the Supreme Court granted retroactive application with regard to defendants who preserved the issue by timely requesting a voir dire transcript or timely challenging the applicability, legality, or constitutionality of the 1994 court rule amendments. *Id*.

We find that the renewed requirement that an indigent defendant receive a transcript of the jury voir dire applies to the instant defendant. Although not contained in the lower court record supplied to this Court, defendant's brief on appeal includes a December 12, 1997 letter from defendant's appellate counsel to the court reporter requesting a jury voir dire transcript, and a December 18, 1997 response from the court reporter indicating that the trial judge, citing the pre1998-amendment rule MCR 6.425(F)(2)(a)(i), had denied defendant's request on the basis that defendant had failed to challenge jury selection. Furthermore, defendant challenges in her January 14, 1998 brief on appeal to this Court the constitutionality of pre1998-amendment MCR 6.425(F)(2)(a)(i). See *Neal*, 459 Mich 82.

Therefore, simply because defendant requested a jury voir dire transcript and because defendant had an appellate defender who was not her defense counsel at trial, we are constrained to remand this case to the circuit court for transcription of the jury voir dire. *Neal*, 459 Mich 81-82; *Bass*, 223 Mich App 260. We clarify that we are not remanding so that defendant may further pursue her argument regarding pretrial publicity. To the extent defendant raises, in the context of her argument regarding the transcript of jury voir dire, her claim that pretrial publicity tainted her trial, her review of the jury voir dire transcript will provide no further enlightenment concerning the publicity issue. First, as discussed above, we have already rejected defendant's argument that the newspaper article tainted jurors as being without merit in light of the article's factual nature and the potentially tainted jurors' pledges of impartiality. Second, jury voir dire had completed by the time the newspaper article was released. Thus, the newspaper article's effect was irrelevant to any potential claim of defendant's regarding jury voir dire. Even though defendant has completely failed to apprise this Court of any other alleged error or irregularity occurring at jury voir dire, pursuant to the Supreme Court's holding in *Neal* we must reluctantly remand.[5] Because we have rejected defendant's other arguments on appeal, the remand is for the limited purpose that defendant may examine the transcript of jury voir dire and raise any meritorious allegations of error arising from the voir dire. *Neal*, 459 Mich 82.

Affirmed in part, and remanded for production of a transcript of jury voir dire. We retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] Defendant's reliance on *People v Rocha*, 86 Mich App 497; 272 NW2d 699 (1978), is misplaced because *Rocha* involved a defendant who was placed in the position of having to decide whether to testify at a probation revocation hearing when his alleged probation violation also constituted a crime for which he faced pending criminal charges. *Id*. at 499. The *Rocha* Court specifically decided whether forcing the defendant at a revocation hearing to choose between either testifying and incriminating himself later at trial, or else remaining silent and surrendering a valuable defense constituted an impermissible penalty for the exercise of the privilege against self-incrimination. *Id*. at 504. The Court concluded that to place the defendant in such a dilemma is inconsistent with our notions of substantial justice. *Id*. In the instant case, defendant's criminal trial on the perjury charge stemmed from her conduct at the probation revocation hearing, not from the conduct that qualified as a probation violation and was the focus of the revocation hearing. Because defendant's crime at the revocation hearing created the specter of a subsequent trial when none would otherwise have existed, her case is distinguishable from *Rocha*.

[2] Generally, neither the court nor counsel should address themselves before a jury to the question of the disposition of a convicted defendant. *People v Szczytko*, 390 Mich 278, 285; 212 NW2d 211 (1973). However, in light of the measures taken by the trial court to assure that defendant suffered no prejudice arising from the jurors' viewing of the article, we cannot conclude that the article's mention of the potential fourteen-year prison term warrants reversal in the instant case. *Id*. at 290. The trial court asked the two jurors who acknowledged reading the entire article whether they could ignore the potential penalty in reaching a decision regarding defendant's guilt of the crime, and both responded affirmatively. Furthermore, the trial court instructed the jury before deliberations that because the penalty issue was unrelated to the question of defendant's guilt or innocence, they should not consider any potential penalty defendant might receive in the event she was found guilty. These inquiries and instructions by the trial court eliminated any potential prejudice to defendant.

[3] Effective May 6, 1998, MCR 6.425(F)(2)(a) was amended to provide that, in the order appointing an indigent defendant's attorney, the trial court must also "direct the court reporter to prepare and file . . . (i) the trial or plea proceeding transcript, (ii) the sentencing transcript, and (iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request."

[4] The Supreme Court had initially issued an order staying the precedential effect of this Court's *Bass* decision. *People v Bass*, 455 Mich 861; 564 NW2d 902 (1997). Subsequently, the Supreme Court granted leave to appeal and continued the stay. *People v Bass*, 456 Mich 851; 568 NW2d 88 (1997). Finally, in its third order, *People v Bass*, 457 Mich 865; 577 NW2d 667 (1998), the Supreme Court vacated its orders granting leave to appeal and staying the precedential effect of *Bass*, "on the

understanding that the Court of Appeals determined that the impediments of the court rule constitute state interference with appellate counsel's ability to provide effective assistance." *Id*. The Supreme Court issued its final order in *Bass* on May 6, 1998, the same day that the amended court rule, quoted in endnote 2, *supra*, became effective and eliminated any requirement that a defendant show cause as a prerequisite to obtaining a transcript of jury voir dire.

[5] The appealing defendant in *Neal* had likewise failed to raise before this Court a specific objection to anything that took place during the voir dire. *Neal*, 459 Mich 76. Although this Court rejected defendant's request for a voir dire transcript on the basis that he had not claimed any error making a transcript necessary to vindicate a substantial right, the Supreme Court nonetheless remanded for production of the requested transcript. *Id*. at 76, 82.