

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

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant/Cross-Appellee,

UNPUBLISHED  
October 22, 1999

v

ADRIAN DESHON BELL,  
Defendant-Appellee/Cross Appellant.

No. 195999  
Recorder's Court  
LC No. 95-003843

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Before: Young, Jr., P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Following a bench trial, defendant, a juvenile, was convicted as an adult of first-degree felony murder, MCL 750.316(b); MSA 28.548(b), and unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645. Defendant was sentenced as a juvenile and committed to the Department of Social Services. The prosecution appealed, challenging the trial judge's decision to sentence defendant as a juvenile. Defendant filed a cross-appeal. Following oral arguments before this Court, the trial judge was charged with judicial misconduct in her handling of defendant's case. Both parties now contend that an ex parte communication between the trial judge and defendant's trial counsel impermissibly tainted defendant's trial and sentencing and, therefore, that a new trial is required. We agree, and reverse and remand for a new trial before a different judge.

We have reviewed the record of the proceedings conducted before the Judicial Tenure Commission, as well as the Special Master's report and the Tenure Commission's decision and recommendation.<sup>1</sup> From that record, we can discern the following relevant events. The trial judge testified that she instructed her clerk to ask defendant's trial counsel whether there was going to be a jury or bench trial. Despite the fact that defendant was charged with first-degree felony murder, the trial judge also recalled remarking to her clerk that the case "sounds like manslaughter." While the trial judge denied directing her clerk to do so, the clerk testified before the Tenure Commission that she advised defense counsel that the trial judge "said it sounds like Murder Second to her." Although defense counsel claimed before the Tenure Commission that the conversation had nothing to do with her decision, counsel recommended that defendant waive his right to a jury trial immediately following the ex

parte communication. Defendant agreed to

waive his right to a jury trial. As stated, defendant eventually was convicted of first-degree felony murder. However, the trial judge sentenced defendant as a juvenile.

The parties agree that these events, at the very least, create the appearance that the trial judge's ex parte communication may have influenced not only defendant's decision to waive his right to a jury trial, but the trial judge's decision to sentence defendant as a juvenile. Indeed, the prosecution asserts that "it is entirely within the realm of probabilities" that the trial court's decision to sentence defendant as a juvenile was to avoid difficulties associated with the earlier ex parte communication. While the Tenure Commission found that an ex parte communication occurred, we note with curiosity that the Tenure Commission concluded that the ex parte communication did not amount to actionable "judicial misconduct" because the trial judge had made a similar remark, months before and on the record, to both the prosecutor and defense trial counsel's predecessor.<sup>2</sup> However, given the unusual circumstances of this case – and particularly because *both* parties have requested such relief – we conclude that, in the interest of avoiding an appearance of impropriety, a new trial should be ordered. MCR 7.216.

Finally, we agree with the parties that the double jeopardy prohibition against successive prosecutions is not an impediment to a new trial. The Fifth and Fourteenth Amendments of the United States Constitution, as well as Const 1963, art 1, § 15, guarantee that no person is to be twice put in jeopardy for the same offense. *People v Langley*, 187 Mich App 147, 149-150; 466 NW2d 724 (1991). However, it is well-established that "the Double Jeopardy Clause does not preclude the retrial of a defendant whose conviction is set aside because of any error in the proceeding leading to conviction other than insufficiency of the evidence to support the verdict." *People v Setzler*, 210 Mich App 138, 139-140; 533 NW2d 18 (1995), citing *Montana v Hall*, 481 US 400, 402; 107 S Ct 1825; 95 L Ed 2d 354 (1987). Here, defendant's convictions are not being set aside because of insufficiency of the evidence. Therefore, the Double Jeopardy Clause does not preclude retrial.

Reversed and remanded for a new trial before a different judge. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.

/s/ Michael J. Kelly

/s/ Martin M. Doctoroff

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<sup>1</sup>. We granted the parties' request to submit the Tenure Commission record.

<sup>2</sup>. Notwithstanding its conclusion that the ex parte communication was not actionable, the Tenure Commission did find that the trial judge instructed her clerk to advise defendant's trial counsel that the trial judge "thought this was a 'Manslaughter or Second Degree Murder' case."