

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY GOINES,

Defendant-Appellant.

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UNPUBLISHED

September 20, 2002

No. 240475

Recorder's Court

LC No. 90-001521

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

COOPER, P.J. (*concurring*).

While I ultimately agree with the decision reached by my colleagues, I write separately because I feel compelled to comment on the unusual turn of events that occurred in the middle of defendant's trial.

In the instant case, trial court Judge Ziolkowski ordered that defendant's trial be severed from his codefendant wife in the middle of the trial being held before trial court Judge Sapala. The order indicates that Judge Ziolkowski severed the trial due to possible antagonistic defenses. Apparently the transcript of the hearing before Judge Ziolkowski is missing and consequently we may never know the thought process behind that decision. Judge Sapala continued and completed both of the trials. He made different findings of fact for each codefendant. While he convicted defendant, he acquitted defendant's wife on the basis of duress, which *is* an antagonistic defense.

A trial court has discretion to determine whether separate trials are required for codefendants. *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). It is important to note that "[w]hen a judge sits as the trier of fact, his verdict is presumed to be the result of a correct application of the law to the evidence presented." *People v Beard*, 171 Mich App 538, 543-544; 431 NW2d 232 (1988). Because trial judges are reputedly able to focus on the task of fact-finding, as opposed to improper considerations that a jury might find compelling, it is generally assumed that error is less likely to require reversal in a bench trial. *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988).

In the case at bar, it seems inappropriate that the trial court continued to make findings of fact and conclusions of law while the codefendant's case, which had previously been severed from this case, was also pending before the trial court. Rather, prudence would seem to dictate that a reasonable alternative would have been to permit one or both of the defendants to continue

his or her trial before a different judge. See generally MCR 6.440(B); *People v Hicks*, 447 Mich 819, 840-841, 844; 528 NW2d 136 (1994).

While I find that Judge Sapala did an admirable job throughout the trial, there is an appearance of impropriety. In fact, I find that the missing transcript is likely the result of the twelve year delay in providing defendant his right to appeal which the federal court found inexcusable. As a result, there is an unexplained severance in the middle of trial.

Reversal in this case would not be mandated given the overwhelming evidence of defendant's guilt. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). However, were it not for *Carines, supra*, I would vote to reverse.

/s/ Jessica R. Cooper