

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK ALAN STARK,

Defendant-Appellant.

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UNPUBLISHED  
November 9, 2010

No. 290796  
Oakland Circuit Court  
LC No. 2008-222304-FH

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Servitto, J. (*concurring*).

Though I agree with the majority's conclusion to affirm, I write separately to address my concerns about the procedural irregularities involved in defendant's conviction. On January 8, 2009, defendant appeared before the trial court and, on that date, waived his right to a jury trial and stipulated to proceeding with a bench trial. The parties stipulated that the court could consider all of the testimony from both the preliminary examination and a prior evidentiary hearing. The court found defendant guilty of eavesdropping on this same date, without a pause in the proceedings or reference to any specific prior testimony. While the trial court did ask defendant if he understood that by accepting the stipulation he was waiving his right to call and cross-examine any witnesses, and his right to testify, and defendant agreed that he understood, given that "a trial court sitting as a trier of the facts determines the credibility of witnesses, and has not only the right but the duty to ask material questions of witnesses so as to clarify the matters before it," *People v Jablonski*, 70 Mich App 218, 224; 245 NW2d 571 (1976), I harbor serious doubts as to whether a waiver such as the one that took place in the instant matter should ever be employed and accepted by a trial court.

First, the purpose of a preliminary examination is to determine whether probable cause exists to believe that a crime was committed and that the defendant committed it. *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003). Probable cause requires a quantum of evidence "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief" of the accused's guilt. *People v Justice (After Remand)*, 454 Mich 334, 344, 562 NW2d 652 (1997). The probable cause standard of proof is, of course, less rigorous than the guilt beyond a reasonable doubt standard of proof that governs at a criminal trial. *People v Yost*, 468 Mich 122, 125-126; 659 NW2d 604 (2003). "The gap between these two concepts is broad." *People v Justice*, 454 Mich 334, 344; 562 NW2d 652 (1997). The two

proceedings are vastly different, and the motive in developing witnesses' testimony at preliminary examination is unlike that at trial.

More importantly, in *People v Ramsey*, 385 Mich 221, 225; 187 NW2d 887 (1971), our Supreme Court announced that "as an absolute rule, it is reversible error for the trial court sitting without a jury to refer to the transcript of testimony taken at the preliminary examination except under exceptions provided by statute." According to the *Ramsey* court, "[a] jury, if impanelled, would not be aware of the testimony taken at a preliminary examination except under the provisions of the statute. A trial judge, sitting as the trier of the facts, can assume no greater prerogatives than a jury if a jury were impanelled to determine the facts." *Id.* The exceptions provided by statute referenced in *Ramsey*, 385 Mich at 225, can be found at MCL 768.26, which provides:

Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.

There is no assertion that the witnesses testifying at the preliminary examination in this matter were unavailable to testify at a trial.

True, examination of the preliminary examination transcript by the judge sitting as trier of fact has been upheld where the examination was limited to impeachment purposes and the parties had stipulated that such examination be made. See, e.g., *People v Dorsey*, 45 Mich App 230; 206 NW2d 459 (1973). Here, in contrast, however, the preliminary examination record together with the testimony at an evidentiary hearing was allowed to substitute for the entire trial. Further, while MCR 6.110(D) allows for an evidentiary issue to be determined by the trial court on the basis of the preliminary examination transcript alone, I have been directed to no court rule or statute that would allow a similar application to the ultimate determination of guilt or innocence in lieu of a trial. I believe that to allow a criminal case to be decided on a preliminary examination transcript is not in accordance with MCL 768.26 and *Ramsey*, 385 Mich 221, and is, in fact, violative of the protections afforded throughout our judicial process.

My disapproval of the judicial process that occurred in this matter having been thoroughly expressed, and despite my dismay with the trial court relying solely on the preliminary examination and evidentiary hearing transcripts, I agree with the majority that defendant's convictions should be affirmed.

/s/ Deborah A. Servitto