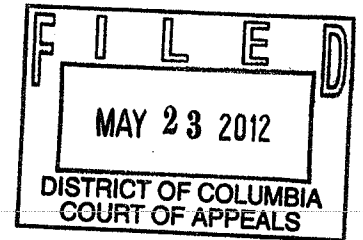


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**District of Columbia
Court of Appeals**



No. 12-CM-101

BOBBY DARRYL THORNE,

Appellant,

2011 CMD 18531

v.

UNITED STATES,

Appellee.

BEFORE: Glickman and Blackburne-Rigsby, Associate Judges, and Reid, Senior Judge.

J U D G M E N T *

On consideration of appellant's motions for summary reversal and remand, appellee's motions to late-file and file the lodged opposition, and appellant's lodged reply, it is

ORDERED that appellee's motions to file the lodged opposition are granted and the Clerk shall file the lodged opposition and reply. It is

FURTHER ORDERED that the motions for summary reversal are granted. *See Oliver T. Carr Mgm't, Inc. v. Nat'l Delicatessen, Inc.*, 397 A.2d 914, 915 (D.C. 1979). Appellant has moved for summary reversal and for re-sentencing by another judge, on the ground that the trial judge sentenced him more severely because he exercised his Sixth Amendment right to confront the government chemist at trial. In brief, the trial judge initially discouraged appellant from exercising that right, and thereafter stated that she would "take into account" appellant's insistence on cross-examining the chemist and that this decision would "have consequences" for appellant. After several such comments, to which appellant made timely objection, the judge sentenced appellant to 180 days in prison, the maximum term of imprisonment authorized by law. This was a substantially longer period of incarceration than the government had sought. Appellant is now mid-way through serving his sentence.

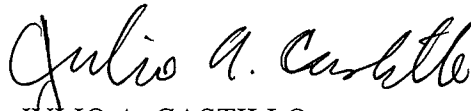
In view of the judge's comments, there is a reasonable likelihood that she punished appellant for invoking his Sixth Amendment right of confrontation. "[P]enalizing those who choose to exercise constitutional rights [is] patently unconstitutional," *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (internal quotation marks omitted), and therefore "[t]he augmentation

of sentence based on a defendant's decision to stand on his right to put the Government to its proof rather than plead guilty is clearly improper." *Coles v. United States*, 682 A.2d 167, 169 (D.C. 1996) (internal quotation marks and alterations omitted).¹

The court will issue a more detailed opinion at a later date. In the meantime, appellant is entitled to appropriate relief from his unconstitutionally imposed sentence. Accordingly, we hereby vacate appellant's sentence and remand this case to the Superior Court with instructions that it be re-assigned without delay to a different judge for a prompt re-sentencing of appellant.² It is

FURTHER ORDERED that the Clerk shall issue the mandate forthwith.

ENTERED BY DIRECTION OF THE COURT:


JULIO A. CASTILLO
Clerk of the Court

* Originally issued on May 16, 2012, as unpublished. Issued today as published.

¹ See also *United States v. Cruz*, 977 F.2d 732, 734 (2d Cir. 1992) (vacating sentence and remanding case for re-sentencing by another judge, because trial judge's "remarks created an unacceptable risk that the sentence was impermissibly enhanced above an otherwise appropriate sentencing norm to penalize the defendant for exercising his constitutional right to stand trial"); *United States v. Crocker*, 788 F.2d 802, 809 (1st Cir. 1986) (same result, because trial judge's "remarks on how the presentation of a frivolous case and the ensuing waste of judicial resources could be factors in determining the sentence to be imposed [were] sufficient to establish that there was a reasonable likelihood of vindictiveness in the imposition of a harsher sentence on the defendant").

² See *In re D.E.*, 991 A.2d 1205, 1214 (D.C. 2010) ("[T]hree principal factors to consider in determining whether further proceedings should be conducted before a different judge [are]: '(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.'" (quoting *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc)); see also *McPhaul v. United States*, 452 A.2d 371, 374-75 (D.C. 1982) (remanding for re-sentencing before a new judge after finding that the trial court had relied on "inappropriate" considerations in sentencing which "could well raise constitutional questions").

No. 12-CM-101

Copies to:

Honorable Jennifer M. Anderson

Honorable Russell Canan

Clerk, Superior Court

Cassandra Snyder, Esquire
111 F Street, NW
Washington, DC 20001

Roy W. McLeese III, Esquire
Assistant United States Attorney
