

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE LAMOND WILSON,

Defendant-Appellant.

FOR PUBLICATION

March 8, 2005

9:00 a.m.

No. 250804

Oakland Circuit Court

LC No. 2003-190421-FC

Official Reported Version

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

While I agree that transferring the case after trial for sentencing by a judge unfamiliar with the trial was plain error, I would hold that this type of error does not require proof of prejudice. I would vacate defendant's sentence and remand to the trial judge for resentencing. In my opinion, if at all possible, a defendant has the right to be sentenced by the judge who presided over his trial.

At issue is the right to be sentenced, whenever possible, by the trial judge, the judge who is most familiar with the evidence. *People v Bart (On Remand)*, 220 Mich App 1, 8; 558 NW2d 449 (1996). Trial judges personally observe each witness's demeanor, so they sit in the best position to judge a witness's credibility. *Id.* Therefore, the right adds an extra measure of integrity, fairness, and justice to the process. It is a tenet of our judicial system based on the soundest of principles, and we should not discard it for the sake of administrative efficiency. Nor should we rationalize this error on the basis that sentencing itself is now a product of the cold calculation of points assigned to jargonistic acronyms.¹ It is in this modern climate that the

¹ While I admit that guidelines serve a legitimate purpose, the thought of removing all trace of humanity from the sentencing process deeply disturbs me. The sentencing function should not operate like a spreadsheet program that instructs judges to punch in OV (offense variables), PRV (prior record variables), and grid factors and then spits out the computer-generated sentence. Nor should sentences become abstract scores calculated by shifting OV and PRV beads on a designated grid's abacus. Sentencing is an integral and critical part of a judge's role in our society. It is best left, if at all possible, to the individual judge who is most familiar with the facts of each case. It is not simply a "mechanical function" requiring a working knowledge of the infamous legislative sentencing guidelines. The legislative guidelines have, to a degree,

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majority requires defendant to prove actual prejudice and then proceeds to demonstrate that any reasonable offer of proof is easily reduced to speculation. For example, it is not enough that the sentencing judge rejected the lighter sentence recommended by the probation officer and the original prosecutor, because the trial judge also might have rejected it, if given the chance.

I would hold that the error fits within that small class of errors that do not require a particularized showing of prejudice to receive a remedy. *People v Carines*, 460 Mich 750, 763 n 8; 597 NW2d 130 (1999); *United States v Olano*, 507 US 725, 735; 113 S Ct 1770; 123 L Ed 2d 508 (1993). I would take this approach for three reasons. First, it is counterintuitive to move for the removal of a judge about to sentence you and ask to be sentenced instead by the trial judge who convicted you. Second, as explained, it is nearly impossible to demonstrate any actual prejudice, no matter how severe it may be. Therefore, under these circumstances, the prejudice requirement fails to serve any legitimate purpose. Third, the error adversely affects the validity of the process more than it affects any one defendant. The lack of a thoroughly informed judge at sentencing increases the risk of injustice, regardless of whether the outcome is more or less favorable to the particular defendant. These factors work in tandem to erode the very purpose of the process: to tailor a punishment as closely as possible to the criminal and the crime. Because the error seriously affects the integrity of the sentencing process, the correct remedy is to vacate defendant's sentence and remand for resentencing by the trial judge.² *Carines, supra* at 763.

I concur in the balance of the majority opinion.

/s/ Peter D. O'Connell

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computerized the sentencing function. I hope that the guidelines have not so systemized sentencing that fastidious categorization and math skills are now adequate substitutes for the knowledge and experience a trial court acquires during the course of trial.

² Of course, it is entirely possible that the trial judge is no longer available to resentence defendant. Under these circumstances, I would concede that the obligation to resentence defendant would fall to the judge who originally sentenced him, because the sentencing judge in this case had some initial exposure to the case. Therefore, if the trial judge were to be unavailable, the sentencing judge could simply reinstate the original judgment of sentence without the need for a new hearing. While the error would remain serious, it would simply lack any realistic remedy.