

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANGELO CHRISTIAN,

Defendant-Appellant.

UNPUBLISHED

August 19, 2021

No. 356693

Oakland Circuit Court

LC No. 2020-274016-FH

Before: RIORDAN, P.J., and MARKEY and SWARTZLE, JJ.

PER CURIAM.

Defendant pleaded guilty to the offense of uttering and publishing, MCL 750.249. Pursuant to the terms of the plea agreement, the prosecution dismissed a charge of larceny in a building, MCL 750.360. The probation department recommended a sentence of two years' probation. The trial court, outraged by the recommendation given defendant's criminal history of 29 misdemeanor and 7 felony convictions and several instances of absconding from parole, imposed a sentence of 1 to 14 years' imprisonment.¹ Defendant appeals by leave granted the sentence imposed by the trial court. *People v Christian*, unpublished order of the Court of Appeals, entered May 11, 2021 (Docket No. 356693). We reverse and remand for resentencing.

¹ Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12. The minimum sentence guidelines range was 9 to 46 months' incarceration. See MCL 769.34(4)(c) (prison sentence within this range is not a departure). We note that after defendant was sentenced in this case and during the pendency of this appeal, defendant added to his extensive criminal record by pleading no-contest to possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), resisting and obstructing an officer, MCL 750.81d(2), and second-degree fleeing and eluding, MCL 257.602a(4)(a). He was sentenced to prison terms of 14 months to 8 years for the drug-possession and resisting-and-obstructing convictions and to 29 months to 20 years for the fleeing-and-eluding conviction. See Michigan Offender Tracking Information System.

The issue in this case concerns defendant’s sentencing hearing. The hearing was conducted using “two-way interactive videoconferencing technology.” See Administrative Order No. 2020-6. Defendant and his attorney were not physically present in the courtroom for sentencing on the felony offense of uttering and publishing. Defendant did exercise his right of allocution during the sentencing hearing. At no point during the hearing did the trial court obtain a waiver of defendant’s right to be physically present in the courtroom for sentencing. There was no objection to conducting the sentencing by video conference. Defendant moved for resentencing, claiming infringements of his constitutional right and his right under MCR 6.006 to be physically present at his sentencing hearing. The trial court denied defendant’s motion for resentencing absent elaboration. As indicated, this Court granted defendant’s application for leave to appeal.² On appeal, defendant seeks resentencing before a different trial judge.

In *People v Heller*, 316 Mich App 314, 318-321; 891 NW2d 541 (2016), this Court remanded the case for resentencing, ruling as follows:

Why did the Supreme Court omit felony sentencings from MCR 6.006(A)? Presumably because sentencing is a critical stage of a criminal proceeding at which a defendant has a constitutional right to be present, and virtual appearance is not a suitable substitute for physical presence. The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty. Our court rules and common law invest sentencing with profound significance, for this grave moment in the criminal process often seals a defendant’s fate or dictates the contours of his or her future. Individualized sentencing furthers the goal of rehabilitation by respecting the inherent dignity of each person the law deprives of freedom, civil rights, or property. A defendant’s right to allocute before sentence is passed—to look a judge in the eye in a public courtroom while making his or her plea—stems from our legal tradition’s centuries-old recognition of a defendant’s personhood, even at the moment he or she is condemned to prison. Sentencing is an intensely human process—after all, we are dealing not with machines and equipment, but with human lives.

Undoubtedly, two-way interactive video technology saves courts money and time, and it dramatically lessens security concerns. But in the felony sentencing context, it is simply inconsistent with the intensely personal nature of the process. After all, sentencing is the point where the heart of the law—and its human face—is most clearly revealed. Sentencing by video dehumanizes the defendant who participates from a jail location, unable to privately communicate with his or her counsel and likely unable to visualize all the participants in the courtroom. Moreover, a courtroom is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers. The courtroom setting provides a dignity essential to the process of criminal

² Two of the three judges on the motion panel would have granted defendant’s motion for preemptory reversal. See *Christian*, unpub order; MCR 7.211(C)(4) (“The decision to grant a motion for preemptory reversal must be unanimous.”).

adjudication. Isolating a defendant from that setting during what may be the most decisive moment of his or her life clashes with the judge's duty to acknowledge the humanity of even a convicted felon.

* * *

[S]ome studies suggest that individuals who appear in court via video conferencing are at risk of receiving harsher treatment from judges or other adjudicators. Courts, too, have recognized that virtual reality is rarely a substitute for actual presence and even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it. Alternatively phrased: In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact. Video tape is still a picture, not a life.

Sentencing is more than a rote or mechanical application of numbers to a page. It involves a careful and thoughtful assessment of the true moral fiber of another, a task made far more complex when the defendant speaks through a microphone from a remote location. The trial judge who sentenced Heller never met or sat in the same room with him. In our view, Heller's absence from the sentencing nullified the dignity of the proceeding and its participants, rendering it fundamentally unfair. [Quotation marks, citations, brackets, and ellipses omitted.]

On the strength of *Heller*, we reverse and remand for resentencing.³ We disagree with the prosecution's contention that defendant effectively waived his appellate argument by voluntarily participating in the sentencing hearing. Moreover, we note that defendant bootstraps a claim of ineffective assistance of counsel, arguing that counsel was ineffective for failing to object to the process of videoconferencing at sentencing and otherwise failing to raise the issue. Additionally, we reject the prosecution's argument that reversal is unwarranted because AO 2020-6 authorized the use of videoconferencing technology in light of the COVID-19 pandemic. While AO 2020-6 does generally authorize videoconferencing, it also provides that "any such procedures must be consistent with a party's Constitutional rights[.]"

Finally, although we conclude that the trial court did not engage in any inappropriate conduct, see MCR 2.003, in order to avoid, preemptively, any appearance of injustice or lack of impartiality upon resentencing, we order resentencing before a different judge as requested by

³ While we have some reservations regarding *Heller*, it is binding precedent. MCR 7.215(J)(1). We decline to explore and decide whether a structural constitutional error occurs when a defendant is not permitted to be physically present in front of a judge for sentencing, even though he or she was "present" through use of videoconferencing technology. The *Heller* panel did not expressly state that a violation of the right to be physically present at sentencing constitutes structural constitutional error, although the impassioned analysis suggests as much. Assuming that the error is not structural, we are not prepared to rule that the error was harmless beyond a reasonable doubt. Indeed, engaging in harmless-error analysis in this context is necessarily highly speculative.

defendant. See *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986) (allowing reassignment when advisable to preserve the appearance of justice).

We reverse and remand for resentencing before a different judge. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Brock A. Swartzle