

Court of Appeals, State of Michigan

ORDER

People v Martwan Johnson

Docket No. 329134

LC No. 14-035440-FC

Michael J. Talbot
Presiding Judge

Kathleen Jansen

Joel P. Hoekstra
Judges

Following oral arguments, in lieu of resolving defendant-appellant's appeal at this time, the Court orders that defendant's motion to remand pursuant to MCR 7.211(C)(1) is GRANTED, and the matter is remanded to the trial court for an evidentiary hearing. See also MCR 7.216(A)(5). Given defendant's post-trial motion, as well as defense counsel's corroborating statements during sentencing, defendant should have been allowed to develop a factual record in the trial court on the issue of whether the deputy's location during trial prejudiced his defense. See *People v Davenport*, 488 Mich 1054; 794 NW2d 616 (2011). Accordingly, on remand, the trial court shall conduct an evidentiary hearing on defendant's claims regarding the presence of a deputy during trial, and defendant's claims that counsel was ineffective by failing to object to the deputy's location in the courtroom. Proceedings on remand are limited to the issues relating to the presence and location of the deputy.

The trial court is to make findings of fact and a determination on the record. In particular, the trial court should make factual findings regarding the deputy's attire, the deputy's location while defendant testified, the deputy's location while co-defendant Justin Walker testified, and more generally, the deputy's location and conduct relative to defendant and co-defendant during trial. The trial court should determine whether there was a distinction between the treatment of defendant and co-defendant by the deputy, as well as whether such a distinction would have been apparent to the jury. If it was noticeable that defendant and co-defendant were not treated equally with respect to being "guarded" by the deputy, the trial court shall ascertain whether this practice was inherently prejudicial or whether defendant was actually prejudiced by this discrepancy. See *Holbrook v Flynn*, 475 US 560, 569-572; 106 S Ct 1340; 89 L Ed 2d 525 (1986); *People v Rose*, 289 Mich App 499, 517-518; 808 NW2d 301 (2010). The trial court should also state with particularity the reasons, if any, for this discrepancy. See *People v Arthur*, 493 Mich 935; 825 NW2d 578 (2013). Further, the trial court should ascertain whether defense counsel expressed satisfaction with the deputy's conduct, whether such satisfaction constituted a waiver of defendant's claim, *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011), and whether defense counsel's representation of defendant respective to the deputy's location in the courtroom constituted ineffective assistance of counsel, see *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The trial court is to hear and decide the matter within 56 days of the Clerk's certification of this order. The parties shall promptly file with this Court a copy of all papers filed on remand. Appellant must also file with the Clerk of this Court copies of all orders entered on remand within 14 days after entry. The trial court is to cause a transcript of any hearing on remand to be prepared and filed within 21 days after completion of the proceedings.

This Court retains jurisdiction in the cause. Defendant-appellant may file a supplemental brief, limited to the issues raised on remand, within 21 days after entry of the trial court's order deciding the matter or 21 days after the transcript of the hearing on remand is filed, whichever is later. Plaintiff-appellee may file a supplemental brief in response within 14 days of service of defendant-appellant's brief. No replies shall be accepted without leave of the Court.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JAN 11 2017

Date

A handwritten signature in cursive script, reading 'Jerome W. Zimmer Jr.', written over a horizontal line.

Chief Clerk