

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY PAUL HOLLAND,

Defendant-Appellant.

UNPUBLISHED

November 30, 2006

No. 271793

Ingham Circuit Court

LC No. 06-000401-FC

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as on leave granted the Ingham Circuit Court’s pretrial order that granted the prosecution’s motion in limine to admit during its case-in-chief statements made by defendant to law enforcement officials pursuant to a written proffer or cooperation agreement. After filing this appeal, defendant entered an unconditional guilty plea to second-degree murder. Thereafter, consistent with a provision of the plea agreement, the parties filed in this Court a “Stipulation of Continuation,” urging this Court to render a decision on the merits of the issue pertaining to interpretation of the parties’ proffer letter. We dismiss this appeal as moot.

In recent years, the Michigan Supreme Court has expressly adopted federal doctrines of justiciability—standing, ripeness, and mootness—as derived from US Const, art III, § 1, which confers only “judicial power” on the courts and from US Const, art III, § 2, which limits the judicial power to “Cases” and “Controversies.” *Lee v Macomb Co Bd of Comm’rs*, 464 Mich 726, 735-741; 629 NW2d 900 (2001); *Nat’l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612-628; 684 NW2d 800 (2004); *Michigan Chiropractic Council v Comm’r of Ins*, 475 Mich 363, 369-374; 716 NW2d 561 (2006) (opinion of Young, J.). In doing so, our Supreme Court found justiciability doctrines to be fundamentally concerned with the constitutional principle of separation of powers. *Lee, supra* at 735-737, citing *Lewis v Casey*, 518 US 343, 349; 116 S Ct 2174; 135 L Ed 2d 606 (1996); *Lujan v Defenders of Wildlife*, 504 US 555, 559-560; 112 S Ct 2130; 119 L Ed 2d 351 (1992); *Raines v Byrd*, 521 US 811, 818, 820; 117 S Ct 2312; 138 L Ed 2d 849 (1997).

Most recently, in *Michigan Chiropractic Council, supra* at 371, Justice Young, speaking for the majority, clearly and forcefully held that justiciability doctrines “are constitutionally derived and jurisdictional in nature, because failure to satisfy their elements implicates the court’s constitutional authority to exercise only ‘judicial power’ and adjudicate only actual cases or controversies.” Furthermore, because they are “jurisdictional in nature, they may be raised at

any time and may not be waived by the parties.” *Id.* at 372. Importantly, Justice Young distinguished “subject-matter jurisdiction” from “constitutional jurisdiction,” noting that the former implicated a court’s authority to try a case of a certain kind or character, whereas the latter “flows from the structural boundaries delineated in our constitution.” *Id.* at 374 n 24.

“Mootness precludes the adjudication of a claim where the actual controversy no longer exists, such as where ‘the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.’” *Id.* at 371 n 15, quoting *Los Angeles Co v Davis*, 440 US 625, 631; 99 S Ct 1379; 59 L Ed 2d 642 (1979) (internal citations omitted). See also *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112-113; 649 NW2d 383 (2002). Like Justice Young in *Michigan Chiropractic Council*, *supra* at 372-373, we find particularly pertinent to the present facts the following statement by the United States Supreme Court in *California v San Pablo & T R Co*, 149 US 308, 313; 13 S Ct 876; 37 L Ed 747 (1893):

“The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. *No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.*” [Citation omitted; italics added.]

Given the foregoing, we are compelled to conclude that the present appeal is moot. Defendant’s unconditional guilty plea obviates any actual case or controversy. Significantly, ¶ 10 of defendant’s plea agreement provided: “It is expressly understood that this plea agreement is not conditional. Tim Holland shall not withdraw his plea based on any outcome of that pending appeal.” As our Supreme Court has held, mootness is a matter of constitutional jurisdiction that cannot be waived by the parties nor can they stipulate to expand the power of this Court. *Michigan Chiropractic Council*, *supra*.

To the extent that the parties would argue that the issue relating to the proffer agreement is not moot because it is one of public significance and capable of repetition yet evade judicial review, the argument is rejected. The United States Supreme Court has repeatedly held that the “capable of repetition” exception to the general rule of mootness applies only in exceptional situations, and generally only where a reasonable expectation exists that the same complaining party will be subjected to the same illegal action again. *City of Los Angeles v Lyons*, 461 US 95, 109; 103 S Ct 1660; 75 L Ed 2d 675 (1983); *Lane v Williams*, 455 US 624, 632; 102 S Ct 1322; 71 L Ed 2d 508 (1982); *Weinstein v Bradford*, 423 US 147, 149; 96 S Ct 347; 46 L Ed 2d 350 (1975). “[A] mere physical or theoretical possibility” of repetition is not sufficient; there must be a “‘demonstrated probability’ that the same controversy will recur involving the same complaining party.” *Murphy v Hunt*, 455 US 478, 482; 102 S Ct 1181; 71 L Ed 2d 353 (1982), quoting *Weinstein*, *supra*, 423 US at 149.

No exceptional situation exists here for this Court to render a decision on the merits. Most importantly, given the fact that defendant’s plea was unconditional, this case cannot satisfy

the requirement of a reasonable expectation that the same controversy will recur involving the same complaining party. That is, the exception might arguably apply if defendant had entered a conditional plea, leading to the distinct possibility that a favorable outcome on appeal might result in withdrawal of his plea. However, such is clearly not the case here. See *Sibron v New York*, 392 US 40, 57; 88 S Ct 1889; 20 L Ed 2d 917 (1968) (a criminal case is moot if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction); *United States v Pemberton*, 852 F2d 1241, 1243 (CA 9, 1988).

Moreover, while it may be true that the general issue of proffer agreements is one of jurisprudential significance, the proffer letter in this case was specifically drawn up to address defendant's particular circumstance, and any pronouncements from this Court as to the validity or applicability of the provisions of this letter would be obiter dictum. Our Supreme Court has declared: "The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them." *Risser v Hoyt*, 53 Mich 185, 193; 18 NW 611 (1884). Any holding from this Court as to the specific proffer letter in this case would constitute a mere advisory opinion, not binding precedent for future cases.

This appeal is dismissed as moot.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto