Order

Michigan Supreme Court
Lansing, Michigan

September 11, 2017

156353 & (83)

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC: 156353
COA: 332288
Wayne CC: 15-005228-FH

VIRGIL SMITH,
Defendant-Appellee.

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On order of the Court, the motion for immediate consideration is DENIED. No party is requesting an order to remove the defendant from the ballot, nor could we enter such an order since the relevant election official is not a party to this case. Therefore, we are not persuaded that this case requires expedited consideration. The application for leave to appeal the August 22, 2017 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing, among other issues: (1) whether a prosecutor's inclusion of a provision in a plea agreement that prohibits a defendant from holding public office violates the separation of powers, see Const 1963, art 3, § 2; see also *United States v Richmond*, 550 F Supp 605 (ED NY, 1982), or is void as against public policy, *Davies v Grossmont Union High Sch Dist*, 930 F2d 1390, 1392-1393 (CA 9, 1991); (2) whether the validity of the provision requiring the defendant to resign from public office was properly before the Court of Appeals since the defendant resigned from the Michigan Senate after the Wayne Circuit Court had struck that part of the plea agreement and, if so, whether it violates the separation of powers or is void as against public policy; and (3) whether the trial court abused its discretion by voiding terms of the plea agreement without affording the prosecutor an opportunity to withdraw from the agreement, see *People v Siebert*, 450 Mich 500, 504 (1995). The parties should not submit mere restatements of their application papers.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

MCCORMACK, VIVIANO, BERNSTEIN, and LARSEN, JJ. (*concurring*).

We write to explain why, in our view, the prosecutor's motion for immediate consideration is properly denied.

MCR 7.311(E), which governs motions for immediate consideration or to expedite proceedings, requires that "[t]he motion or an accompanying affidavit . . . explain why immediate consideration of the motion or expedited scheduling of the proceeding is necessary."

In her first motion for immediate consideration, filed on August 10, 2017, the prosecutor asserted as follows:

> A decision from this Court is necessary by August 22, 2017, so that defendant may make an informed decision whether he will continue to run for office and, if he chooses to run, the voters casting ballots will be aware whether defendant will be violating the plea agreement if elected and that a special election would be necessary in the event defendant resigns or is removed from office.

She repeats this basic argument in her second motion for immediate consideration, which is presently before the Court.[1] Although we were initially taken by this argument, upon closer examination and for the reasons that follow, it is entirely without merit.[2]

The obvious implication of the prosecutor's initial assertion that a decision was "necessary by August 22, 2017," was that a final decision on the issues raised in the prosecutor's application was needed from this Court before the deadline for the printing of the ballots.[3] We accepted this representation at face value, and we ordered expedited consideration as on reconsideration granted by the Court of Appeals. *People v Smith*, ___ Mich ___; 899 NW2d 407 (2017). But we got that wrong: expedited action was not warranted because no decision from the Court of Appeals, or from this Court today, could

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[1] The second motion, filed on August 24, 2017, states that "[a]lthough the candidates for the November election had to be certified and information sent to the printer for preparation of the ballots by August 22, 2017, an expedited decision . . . is still necessary [for the same reasons set forth in the prior motion]."

[2] And, for the same reasons, our previous order requiring expedited consideration of this case by the Court of Appeals was erroneous.

[3] In a footnote, the prosecutor asserted that the information regarding the timeline for printing of the ballots was obtained "from the City of Detroit Clerk's Office Department of Elections." No affidavit or other authority, however, was offered to support this assertion, or her request for expedited consideration as a whole.

affect whether defendant's name appears on the general-election ballot. No party requests that defendant's name be removed from the ballot, nor could we grant such relief since the relevant election official is not a party to this action (nor could she be).

We are also unpersuaded that an expedited ruling from this Court is necessary to give defendant an opportunity to "make an informed decision whether he will continue to run for office . . . ." Indeed, it is not entirely clear to us what the prosecution's representation means. However, to the extent the prosecutor is suggesting that an expedited ruling is necessary so that defendant can take some action to have his name removed from the ballot, it is not clear to us how, short of expiring (see MCL 168.326), defendant could accomplish this. Section 3-106 of the Detroit City Charter provides that, except as otherwise provided by the charter or a city ordinance, "state law applies to . . . the filing for office by candidates . . . ." Under MCL 168.322a, the state law governing election to city offices, a candidate for a city office is only permitted to withdraw if he or she files the appropriate notice within 3 days after the filing deadline (here that deadline was April 25, 2017). Thus, it appears the deadline for defendant to withdraw from the race has long since passed. And notably, while the prosecutor's concern that defendant be left with a full range of options is admirable, defendant himself has not expressed a similar concern or made any request for expedited review.

Next, the prosecutor's concern for the quality of information available to the general-election voters, a concern our colleagues in partial dissent apparently share, rings hollow. As an initial matter, it is not clear to us why, if the prosecutor believes this information is essential to the voters, she did not seek an expedited ruling in advance of the primary election so those voters, too, would have the benefit of it. The only difference now is not the voters' need for information, but that defendant came in second in the primary election and will therefore be on the general-election ballot. Moreover, the prosecutor represented to this Court that the voters need to be aware that "a special election would be necessary in the event defendant resigns or is removed from office." But that, like the ballot-access issue, seems to be a red herring since it appears that no special election would occur if defendant were to win the election, and were then to resign or be removed from his seat. Instead, under Section 3-105 of the Detroit City Charter, a replacement would be appointed by a vote of the Detroit City Council, and the election to fill the vacant position would occur at the next general election that is more than 180 days after the vacancy occurs.[4]

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[4] Section 3-105 of the Detroit City Charter provides, in relevant part, as follows:

> If a vacancy occurs on City Council it shall be filled by appointment, based on a two-thirds (2/3) vote of members. The person appointed shall serve until an elected member takes office. The election to fill the vacant

That leaves only the prosecutor's assertion that an expedited ruling from this Court is necessary so that "the voters casting ballots will be aware whether defendant will be violating the plea agreement if elected . . . ." However, we are not aware of any precedent for the notion that a court should expedite a ruling for such a purpose.[5] We are hesitant to conclude that courts and prosecutors should concern themselves with the quality or quantity of information available to voters, outside of enforcing the election laws and any attendant constitutional concerns. But even if such were our proper concern, it is not clear to us what information an expedited decision in this case would provide, beyond that which is already available to the voters, i.e., that this case might affect defendant's ability to complete his term. Even if we were to grant immediate consideration, peremptorily reverse the Court of Appeals, and hold that the plea agreement does not violate the Constitution or public policy, it is far from clear that the trial judge would be under any obligation to accept the plea agreement. Judges have wide discretion to reject any sentencing agreement, including this one. *See People v Siebert*, 450 Mich 500, 509 (1995) (opinion by BOYLE, J.) ("In the context of plea and sentence agreements, the court's interest in imposing a just sentence is protected by its right to reject any agreement, except that which invades the prosecutor's charging authority."). We would also need to consider whether to direct the trial court on remand to consider the dissenting Court of Appeals judge's assertion that the trial court failed to comply with MCR 6.302 because it "conducted no meaningful voir dire of defendant regarding the negotiation of the plea agreement, his voluntariness to enter the plea, or his now-purported unwillingness to do so." *People v Smith*, ___ Mich App ___, ___ (2017) (Docket No. 332288) (RIORDAN, J., dissenting); slip op at 3. If the dissenting judge is correct, the trial court would have another reason to reject the plea.

Of course, if the plea agreement were not accepted by the trial court, defendant would be presumed innocent and would be entitled to a trial by jury on all of the charges. See *People v Ferguson*, 383 Mich 645, 651 (1970) (opinion by T. E. BRENNAN, C.J.). And, if he were convicted at trial, he would then be entitled to appeal that conviction. Therefore, we are perplexed by the partial dissent's assertion that an immediate decision by this Court on the validity of the plea agreement would somehow leave the voters of Detroit "fully apprised" as to the eventual outcome of defendant's case (which necessarily will involve future decisions by the trial court, prosecutor, and defendant, and

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> position shall occur at the next general election to be held not sooner than one hundred eighty (180) days after occurrence of the vacancy.

[5] The partial dissent likewise cites no authority for its rather confusing charge that by taking time to carefully consider the important constitutional issues of first impression presented in the prosecutor's application for leave, we have "substantially transformed the decision-making environment for each of the parties, as well as for Detroit voters."

the resolution of any further appeals), or that a ruling by our Court after due deliberation, in the ordinary course, will leave the voters "entirely in the absence of such knowledge."[6]

For all of these reasons, we believe expedited consideration is not warranted in this case.

MARKMAN, C.J., (*concurring in part and dissenting in part*).

I concur with the Court's order directing the Clerk to schedule oral argument on whether to grant the application or to take other action. However, I respectfully dissent from the denial of the motion for immediate consideration and the 42-day timetable for the filing of supplemental briefs imposed by the Court's order, which preclude this Court from resolving this matter prior to votes being cast in the November election. I view this as a highly time-sensitive matter. This Court previously directed the Court of Appeals to expedite its resolution of this case within 10 days, and that Court met the severe time constraint imposed upon it. However, we now decline to impose a similar obligation of expedition upon ourselves. By failing to hold this Court to the same standard imposed on the Court of Appeals, the Court has substantially transformed the decision-making environment for each of the parties, as well as for Detroit voters. Had the prosecutor prevailed before this Court *today*, a straightforward communication of her intentions with regard to enforcement of the present plea bargain with the defendant might well have been sufficient in resolving the present dispute. If, however, she prevails in accordance with the Court's timetable, the prosecutor may be confronted with a situation in which she will have to assess whether to pursue renewed criminal charges and possibly proceed to trial against a potentially newly elected member of the City Council. Furthermore, if elected, every day that defendant serves on the Council will be one more day that the prosecutor has lost some benefit of her plea bargain. Concerning defendant, had this case been resolved before this Court *today*, he would no longer be undertaking a potentially career-defining risk in deciding whether to present himself for public office and face possible criminal prosecution and an increased term of incarceration, or to comply with the apparent terms of his plea bargain by ceasing his campaign for office. And concerning the people of Detroit, who are more than bystanders to this dispute, had the case been resolved by this Court *today*, they would have been fully apprised as to whether one of the candidates on their ballot might be unable to serve in office and would have to be replaced after election (by an appointment of the Council) as the result of either a plea bargain or a successful criminal prosecution, thereby depriving the people of their right to directly choose their own Council member. Under the Court's timetable, however, Detroit voters will be required to cast their

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[6] The partial dissent also makes the rather serious allegation that we are "depriving the people of their right to directly choose their own Council member." It will suffice here to point out that the voters of Detroit made the democratic choice to fill vacancies by appointment followed by election, when they approved their current charter in 2011.

ballots entirely in the absence of such knowledge. Each of these individual predicaments implicate legitimately *public* concerns-- the impact of a plea agreement; the circumstances under which a citizen may run for public office; the extent to which the public is entitled to know the fundamental penal circumstances of those who would represent them. Because, in my judgment, there are substantial consequences pertaining to matters of public interest that arise from the Court's decision not to treat this case with greater expedition, I respectfully dissent from the denial of the motion for immediate consideration and would instead grant that motion and enter an order providing for a far more prompt resolution.

ZAHRA and WILDER, JJ., join the statement of MARKMAN, C.J.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 11, 2017

Clerk

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