STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

CITY OF ANN ARBOR,

Intervening Plaintiff-Appellant,

and

ABDUL GHDIER ELKHOJA,

Defendant-Appellee.

FOR PUBLICATION
May 21, 2002
9:15 a.m.

No. 224126
Washtenaw Circuit Court
LC No. 99-012310-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ABDUL GHDIER ELKHOJA,

Defendant-Appellant.

No. 228734
Washtenaw Circuit Court
LC No. 99-012310-FC

Updated Copy
August 30, 2002

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

SAWYER, J. (*concurring in part and dissenting in part*).

While I agree with the majority's affirmance of defendant's convictions, and with the conclusion in part I(A) of the majority opinion that the city has standing to challenge the trial court's discovery order, I respectfully dissent from the majority's conclusion that the trial court correctly concluded that defendant was entitled to the Law Enforcement Information Network (LEIN) information on the prosecutor's civilian witnesses.

It is fairly clear to me that the trial court erred in ordering LEIN information to be gathered for defendant. By statute, LEIN information may not be given to a private person for

any purpose and doing so is a criminal offense under MCL 28.214, which provides in relevant part:

> (2) A person shall not disclose information from the law enforcement information network to a private entity for any purpose, including, but not limited to, the enforcement of child support programs.
>
> (3) A person shall not disclose information from the law enforcement information network in a manner that is not authorized by law or rule.
>
> (4) A person who violates subsection (2) or (3) is:
>
> (a) For a first offense, guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both.
>
> (b) For a second or subsequent offense, guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

No law or rule has been identified that authorizes the disclosure of the LEIN information as ordered by the trial court. Thus, the trial court commanded the city and its employees to commit criminal offenses.

The majority puts great stock in this Court's opinion in *People v Mack*, 218 Mich App 359; 554 NW2d 324 (1996), nullified 455 Mich 865 (1997). Although the majority acknowledges that the Supreme Court ordered that *Mack* was to have no precedential effect, it apparently finds the analysis to be persuasive. The majority correctly states that, because the Supreme Court merely withdrew the precedential affect of *Mack*, rather than reversing *Mack*, this Court is not precluded from reaching the same conclusion as did the panel in *Mack*. However, it would certainly seem reasonable to conclude that the Supreme Court found the reasoning in *Mack* to be suspect.

Indeed, in looking at the rationale of *Mack*, 218 Mich 363, relied on by the majority, I see that the reasoning is, in fact, suspect. *Mack* reasons that 1981 AACS, R 28.5208(4) prohibits dissemination of LEIN information to a person or entity "'which is not legally authorized to have access to this information.'" The *Mack* panel then rationalizes that, because dissemination was ordered by the court, that person or entity is now authorized by law to have access to the information. This conclusion is reached without any reference to the authority by which the court orders the information to be released and without regard to MCL 28.214, which specifically prohibits dissemination to a private entity. The reasoning in *Mack* is circular: the trial court has the authority to order release of the information because it entered an order to release the information.

The majority also puts stock in the fact that the prosecutor would be obligated to turn over only exculpatory information to defendant. This, however, does not address the central issue whether there is any authority to require either the prosecutor or the city to seek out such information. As this Court stated in *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423

(1991), the prosecutor "is not required to undertake discovery on behalf of a defendant." See also *People v McWhorter*, 150 Mich App 826, 832; 389 NW2d 499 (1986). Thus, while I might agree that the prosecutor has an obligation to turn over information regarding a witness' criminal background that would be beneficial to the defendant *and* that the prosecutor otherwise has in his file, I am aware of no authority that supports the proposition that the prosecutor is obligated to seek out such information.

Finally, with respect to the majority's conclusion that the trial court properly concluded that witnesses would be precluded from testifying if the prosecutor and the city did not comply with the court's discovery order, I do not believe that the city is a proper party to raise this issue. While the city has standing to challenge the discovery order as it pertains to the city, the prosecutor is the proper party to challenge sanctions that the trial court imposes with regard to the trial itself. The city may only challenge sanctions imposed against it, if any.

In sum, the prosecutor is under no obligation to engage in discovery for a defendant. More to the point, the prosecutor, and the city for that matter, is specifically prohibited by statute from engaging in the type of discovery ordered by the trial court. Accordingly, I would conclude that the trial court erred in ordering the city and its employees to engage in criminal behavior. I would reverse.

/s/ David H. Sawyer