STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON EARL WARNER,

Defendant-Appellant.

FOR PUBLICATION
October 7, 2021

No. 351791
Eaton Circuit Court
LC No. 2016-020296-FC

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

BORRELLO, J (*concurring in result*).

I concur in the result reached by the majority but write separately to express my strong disagreement with the majority's attempt to overturn law set forth by a superior court under the guise of labeling a holding by our Supreme Court "dicta." Here, the majority seeks to cast aside prior holdings by our Supreme Court and this Court which held that following entry of an order of *nolle prosequi*, the prosecution was required to begin the proceedings anew. In their opinion, the majority concludes that it was proper for the trial court to allow the prosecution to reinstate the CSC-I charge against defendant by amending the information and without remanding to the district court for a new preliminary examination. The majority arrives at their result by erroneously concluding that the procedure to be undertaken in such cases as previously set forth in *People v Curtis*, 389 Mich 698; 209 NW2d 243 (1973) was meaningless dicta. It is here where I take issue with my colleagues. It is no small detail for an inferior court to begin labeling the holdings of a superior court dicta, especially in cases, where, like here, the superior court has reaffirmed the very holding now labeled dicta by an inferior court. As will be pointed out below, our Supreme reaffirmed their holding in *Curtis* in 2010. Following their affirmance, this Court published a case based on that very "dicta." Unfortunately, because the majority's precepts of what constitutes "dicta" are erroneous, the entirety of their analysis on this issue is rife with error. Unlike the majority, I do not believe we need to conjure an opinion from a blank slate, nor do I see a legal or policy basis to casually dismantle a half century of legal precedent set forth by a superior court. Therefore, contrary to the analysis employed by the majority, I conclude, that binding precedent from our Supreme Court dictates that the procedure employed here by the trial court was erroneous. Nonetheless, I further conclude that the error was harmless and would affirm the result on that basis.

Our Supreme Court held in *Curtis*, 389 Mich at 706 that the forerunner to MCL 767.29[1] "was enacted to protect the interests of the criminal defendant" and "effectively overruled the old common law rules permitting a prosecutor to retract a Nolle prosequi and immediately proceed to trial on the same indictment." The *Curtis* Court further held that "[t]his statute then had the effect of requiring a prosecuting attorney who entered a Nolle prosequi after indictment to obtain a new indictment and begin proceedings anew if he wished to reinstate the original charge." *Curtis*, 389 Mich at 706.

In this case, the trial court permitted the prosecution to avoid following this procedure by allowing the prosecution to amend the information to reinstate the CSC-I charge that had previously been dismissed by a *nolle prosequi* order. Under *Curtis*, the prosecution should have been required "to obtain a new indictment and begin proceedings anew" in order to reinstate the original CSC-I charge. *Curtis*, 389 Mich at 706. The failure to follow this procedure was error. *Id*.

The majority avoids this result by concluding that the rule quoted above from *Curtis*, requiring a prosecutor to "begin proceedings anew" in order to reinstate a charge that had been dismissed by *nolle prosequi* after indictment, was dicta. They are wrong. "[O]biter dictum" is "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001) (second alteration in original; quotation marks and citation omitted). However, this Court has also recognized that "[t]he Michigan Supreme Court has declared . . . that [w]hen a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." *Id*. (quotation marks and citation omitted; second alteration in original).

In *Curtis*, the Court's pronouncement of the rule requiring prosecutors to begin anew when reinstating a charge that had been dismissed by *nolle prosequi* was made in the context of the Court's analysis of the history of MCL 767.29 and the common law applicable to *nolle prosequi* before that statutory provision was enacted. *Curtis*, 389 Mich at 704-706. The Court was required to construe MCL 767.29 because the "appellee, and the Honorable Circuit Court Judge, by means of his order of superintending control, [took] the position that the matter is determined by MCLA 767.29; MSA 28.969 . . . ." *Curtis*, 389 Mich at 703.

The *Curtis* Court explained that in order to answer the question presented—i.e. "whether or not a District Court judge may grant an order of Nolle prosequi of any felony charge before him, upon motion of the prosecuting attorney, or whether that discretion is reserved to Circuit Court"—a "review of the history of the statute involved and the term 'nolle prosequi' itself is necessary for an understanding of what the People of this State attempted to accomplish by first enacting this statute in 1846." *Curtis*, 389 Mich at 703-704. In the context of this analysis, the

[1] The *Curtis* Court noted that this statute had "remained virtually unchanged since its first adoption in 1846." *Curtis*, 389 Mich at 704.

Court determined that the statute changed the prior existing common law regarding *nolle prosequi*[2] by requiring all *nolle prosequi* to be entered on the record and further requiring prosecutors to "obtain a new indictment and begin proceedings anew" before reinstating any charge that had been previously dismissed by an order of *nolle prosequi* after indictment. *Id*. at 706. After making this determination, the *Curtis* Court further concluded:

> It does not appear, therefore, that the Legislature in any way attempted to restrict the use of Nolle prosequi in those circumstances where the prosecutor could not, solely at his discretion, reinstate the case for immediate trial. In situations akin to the one before us, this could not be done in any event as no indictment nor information had yet been filed with the trial court. The defendant still retained the right to a grand jury proceeding or a preliminary examination.
>
> We thus hold that MCLA 767.29; MSA 28.969 applies only to proceedings held in Circuit Court after the indictment or information is filed with that court. [*Id*. at 706-707.]

Our Supreme Court in *Curtis* proceeded to analyze other sub-issues before ultimately holding that "the Circuit Court, in this situation, committed error in issuing its order of superintending control requiring that an examination be held on the higher charge. As to that count, the prosecuting attorney had already entered a Nolle prosequi, with leave of the district court. We now state that such an action was within the discretion of the District Court judge." *Id*. at 710-711.

It is thus clear from the Supreme Court's opinion in *Curtis* that the issue of how a prosecutor was to reinstate a charge that had been previously dismissed by a *nolle prosequi* order was intentionally taken up and decided by the Court, and it is also clear from the opinion that this issue was necessary to the decision or, at a minimum, germane to the controversy. Contrary to the view taken by the majority, our Supreme Court in *Curtis* expressed in no uncertain terms that this issue was necessary and germane to its analysis. Accordingly, the rule that a prosecutor in this situation must "begin proceedings anew" is not dicta but is instead a binding decision by a superior court. *Higuera*, 244 Mich App at 437. This conclusion is further bolstered by the fact that our Supreme Court has cited *Curtis* for this same rule. See *People v Richmond*, 486 Mich 29, 36 n 3; 782 NW2d 187 (2010) ("If the prosecution's voluntary dismissal was a *nolle prosequi* under MCL 767.29, the prosecution could have reinstated the 'original charge on the basis of obtaining a new indictment . . . .' *People v Curtis*, 389 Mich. 698, 706, 209 N.W.2d 243 (1973).") (ellipsis in original).

The majority does not stop at its pronouncement that our Supreme Court's rule announced in *Curtis* was dicta; they go further by criticizing the soundness of our Supreme Court's decision

[2] The *Curtis* Court summarized the common law applicable to *nolle prosequi* as it existed prior to the enactment of the statutory provision at issue as follows: "A further review of the common law reveals that the Nolle prosequi at that time could be retracted at any time, and must have become a Matter of record to prevent a revival of proceedings on the original indictment." *Curtis*, 389 Mich at 705-706.

in *Curtis*, characterizing our Supreme Court's construction of the statute as a comment that is not precedential or persuasive because (although the majority attempts to deny that this is their reason) the Supreme Court effectively read additional language into the statute. However, our Supreme Court has been abundantly clear in stating that "[i]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 192-193; 880 NW2d 765 (2016) (quotation marks and citation omitted).

Additionally, the majority relies on MCR 6.112(H), which provides that the "court before, during, or after trial may permit the prosecutor to amend the information or the notice of intent to seek enhanced sentence unless the proposed amendment would unfairly surprise or prejudice the defendant." However, this court rule is silent regarding the procedure when the prosecution seeks to reinstate a charge that has previously been dismissed by an order of *nolle prosequi* such as occurred in the instant case. Thus, the circumstances at issue in this case are squarely controlled by our Supreme Court's holding in *Curtis* and the court rule is inapplicable.

Having concluded that the procedure followed in this case was erroneous does not, however, end the analysis. The practical effect of this error was to deny defendant a new preliminary examination before the CSC-I charge was reinstated. As this Court concluded in *People v McGee*, 258 Mich App 683, 685; 672 NW2d 191 (2003), "in light of defendant's subsequent conviction, any error in failing to conduct a preliminary examination does not warrant reversal because defendant has not shown that the alleged error affected the trial." The same is true in this case. Defendant was subsequently convicted of CSC-I following his jury trial. Thus, the failure to conduct a preliminary examination as a result of the improper procedure followed for reinstating the CSC-I charge was harmless. *Id*. For that reason, I would conclude that reversal is not required on this ground.

/s/ Stephen L. Borrello