

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 23, 2012

v

KWAME KILPATRICK,

Defendant-Appellant.

No. 304991
Wayne Circuit Court
LC No. 08-010496-FH

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

In this appeal on remand from our Supreme Court as on leave granted¹, defendant, Kwame Kilpatrick, challenges the constitutionality of MCL 780.768, which served as the statutory basis for the trial court’s June 15, 2011, order requiring all proceeds realized from the sale of Kilpatrick’s book be placed into escrow and dispersed to pay restitution to the city of Detroit. We remand for further proceedings.

“The constitutionality of a statute is a question of law that this Court reviews de novo.” *People v Douglas*, 295 Mich App 129, 134; 813 NW2d 337 (2011). “Statutes are presumed to be constitutional and must be so construed unless their unconstitutionality is readily apparent.” *People v Russell*, 266 Mich App 307, 310; 703 NW2d 107 (2005) (citation omitted). As recognized by our Supreme Court, “We exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict.” *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007), quoting *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). “Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.” *Id.* at 423, quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).

At the outset, we are mindful of our Supreme Court’s admonition that “[t]his Court will not unnecessarily decide constitutional issues, and it is an undisputed principle of judicial review

¹ *People v Kilpatrick*, 491 Mich 851; 808 NW2d 792 (2012).

that questions of constitutionality should not be decided if the case may be disposed of on other grounds.” *People v Mercer*, 482 Mich 884; 752 NW2d 470 (2008) (citation omitted). While the prosecutor sought an order premised on MCL 780.768 requiring Kilpatrick to forfeit all proceeds realized from the sale of his book and Kilpatrick challenges the constitutionality of that statutory provision both in the trial court and on appeal, we find an alternative basis for our ruling which renders unnecessary an analysis of the constitutionality of MCL 780.768.

The order entered following the 2009 restitution hearing clearly required Kilpatrick to engage in monthly accountings of his financial circumstances, including a detailing of all income and assets. In conjunction with this same order, Kilpatrick was, at a minimum, required to “continue to pay 30% of earned income and gifts,” which would be applicable to any income generated from his authorship of the book or monies transferred to Kilpatrick from his sister and/or AKtion following payment from Creative Publishing. This Court has previously upheld the trial court’s modification of Kilpatrick’s restitution requirements, which mandated that he make additional payments following his failure to disclose various monetary gifts to his family. *People v Kilpatrick*, unpublished order of the Court of Appeals, entered March 5, 2010 (Docket No. 296559). A determination that Kilpatrick’s failure to disclose his authorship, the anticipated sale of the book, and any proceeds received by AKtion from the publisher, without a clear contractual indication of ownership rights, could be construed as either a fraud on the court or a fraudulent conveyance requiring modification of his restitution requirements consistent with the trial court’s previous modification of the restitution order.

Further, the terms of his agreement with the Parole Board may also render moot the necessity of this appeal. *People v Kilpatrick*, unpublished order of the Court of Appeals, entered August 30, 2011 (Docket No. 304991) (Talbot, J, dissenting). Despite testimony at numerous hearings by employees of the Michigan Department of Corrections, there is no complete or definitive listing within the lower court record of the actual agreement or conditions delineated by the Parole Board with Kilpatrick that might address any income realized from his media-related pursuits (i.e., speaking engagements, etc.). While there is no indication that the Department of Corrections or Parole Board had received or were aware of any contracts specifically pertaining to the authorship and publication of this book, that does not preclude the existence of a generic or broad condition in the Parole Board order that would permit confiscation of the proceeds to meet his restitution obligation. Kilpatrick’s counsel recognized and acknowledged his client’s restitution obligation, stating at times during the escrow hearing:

Mr. Kilpatrick wants to pay restitution. If he’s paroled it’s going to be a condition of his parole.

Mr. Kilpatrick has every intention to pay restitution. The parole board, when they parole him . . . , will have every intention to make that as a condition of his parole, pursuant to your order, Judge. I think he would have to, pursuant to the Crime Victim’s Rights Act.

Because this Court is unable to ascertain if the terms of his parole would encompass the proceeds of his book deal and obviate the necessity of the current proceedings, we remand this matter for an investigation of the specific parole requirements imposed on or agreed to by Kilpatrick.

As a related matter, we note that in an article written by Corey Williams of the Associated Press, Kilpatrick was quoted as stating, “Any money that I make – any dime, any penny I make – will go to pay restitution.” If that quote is accurate, defendant has waived his objections to the order of escrow, which provides that defendant’s profits from the book be paid toward his restitution. Because defendant has publicly stated that he is committed to make restitution, he should not be permitted to complain about a court order that facilitates that restitution, especially before the over \$860,000, which is owed, has been paid.

Additional concerns exist regarding substantive failures by all involved in this matter. First, the prosecutor failed to prove that Kilpatrick was to actually receive funds from the sale of the book. While it is logical, and consistent with Kilpatrick’s history of avoiding the disclosure of his true income and assets for use in paying the ordered restitution, to assume that he was to benefit financially from the publication of this book, there has been no such demonstration by the prosecutor. While it is highly doubtful that Kilpatrick engaged in this endeavor for purely altruistic reasons, there is no contract in evidence between Kilpatrick and any entity regarding the writing of this book or the assignment of his rights.

Second, Kilpatrick appeals to this Court without having actually admitted that he is entitled to any proceeds from this publication. If Kilpatrick does not assert having an entitlement to proceeds from the book, the issue is arguably moot as this Court cannot fashion a remedy if there is no demonstrable harm. “An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy.” *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). As discussed by our Supreme Court in *People v Richmond*, 486 Mich 29, 34-35; 782 NW2d 187 (2010), amended 486 Mich 1041 (2010) (citations and quotation marks and brackets omitted):

It is well established that a court will not decide moot issues. This is because it is the principal duty of this Court . . . to decide actual cases and controversies. That is, the judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. As a result, this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before it. Although an issue is moot, however, it is nevertheless justiciable if the issue is one of public significance that is likely to recur, yet evade judicial review. It is universally understood . . . that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, . . . or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. Accordingly, a case is moot when it presents nothing but abstract questions of law which do not rest upon existing facts or rights.

While appellate counsel, at oral argument, conceded that Kilpatrick was to receive funds from the publication of this book pursuant to a verbal contract, he simultaneously averred that Kilpatrick’s rights to the book proceeds were forfeited before any agreement regarding his potential share of profits was actually finalized. Appellate counsel also acknowledged that Kilpatrick verbally assigned his interests in the book and any assumed proceeds to his sister, but without details regarding this alleged agreement Kilpatrick is unable to demonstrate that any

right he might retain has been impacted by the lower court's ruling. In effect, Kilpatrick must either admit and delineate the details of his interest in the book proceeds and, thus, subject himself to forfeit the proceeds to pay his restitution obligation or forego his right to complain of injustice because he has failed to demonstrate a legal injury.

The trial court is also not without fault. During the hearing in this matter, the prosecutor sought to place Kilpatrick under oath and directly question him regarding the financial and literary arrangements for this publication. The prosecutor, through direct questioning, could have established the existence of a contract, an expectation for reimbursement by Kilpatrick, or possible subterfuge in seeking to avoid receipt of income that would be designated for restitution. Unfathomably, despite the absence of any contracts directly involving Kilpatrick, the trial court declined, finding it unnecessary. This is nonsensical as there was no definitive proof that Kilpatrick was to receive proceeds from the book without this testimony. The trial court's order is also overly broad and requires that proceeds received from the sale of the book be forfeited not only by Kilpatrick but also from "any of his agents, assignees, representatives, family members, corporations or other entities controlled by family members, including AKtion Enterprises, LLC." Arguably, this precludes payment to his co-author, who may have entitlement to compensation for work performed. The order infringes on the rights of individuals or entities that were not actually parties to the underlying action and these individuals or entities did not seek to intervene or formally participate in any of the lower court proceedings.

While this Court understands the frustration of the trial court and prosecutor in trying to obtain a forthright answer from Kilpatrick regarding his assets, income and activities, until a factual basis is established to support the forfeiture, it is premature and unnecessary to address the constitutionality of the challenged statute.

We also reject the prosecution's assertion of the fugitive disentitlement doctrine to the facts and circumstances of this case. The fugitive disentitlement doctrine² was first applied in the federal courts following the United States Supreme Court's ruling in *Smith v United States*, 94 US 97; 24 L Ed 32 (1876). *Prevot v Prevot*, 59 F3d 556, 562 (CA 6, 1995). In general terms, the doctrine stands for the proposition that a fugitive from justice cannot "reap the benefit of the judicial process without subjecting himself to an adverse determination." *United States v Hopkinton*, 852 F2d 636, 643 (CA 1, 1988), superseded by statute *United States v Mondragon*, 313 F3d 862 (CA 4, 2002). While a fugitive's status "does not strip the case of its character as an adjudicable case or controversy . . . it disentitles the defendant to call upon the resources of the Court for determination of his claims." *Molinaro v New Jersey*, 396 US 365, 366; 90 S Ct 498; 24 L Ed 2d 586 (1970). The doctrine "does [not] . . . implicate constitutional privileges; rather it rests upon the supervisory power of the federal court to administer the federal court system." *Prevot*, 59 F3d at 562 n 6 (citation omitted). The reasons underpinning this doctrine have been identified to primarily include the following:

² The Michigan Supreme Court has recognized this doctrine in, at least, the civil context. *Friend v Friend*, 485 Mich 1019, 1020; 776 NW2d 306 (2010) (Corrigan, J, concurring); *Friend v Friend*, 486 Mich 1035, 1036; 783 NW2d 122 (2010) (Corrigan, J, dissenting).

First, so long as the party cannot be found, the judgment on review may be impossible to enforce. This was the rationale of the first case to acknowledge the doctrine, *Smith v United States*, [94 US] at 97: “It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render.” See also *Bonahan v Nebraska*, 125 US 692; 8 S Ct 1390; 31 L Ed 854 (1887); *Eisler v United States*, 338 US 189; 69 S Ct 1453; 93 L Ed 1897 (1949). Second, we have said an appellant’s escape “disentitles” him “to call upon the resources of the Court for determination of his claims.” *Molinaro v New Jersey*, 396 US 365, 366; 90 S Ct 498, 499; 24 L Ed 2d 586 (1970) (*per curiam*). [*Degen v United States*, 517 US 820, 824; 116 S Ct 1777; 135 L Ed 2d 102 (1996), superseded by statute *United States v All Funds on Deposit at Citigroup Smith Barney Account No 600-00338*, 617 F Supp 2d 103 (ED NY, 2007).]³

The *Degen* Court, however, admonished overzealous use of the doctrine by recognizing the existence of alternative means to assure the cooperation of a recalcitrant defendant and to impose sanctions short of dismissal. *Degen*, 517 US 820 at 827. The United States Supreme Court has specifically indicated, “[W]e have held it unconstitutional to use disentitlement similar to this as punishment for rebellion against the United States, or, in at least one instance, for contempt of court.” *Id.* at 828 (internal citation omitted).

The prosecution’s contention regarding the applicability of this doctrine to preclude Kilpatrick’s appeal constitutes a highly strained use, at best. Kilpatrick does not meet the status of a fugitive as historically used in disentitlement cases. While he has certainly failed to comply with court orders and has been less than honest or forthcoming in the myriad of hearings conducted overall in this matter, he has appeared and participated in the hearings. Applying the doctrine to the circumstances presented here is questionable as,

[i]t remains the case, however, that the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a resource to rules foreclosing consideration of claims on the merits. [*Degen*, 517 US at 828.]

Further, as noted by the United States Supreme Court, alternative mechanisms exist and are available to this Court to secure the enforcement of its orders, making the use of this doctrine unnecessary and contrary to its intended purpose. *Id.* at 826, 829.

³ We note that “Congress [has] enacted the fugitive disentitlement statute as part of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA),” 28 USC 2466. *United States v \$6,190.00 in United States Currency*, 581 F3d 881, 885-886 (CA 9, 2009).

Remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder