

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROGER JAMES PACER,

Defendant-Appellee.

UNPUBLISHED

August 22, 2000

No. 218993

Oakland Circuit Court

LC No. 98-DA7018-AR

Before: Wilder, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Defendant was initially charged with domestic violence, MCL 750.81(2); MSA 28.276(2), for personal injuries sustained by complainant, his girlfriend. On the date set for a bench trial, the prosecution dismissed the original complaint and filed an amended complaint charging defendant with domestic assault and battery, second offense, MCL 750.81(3); MSA 28.276(3). In response, defense counsel informed the district court that complainant did not wish to pursue the charges and was unwilling to testify against defendant. The district court then stated that if complainant did not appear at a scheduled pretrial conference, the court would dismiss the case. When complainant failed to appear at the pretrial conference, the district court did indeed dismiss the case, explaining that it was taking such action because “[t]he victim is not here pursuant to the Court’s order.”

Thereafter, the prosecution appealed this decision to the circuit court. The circuit court concluded that the district court had the authority to both compel the attendance of a complainant at a pretrial conference and to dismiss the case if the complainant fails to appear. The circuit court then remanded the case to the district court for a determination of whether a subpoena was issued for complainant’s appearance at the pretrial conference. The prosecution appeals by leave granted. We reverse.

“This Court reviews a trial court’s ruling regarding a motion to dismiss for an abuse of discretion.” *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). The prosecution argues that the district court was without the authority to compel complainant’s appearance at the pretrial conference, and that, in any event, dismissal was an unwarranted intrusion upon the prosecutor’s

authority to proceed with the case. Because we agree with the second of these two propositions, we need not and choose not to address the former.

As this Court observed in *People v Morrow*, 214 Mich App 158; 542 NW2d 324 (1995),¹ “the decision whether to dismiss a case or proceed to trial is within the prosecutor’s sole discretion.” *Id.* at 165. “[T]he trial court’s authority over the discharge of the prosecutor’s duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires.” *Id.* at 161. The *Morrow* Court noted that a sole complainant’s “decision to recant before trial should not alone preclude the prosecution from reaching a jury.” *Id.* at 164.

In support of its holding, the *Morrow* Court quoted from *Commonwealth v Cundiff*, 149 KY 37; 147 SW 767 (1912). We believe the legal principles expounded upon in *Cundiff* deserve repeating:

The judge does not represent the state any more than he does the defendant in the prosecution. His right to control the prosecution goes only to the extent of determining whether or not the indictment is good on demurrer. If he holds it to be a good indictment, he is without power to direct its dismissal. Nor does the fact that the injured party . . . want[s] the prosecution dismissed change the situation. *The prosecution is not for their benefit, but for the public good.* While the party, who has suffered the immediate wrong at the hands of the accused, may be of material aid . . . in imposing upon the accused the punishment, which his offense merits, she is without power to direct or control the prosecution, much less to have the court discontinue it.

* * *

To uphold such a ruling, would be to put it in the power of a court to defeat the ends of justice at any time, where it was shown that the injured party did not desire the case prosecuted. If such rule obtained, where one had committed a crime, it would only be necessary for him to procure the consent of the injured party or of the relatives of the injured party, that the prosecution should be dismissed. Thus, a premium would be placed upon crime; for, not only would the original crime go unpunished, but the action of the court would be frequently brought about by the practice of corrupt or improper methods in procuring from the prosecuting witness, or her relative, the desired

¹ In *Morrow*, the complainant recanted her testimony at the pretrial conference. Under oath, the complainant “stated that she consented to have sex with defendant and that she lied during the preliminary examination about defendant forcibly raping her.” Immediately thereafter, the trial court sua sponte dismissed the case with prejudice.” *Morrow, supra* at 159. This Court reversed, concluding that “the trial court exceeded its authority and impinged on the prosecutor’s executive-branch powers when it dismissed the information against defendant.” *Id.*

request that the prosecution be terminated or discontinued. [*Cundiff, supra* at 39-40 (emphasis added).]

The importance of not allowing the victim to determine whether a prosecution goes forward is particularly acute in a domestic violence case. As numerous courts and commentators have observed, victims of domestic violence often recant or minimize what they have told the police. See, e.g., *Commonwealth v DiMonte*, 427 Mass 233, 244; 692 NE2d 45 (1998) (“As often occurs in cases of domestic violence, the victim of the abuse did not testify.”); *Prosecutorial use of expert testimony in domestic violence cases*, 8 Colum J Gender & L 67, 68 (1998) (observing that in domestic violence cases, prosecutors are often faced with exceptional challenges, including “victims who refuse to testify, who recant previous statements”).

We note that in the instant case, there was no evidence of complainant’s feelings about defendant’s prosecution other than defense counsel’s representations that she did not want the prosecution to proceed. Regardless, the course of this prosecution cannot be dependent upon the wishes of the complaining witness. *Morrow, supra* at 164. Accordingly, because the district court exceeded its authority when it dismissed this matter at pretrial, we conclude that the circuit court abused its discretion in affirming the district court’s dismissal of this case.

Finally, we reject the prosecution’s assertion that this matter need be assigned to a different judge on remand. We see nothing in the record to indicate that the district court judge to whom the case was originally assigned will not be able to put aside any previously held opinions and conclusions and preside justly over the matter. *People v Pillar*, 233 Mich App 267, 271; 590 NW2d 622 (1998).

Reversed and remanded to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Donald E. Holbrook, Jr.

/s/ Gary R. McDonald