

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

PAUL THOMAS GABRIEL,

Defendant-Appellee.

UNPUBLISHED

December 17, 2020

No. 351570

Muskegon Circuit Court

LC No. 19-000140-FC

Before: RONAYNE KRAUSE, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

The prosecution appeals by leave granted¹ the trial court’s order granting defendant’s motion to disqualify the Muskegon County Prosecutor’s Office from trying this criminal case. For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand.

I. BACKGROUND

The prosecution charged defendant with open murder, MCL 750.316, for shooting and killing the victim, Anthony Federighe. Defendant claimed he shot the victim in self-defense. Following his preliminary hearing, defendant moved to disqualify the Muskegon County Prosecutor’s Office. Defendant argued that before the shooting, he called the prosecutor’s office and spoke to assistant prosecutor Brian Hosticka. Defendant alleged that Hosticka gave him permission to shoot the victim’s father, Tony Federighe, with whom he had many confrontations. Afterward, defendant sent text messages to two individuals repeating what Hosticka told him. The prosecution intended to admit those text messages to prove that when defendant shot the victim, it was premediated and not in self-defense. Defendant claimed that Hosticka’s testimony would be necessary at trial to provide context to the text messages. Defendant also claimed that the testimony of Beth DeYoung, a legal secretary at the office, would also be called to testify because she spoke to defendant about Tony during a private encounter, and her conversation with defendant

¹ See *People v Gabriel*, unpublished order of the Court of Appeals, entered July 23, 2020 (Docket No. 351570).

during that encounter would also provide context to the text messages. Defendant argued that having DeYoung and Hosticka testify at trial would create the appearance of impropriety because their superior, Matthew Roberts, who holds the title of “Chief Trial Attorney” and has supervisory authority over both potential witnesses, would have to cross-examine them.

The prosecution filed an application for leave to appeal and moved to remand this case for an evidentiary hearing, which was granted by this Court. *People v Gabriel*, unpublished order of the Court of Appeals, entered March 12, 2020 (Docket No. 351570). During the evidentiary hearing, DeYoung explained that she knew Tony, the victim, and the victim’s mother because her son previously played hockey with the victim. She testified that she encountered defendant by chance while dining, and because defendant asked about Tony, she shared with him two personal encounters that she had with Tony in which he acted aggressively. Hosticka testified that defendant called the prosecutor’s office to discuss issues he was having with Tony. Hosticka testified that during that conversation, defendant mentioned that he owned a gun, and Hosticka told defendant that he did not blame him for doing so. Hosticka testified that his statement regarding not blaming defendant for doing so was in reference to defendant owning a gun, not in reference to defendant shooting anyone. Hosticka testified he never gave defendant permission to shoot anyone, and he recommended that defendant call the police if he had additional encounters with Tony. At the end of the evidentiary hearing, the trial court again concluded that it had the authority to rule on defendant’s motion, and reaffirmed its order disqualifying the prosecutor’s office. This appeal ensued.

II. ANALYSIS

In their appeal, the prosecution makes two arguments. First, they argue that the separation-of-powers doctrine precludes trial courts from ruling on motions to disqualify prosecutors. According to the prosecutor, the trial court lacked the constitutional authority to disqualify the Muskegon County Prosecutor’s Office because MCL 49.160 no longer permits trial courts to disqualify prosecutors because of conflicts of interest.

This Court reviews for an abuse of discretion the trial court’s decision regarding a defendant’s motion to disqualify a prosecutor. *People v Petri*, 279 Mich App 407, 423-424; 760 NW2d 882 (2008), lv den 482 Mich 1186 (2008), recon den 483 Mich 917 (2009). “A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes.” *Id.* at 421. “[T]he determination whether a conflict of interest exists sufficient to require disqualification of the prosecuting attorney is a question of fact that is reviewed on appeal for clear error.” *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). “Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.* This Court reviews de novo constitutional issues and “the interpretation and application of statutes.” *People v Bosca*, 310 Mich App 1, 56; 871 NW2d 307 (2015) (quotation marks and citation omitted).

The prosecution first argues that the separation-of-powers doctrine prevents trial courts from ruling on motions to disqualify prosecutors from trying cases. In Michigan, the separation-of-powers doctrine is set forth in Article 3, § 2, of Michigan’s 1963 Constitution, and it provides as follows:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const 1963, art 3, § 2.]

“The prosecutor is a constitutional officer whose duties are as provided by law.” *People v Morrow*, 214 Mich App 158, 160; 542 NW2d 324 (1995) (quotation marks and citation omitted). See Const 1963, art 7, § 4. “The conduct of a prosecution on behalf of the people by the prosecutor is an executive act.” *Morrow*, 214 Mich App at 160 (quotation marks and citation omitted). “[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. Therefore, “a trial court does not have authority to review the prosecuting attorney’s decisions outside this narrow scope of judicial function.” *Id.*

In this case, the prosecution specifically contends that the separation-of-powers doctrine contained in Article 3, § 2, of Michigan’s 1963 Constitution prevented the trial court from disqualifying the prosecutor’s office. In support of this argument, the prosecution points to *People v Muniz*, 259 Mich App 176, 178-179; 675 NW2d 597 (2003). In *Muniz*, 259 Mich App at 178, the issue presented to this Court was whether the trial court had the authority to order the prosecution to “issue new informations based on recent amendments to the statute that were not in force when defendants allegedly committed the crimes.” This Court held that “[a]ccording to separation-of-powers principles, the constitutional responsibility to determine the grounds for prosecution rests with the prosecutor alone.” *Id.* However, the issue decided by this Court in *Muniz* is not the issue presented in this case. Here, there are no claims that the trial court interfered with the prosecution’s grounds for the issuance of charges.

The prosecution quotes a portion of this Court’s holding in *Muniz*, 259 Mich at 178-179: “[a] trial court’s authority over prosecutorial duties is limited to acts or decisions that are unconstitutional, illegal, or ultra vires,” to stand for the proposition that the trial court was constitutionally barred from deciding whether the Muskegon County Prosecutor’s office should be disqualified from this matter. This argument misreads our holding. Rather than representing a global ban on judicial inquiry into a prosecutor’s office as advocated here, our holding in *Muniz* is limited to cases where a trial court interfered with the prosecutor’s duty to bring charges. See *People v Jones*, 252 Mich App 1, 10; 650 NW2d 717 (2002) (holding that “it is within the prosecution’s discretion to proceed to trial or to dismiss a case”); *Morrow*, 214 Mich App at 165 (holding that the trial court had the authority to proceed with the charges against the defendant); *People v Williams*, 186 Mich App 606, 611; 465 NW2d 376 (1990) (holding that the prosecution decided which charges to bring against a defendant). That did not occur here, hence, *Muniz* is not controlling.

The prosecution also argues that trial courts do not have the authority to rule on motions to disqualify because the authority to do so was stripped from the Courts by the Legislature when it amended MCL 49.160.

MCL 49.160, as amended by 2003 PA 706, provides, in relevant part:

(1) *If the prosecuting attorney of a county determines himself or herself to be disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, he or she shall file with the attorney general a petition stating the conflict or the reason he or she is unable to serve and requesting the appointment of a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve. [Emphasis added.]*

The previous version of the statute, MCL 49.160, as amended by 1978 PA 535, provided, in relevant part:

(1) *If the prosecuting attorney of a county is disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, the supreme court, the court of appeals or the circuit court for that county, upon a finding to that effect by the court, may appoint an attorney at law as a special prosecuting attorney to perform the duties of the prosecuting attorney in the respective court in any matter in which the prosecuting attorney is disqualified or until such time as the prosecuting attorney is able to serve. [Emphasis added.]*

This Court specifically held that former MCL 49.160 “authorize[d] the court to appoint a special prosecutor to replace a prosecuting attorney who is disqualified because of a conflict of interest or who is otherwise unable to attend his duties upon a finding to that effect by the court.” *Doyle*, 159 Mich App at 641 (quotation marks and citation omitted).² Additionally, this Court has repeatedly held that former MCL 49.160 was the exclusive source of the trial court’s authority to appoint a special prosecutor. See *People v Herrick*, 216 Mich App 594, 598; 550 NW2d 541 (1996); *Doyle*, 159 Mich App at 641; *In re Appointment of Special Prosecutor*, 122 Mich App 632, 634; 332 NW2d 550 (1983).

The prosecution correctly notes that the Legislature has removed any reference it made to the courts in the newest version of MCL 49.160. Specifically, the statute no longer permits the “the supreme court, the court of appeals or the circuit court for that county” to appoint a special prosecutor. MCL 49.160, as amended by 1978 PA 535. The Legislature also removed the phrase “upon a finding to that effect by the court” regarding “reasons of conflict of interest” MCL 49.160, as amended by 1978 PA 535. The current version provides that the prosecuting attorney “shall file with the attorney general a petition” if the prosecuting attorney “determines himself or herself to be disqualified by reason of conflict of interest” Therefore, the current statute appears to reflect the Legislature’s intent to remove the trial court from the process of appointing a special prosecutor. *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013) (“The intent of the Legislature is expressed in the statute’s plain language.”).

However, the matter now before the Court does not involve the ability of trial courts to appoint special prosecutors. The issue before the Court is the trial court’s ability to disqualify a

² Opinions published before November 1, 1990, are not binding on this Court. See MCR 7.215(J)(1). However, they may still serve as persuasive authority. See *People v Barbarich*, 291 Mich App 468, 476 n 2; 807 NW2d 56 (2011).

prosecutor's office due to a conflict of interest. Although this Court has held that former MCL 49.160 was the sole authority that the trial court had to appoint a special prosecutor and the Legislature has since altered the language of the statute to remove the trial court from that process, this Court never held that the former version of MCL 49.160 was a trial court's sole source of authority to determine a conflict of interest and disqualify prosecutors. Rather, a trial court's authority to determine a conflict of interest and rule on a motion to disqualify a prosecutor's office lies in caselaw, not MCL 49.160.

Courts of our state have long determined whether a prosecutor must be disqualified because of a conflict of interest. See *People v Cline*, 44 Mich 290, 296; 6 NW2d 671 (1880). ("We are also of the opinion that the prosecuting attorney was disqualified from conducting the prosecution in this case."). Additionally, while former MCL 49.160 was the applicable law, this Court and trial courts reviewed numerous situations to determine whether there was a conflict of interest that required the disqualification of a prosecutor without referring to former MCL 49.160. See *People v Mayhew*, 236 Mich App 112, 126-128; 600 NW2d 370 (1999). Additionally, since the Legislature amended MCL 49.160 to its current version, trial courts have continued to determine whether a conflict which required the disqualification of the prosecutor's office existed, and this Court has continued to review those findings. See *People v Davenport*, 280 Mich App 464, 470; 760 NW2d 743 (2008) ("The trial court should be promptly informed of a defense attorney's move to the prosecutor's office, and it should inquire into the matter and order an appropriate safeguard, such as disqualifying the individual attorney affected by the conflict of interest, or the entire prosecutor's office, if necessary.").

This Court has held that a trial court's "inherent power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *In re Parole of Hill*, 298 Mich App 404, 427; 827 NW2d 407 (2012) (quotation marks and citation omitted). Additionally, this Court has noted that trial courts have the "authority to direct and control the proceedings before them." *Id.* at 428 (quotation marks and citation omitted). Accordingly, the trial court possessed the authority to determine whether the Muskegon County Prosecutor's Office should be disqualified from handling this matter.

Having so concluded, we next turn to the prosecutor's second claim on appeal; that the trial court erred by its finding that a conflict of interest required disqualification of the entire Muskegon County Prosecutor's Office.

"The disqualification of a prosecutor because of a conflict of interest can occur in situations where the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with the accused." *Mayhew*, 236 Mich App at 126-127. "After a determination has been made that a conflict of interest exists with regard to a prosecutor, the question then arises whether the entire prosecutor's office must be disqualified." *Id.* at 127. If the prosecutor involved "in the conflict of interest has supervisory authority over other attorneys in the office, or has policy-making authority, then recusal of the entire office is likely to be necessary." *Id.* (quotation marks and citation omitted).

At the outset of our discussion on this issue, we note that, to the extent the trial court ordered relief on the "appearance of propriety" standard set forth in *Doyle*, such conclusions were

erroneous because that standard is no longer applicable to determining conflicts of interest. In *Doyle*, 159 Mich App at 635, this Court found that “[c]ases discussing disqualification of prosecutors fall into two main subject categories.” *Id.* at 641. “The first category involves disqualification for a conflict of interest arising out of some professional, attorney-client relationship, as when the defendant is a former client of the prosecuting attorney,” and the second category “includes situations where the prosecuting attorney has a personal interest (financial or emotional) in the litigation, or has some personal relationship (kinship, friendship or animosity) with the accused.” *Id.* at 641-642. The *Doyle* Court contended that the conflict before it was part of the second category and then on the basis of Canon 9 of former Michigan Code of Professional Responsibility, it applied the “appearance of impropriety” standard to the facts. *Id.* at 642-646. However, the “appearance of impropriety” standard set forth by Canon 9 of the former Michigan Code of Professional Responsibility is no longer used to determine conflicts of interests. See Comment to MRPC 1.9. Accordingly, any continued reliance on this standard by the trial court constituted error.

Here, the record indicates that DeYoung had a personal relationship with the victim’s family and defendant. However, DeYoung was employed as legal secretary for the Muskegon County Prosecutor’s Office, and there is no indication that she was working on the case against defendant or that she had any supervisory or policy-making authority in the office. DeYoung testified that Roberts was her superior. Therefore, the record indicates that DeYoung’s relationship with this case did not require disqualification of the prosecutor’s office. Additionally, Hosticka testified that he was an assistant prosecutor at the Muskegon County Prosecutor’s Office and that Roberts was also his supervisor. The record also indicates that although Hosticka was aware of defendant’s motion to disqualify the prosecution’s office on the basis of their phone call, he was not involved in the case. Additionally, the record indicates that Hosticka had no policy-making or supervisory authority over the office. Therefore, even assuming that Hosticka had “a personal, financial, or emotional interest in the litigation or a personal relationship with the accused” on the basis of his phone call with defendant, caselaw does not support the disqualification of the Muskegon County Prosecutor’s Office. *Id.* at 127. Therefore, the trial court clearly erred by determining that there was a conflict of interest requiring the disqualification of the prosecutor’s office.

At oral argument, defendant indicated that, contrary to his brief on appeal, the “gist” of his argument regarding conflicts of interest justifying disqualification of the entire Muskegon County Prosecutor’s Office are (now) premised on his intent to call Roberts as a witness. According to defendant, Roberts would be called to impeach the testimony of Hosticka, thus creating what defendant argued was a clear conflict. Again, we point out that Roberts is Hosticka’s supervisor, not vice-versa. However, even presuming that calling Roberts as a witness would disqualify him as the prosecutor handling the matter, the defendant still has not made a coherent case as to why the entire Muskegon County Prosecutor’s office would be disqualified. As stated by the prosecutor during oral argument, if Roberts were disqualified, then the case could be tried by the Chief Assistant Prosecutor. Defendant never indicated either in this brief or at oral argument that he planned to call the Chief Assistant Prosecutor as a witness. We cannot glean from this record a factual basis from which the trial court could have concluded that the entire Muskegon County Prosecutor’s Office needed to be disqualified. See *Mayhew*, 236 Mich App at 127-128.

Our decision is also supported by the Michigan Rules of Professional Conduct. In addition to Michigan caselaw, the Michigan Rules of Professional Conduct govern how trial courts should handle conflicts of interest. *Davenport*, 280 Mich App at 470. “Michigan lawyers are governed by the Michigan Rules of Professional Conduct (MRPC), under which a lawyer generally cannot simultaneously be a witness and an advocate at trial.” *Petri*, 279 Mich App at 417. However, MRPC 3.7(b) provides that “[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.” MRPC 3.7(b). Both MRPC 1.7 and MRPC 1.9 involve conflicts of interest that occur when representation of one client is adverse to another client or a former client.

In this case, Roberts, not Hosticka, was the prosecutor in charge of defendant’s case. Nothing in the record indicates that Hosticka was involved in any manner with the case, or that Hosticka had any supervisory authority or policy-making authority over any other attorney in the office. See, *Mayhew*, 236 Mich App at 127. Additionally, DeYoung, as a legal secretary, did not have any authority regarding the handling of defendant’s case. Furthermore, MRPC 1.7 and 1.9 are not applicable to this case. There is no contention that DeYoung or Hosticka previously represented or currently represented defendant in another matter. Therefore, the trial court clearly erred by determining that there was conflict of interest that required the disqualification of the entire Muskegon County Prosecuting Attorney’s office.³

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Amy Ronayne Krause

/s/ Jane E. Markey

/s/ Stephen L. Borrello

³Foreign jurisdictions considering this factual scenario have reached similar conclusions. See *State ex rel Macy v Owens*, 934 P2d 343, 344-345 (Okla, 1997) (holding that Rule 3.7 did not permit the trial court do disqualify the entire prosecutor’s office when two members from the office would likely testify at trial); *Commonwealth v Turner*, 390 Pa Super 216, 222; 568 A2d 622 (1989) (holding that disqualification was not required under Rule 3.7(b) because Rule 1.7 or Rule 1.9 did not apply to the assistant district attorney testifying at trial); *State v Doran*, 105 NM 300, 304-305; 731 P2d 1344 (1986) (holding that the prosecutor’s office did not need to be disqualified because defense counsel called a prosecutor as a witness).