

STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS  
Christopher M. Murray, P.J., Kurtis T. Wilder, and Cynthia Diane Stephens, J.J.

PEOPLE OF THE STATE OF MICHIGAN  
Plaintiff-Appellant,

v

No: 147187

RYAN CHRISTOPHER SMITH  
Defendant-Appellant.

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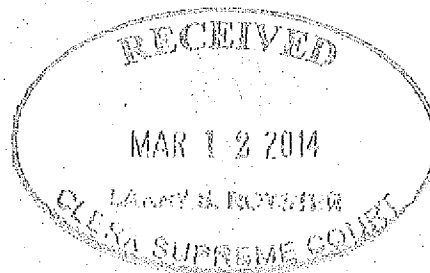
Third Circuit Court No: 11-1972-0117H  
Court of Appeals No: 312242

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DEFENDANT-APPELLEE'S BRIEF ON APPEAL

\*\* ORAL ARGUMENT REQUESTED \*\*

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**STATEMENT OF QUESTIONS PRESENTED**

**I. DID THE TRIAL COURT LOSE JURISDICTION FOR PURPOSES OF SENTENCING OR OTHERWISE, BY FAILING TO SENTENCE A DEFENDANT WITHIN ONE YEAR AFTER DELAYING SENTENCE UNDER MCL 777.1?**

Court of Appeals Did Not Answer

People Answer: No

Defendant Answers: Yes

**II. WHETHER A DEFENDANT WAIVES A CLAIM OF ERROR RELATED TO A DELAY IN SENTENCING WHERE HE REQUESTS A DELAY IN SENTENCING UNDER MCL 777.1?**

Court of Appeals Did Not Answer

People Answer: Yes

Defendant Answers: No

**III. WHAT REMEDY SHOULD APPLY TO A FAILURE TO SENTENCE A DEFENDANT WITHIN A YEAR OF CONVICTION?**

Court of Appeals Did Not Answer

People Answer: Reinstate the Conviction and Impose Sentence

Defendant Answers: Permit the Dismissal to stand.

## STATEMENT OF PROCEEDINGS AND FACTS

On May 12, 2011, in return for pleading guilty to attempt carrying a concealed weapon, MCL 750.227, a two and one-half year felon. The prosecution agreed to defendant being sentenced to a guidelines sentence, including a probationary sentence as well as alternative work force as part of the probationary period. (Appellant's Appendix, p 9a).

At sentencing, although the probation department recommended a delayed sentencing, prosecution objected. (Appellant's Appendix, p, 20a). The court adjourned the sentencing to permit both sides to submit memoranda of law where the court could delay sentencing for a year.

At the second sentencing on June 17, 2011, over objections from the prosecution, defense requested the court exercise its discretion and place defendant on delayed sentencing status, pursuant to MCL 771.2. The court did so and scheduled the delayed sentencing for June 15, 2012, within the proscribed year. (Appellant's Appendix, p 32a). The prosecution did not appeal this decision.

There is no indication what occurred on June 15, 2012. The Register of Actions reveals the next sentencing date was June 18, 2012. On that date, the case was dismissed for lack of jurisdiction.

The prosecutor sought a delayed Application for Leave with the Michigan Court of Appeals.

The Application was denied on May 7, 2013, for Lack of Merit. However, the dissent would have reversed the order of dismissal, finding even though the year had passed, the court could not dismiss the case over the prosecutor's objection. The dissent further noted the case

could not be remanded for sentencing and would allow the parties to address the appropriate remedy on remand. (Appellant's Appendix, p 5a).

This Court granted the prosecution's Application, directing three questions be addressed: Did the trial court lose jurisdiction for purposes of sentencing or otherwise, by failing to sentence a defendant within one year after delaying sentence under MCL 777.1; whether a defendant waives a claim of error related to a delay in sentencing where he requests a delay in sentencing under MCL 777.1; what remedy should apply to a failure to sentence a defendant within a year of conviction.

**I. THE TRIAL COURT LOST JURISDICTION FOR PURPOSES OF SENTENCING OR OTHERWISE, BY FAILING TO SENTENCE DEFENDANT WITHIN ONE YEAR AFTER DELAYING SENTENCE UNDER MCL 777.1.**

**Standard of Review**

Appellee agrees the standard of review is de novo. Interpretation of a statute is reviewed de novo. *People v Riddle*, 467 Mich 116 (2002).

If a trial court misapplies the law, such decisions are also reviewed de novo. *People v Barrera*, 451 Mich 261, 269 n 7 (1996), quoting *United States v Thomas*, 62 F3d 1332, 1336 (CA 11, 1995).

A decision of the Court of Appeals is reviewed for clear error. MCR 7.302(B)(5).

Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Kurylczyk*, 443 Mich 289, 303 (1993).

**Argument**

By failing to sentence defendant within the year as prescribed by the statute, the trial court lost in personam jurisdiction to sentence defendant.

The statute involved, MCL 771.2<sup>1</sup>, permits a court to delay sentencing to allow a defendant an opportunity to prove to the court his eligibility for probation or other leniency

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<sup>1</sup> (2) In an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation, such as participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082. When sentencing is delayed, the court shall enter an order stating the reason for the delay upon



compatible with the ends of justice and his rehabilitation. It is not a sentence. *People v Saenz*, 173 Mich App 405 (1988); *People v Leonard*, 144 Mich App 492 (1985).

This delay does not deprive the court of jurisdiction to sentence a defendant at any time during the period of delay. MCL 771.1(2).

While defendant does not dispute the power to dismiss a case rests with the prosecutor, *People v Monday*, 70 Mich App 518 (1976), it has also been recognized if a defendant has not been sentenced within a year from the date of a conviction, and is not consented to a sentence past that time, *People v Richards*, 205 Mich App 438 (1994), the court loses jurisdiction to impose the sentence, unless good cause is shown for the delay. *People v Dubis*, 158 Mich App 504 (1987); *People v McLott*, 70 Mich App 524 (1976). To hold otherwise would invite an abuse of the court's and prosecutor's powers and not provide finality to a case.

In this case, although the trial court had voiced her disapproval with the prosecution's position to the delayed sentencing, to presume the court purposely delayed the sentencing past the one year is presumptuous. There is no indication the court intentionally delayed sentencing past the year. The record is silent as to what occurred on the date originally scheduled for sentencing, which was within the year. The record is silent as to whether the prosecution sought to have defendant sentenced on that date.

The sentencing court was correct in dismissing the case, because it had lost in personam, jurisdiction over defendant. *Richards*, supra

Defendant would note since the record is silent as to what occurred on that date originally scheduled for sentencing, well within the year, one cannot speculate as to what occurred on that date. There is nothing to indicate defendant agreed to the new sentencing date, and the record is

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the court's records. The delay in passing sentence does not deprive the court of jurisdiction to sentence the defendant at any time during the period of delay.

silent as to whether the prosecution sought to have defendant sentenced on that date. However, defendant would note that although the prosecutor objected to placing defendant on delayed sentencing status, it did not appeal the trial court's decision.

Thus the trial court dismissed the case for a proper legal reason: it had lost personal jurisdiction to sentence defendant. *People v Turner*, 92 Mich App 485 (1979).

**II. DEFENDANT DID NOT WAIVE A CLAIM OF ERROR RELATED TO A DELAY IN SENTENCING WHERE HE REQUESTED A DELAY IN SENTENCING UNDER MCL 777.1**

A waiver is the intentional relinquishment of a known right. It is distinct from forfeiture, which is the failure to make a timely assertion of a right. An issue that is waived is not subject to appellate review and one that is forfeited is subject to limited review. *People v Carter*, 462 Mich 206 (2000).

A defendant cannot have waived his right to be sentenced by acquiescing to the delays, since a defendant will always agree to freedom. Further, a jurisdictional issue should not depend on the defendant's consent or waiver. *People v Bracey*, 124 Mich App 401, 406 (1983); *Turner*, supra.

In this case, defendant did not waive a claim in error when he requested his sentence be delayed pursuant to statute. He had requested the delay in order to demonstrate to the court that he deserved leniency. (Appellant's Appendix, p 28a).

He did not request an indefinite delay in sentencing, rather requested he be sentenced within the one year as required under the statute. He had no control over the court's docket and the record is silent as to why the sentencing was adjourned. Under the circumstances of this case, there was no implicit waiver of the delay. In fact, it was clear he was prepared to be sentenced within the prescribed time.

A request to delay sentencing under the statute neither waives nor forfeits a defendant's claim his sentence was untimely.

As noted by the prosecution, a trial court loses in personam jurisdiction rather than subject matter jurisdiction where the sentence is not done within the year. While a defendant

who agrees to a sentence past the year may waive any error, *Richards*, supra, if this Court were to agree that a defendant's request to delay the imposition of a sentence under the statute operates as a waiver, it invites abuse. A court would delay the imposition of a sentence with a defendant's implicit consent and bar any meaningful appellate review.

Defendant did not agree to a delay in sentencing past the required time period as permitted by the statute. As noted, the statute's purpose is to encourage informed probation decisions. *Bracey*, supra, 406-407.

Under the statute, a defendant may request an adjournment of his sentence for one year. If granted, the delay does not operate to extinguish any claim of a delay in sentencing past the year.

The prosecutors' contention there is no error to correct because his request under the statute operated as an intentional relinquishment of his right to be sentenced pursuant to the statute is simply incorrect.

**III. THE APPROPRIATE REMEDY FOR A FAILURE TO SENTENCE A DEFENDANT WITHIN A YEAR OF CONVICTION IS DEPENDANT ON THE FACTS OF THE CASE.**

The remedy for a failure to sentence a defendant within a year of a conviction should not be absolute.

The vast majority of defendants are sentenced within the year of their conviction. However, this period may be exceeded in the most limited and unusual circumstances, *Dubis*, supra, *Turner*, supra, and a defendant's consent to be sentenced past the one year requirement may operate as a waiver. *Carter*, supra.

Ideally a defendant should be sentenced within a reasonable time following his conviction, which requires consideration of the reason for the delay, the length of the delay, whether defendant consented to the delay, and any actual prejudice to defendant which results from the delay.

While the prosecution suggests an analogy be made to one's exercise of one's Sixth Amendment right to a speedy trial, US Constit, Am VI, there is nothing in that Amendment or the state's constitution, Mich Const 1963, article 1 § 20 that refers to a delay in a sentence would violate a defendant's right to a speedy trial. To proceed on such a claim, a defendant must show either prejudice from the delay or misconduct by the prosecution for strategic advantage. See *Doggett v United States*, 505 US 647; 112 SCt 2686; 120 LEd2d 520 (1992)

As noted in *People v Kennedy*, 58 Mich 372; 25 NW 318 (1885), a defendant 'is entitled to have his liberty as soon as the limit of the law, reasonably administered, will permit'. 58 Mich at 377; *McLott*, supra.

As the Court noted in *Bracey*, also citing *Kennedy*,

(A) court had the power to defer sentence for a reasonable period for any proper purpose , such as allowing time for defendant to make a motion for a new trial, or take exceptions to the (appellate court) or for the \* \* \* judge to inform himself relative to the proper sentence to pass upon the defendant. *Bracy*, supra, 409.

Turning to the case at bar, defendant would submit the appropriate remedy in this case would be to permit the decision of the trial court to stand.

The case is similar to the circumstances in *Monday*, supra, where that court held:

Our conclusion would, under normal circumstances, lead us to vacate the order of dismissal, reinstate the conviction, and remand for imposition of sentence. We decline to do so. The order of the trial court, though technically wrong, is equitably right. Except for the relatively minor offense charged herein, defendant's record is impeccable. We see no useful purpose and, in fact, perceive some harm in insisting that a felony charge appear on defendant's ( , , , ) record. Having won the "war" and prevailed on principle, we suggest the prosecutor, upon remand, reconsider and move for nolle prosequi or otherwise consent to dismissal as first ordered by the trial judge. Compassion is still an element of the law. The quality of mercy should not be strained on the facts before us. *Monday*, supra, 523.

Assuming arguendo the prosecution's position is adopted, it would at most result in reinstatement of the conviction of attempt carrying concealed weapon. That is not the proper solution. Defendant would submit the ends of justice and equity would dictate such a remedy would be inappropriate in this case.

Except for this minor offense, defendant's record is spotless. He had complied with the court's requirements through the year, paid the required fees, and graduated from college. There is no useful purpose and as noted by the trial court, harm in having a felony appear on defendant's record.

To merely reinstate the conviction would saddle defendant with a felony conviction until he were given the opportunity to seek to have this conviction expunged, pursuant to MCL 780.621, the statute governing setting aside convictions. During this time it would be difficult, almost impossible, for him to be an active member of society, to secure gainful employment, to

pursue post-graduate education. This was the concern of the sentencing court. (Appellant's Appendix, pp13a-14a, 21a, 38a).

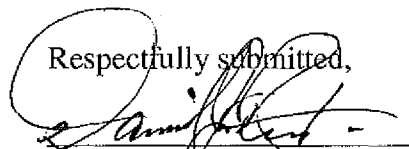
In short, it would be difficult to be a productive member of society with the stigma of a felony conviction. The delayed sentencing served its purpose in rehabilitating defendant. To further punish defendant for a technical error by the sentencing court would not serve the ends of justice. The purpose of the statute was satisfied.

Defendant proved to the sentencing court his eligibility for 'such other leniency as may be compatible with the ends of justice'.

**SUMMARY AND RELIEF SOUGHT**

**WHEREFORE**, Defendant-Appellee respectfully requests this Honorable Court permit the trial court's Order of Dismissal to stand.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel J. Rust", is written over a horizontal line. The signature is cursive and somewhat stylized.

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DATED: **March 10, 2014**