

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Circuit Court File No. 99-7901-AR
District Court File No. 99-0145-SM
HON. PHILIP E. RODGERS, JR.

DONNA FOLGARELLI,

Defendant-Appellant.

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Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

DECISION AND ORDER

This case is an appeal from a District Court determination affirming the Grand Traverse County Prosecutor's decision to reinstate charges against the Defendant which were previously dismissed without prejudice pursuant to a District Court Order entered February 3, 1999. The parties stipulated to the Appellant's request for leave to appeal and the Court entertained the oral arguments of counsel on June 18, 1999. The Court took the matter under advisement and will now provide its opinion. MCR 2.517.

The parties do not dispute the factual history of this litigation. Appellant was charged with violating the Regulation of Manufacture, Distribution and Sale of Food Act, ("Act") MCL 289.701, et seq.; MSA 12.933, et seq., on January 14, 1999 by allowing her dogs to be in Folgarelli's Import Food Market ("Market") contrary to Administrative Rule R285.553.14 and MCL 289.707(K); MSA 12.933(7). Appellant's Market is well known and significant publicity followed this charge. Appellant denied the alleged violations.

Subsequently, on or about February 3, 1999, the Prosecutor moved to dismiss all charges against the Appellant based upon her agreement to remove her dogs entirely from the Market premises. This agreement was reduced to writing and the District Court dismissed the case pursuant to its Order of February 3, 1999.

Thereafter, on or about February 5, 1999, the Prosecutor was informed by a third party that the Appellant allowed her dogs to re-enter the Market contrary to the parties' agreement. The Prosecutor then reinstated the original charges against the Appellant.

Appellant contends that she did not violate the parties' agreement and moved the District Court for an evidentiary hearing and for specific performance of her agreement with the Prosecutor. The Trial Court heard oral argument on Appellant's motion on April 27, 1999 and denied that motion in an oral opinion from the bench. Subsequently, the Trial Court denied a timely motion for reconsideration on May 18, 1999.

The parties agree that the Trial Court may review agreements between the Prosecution and the Appellant. The Appellee's position on this point is properly and concisely stated at pages 5 and 6 of their brief:

The People concede the judiciary may review agreements entered into between the prosecution and the defendant. The agreements are commonly referred to as plea bargains. *Santobello v New York*, 404 US 257 (1971). A court may review a prosecutorial agreement involving the requirement that the accused perform an act in exchange for prosecutorial consideration. . . .

The cases in which a court reviews prosecutorial agreements, or plea bargains, are cases in which the accused performed an act or gave up a protected right. They do not contain a condition that a person simply must obey the law. All cases involving either agreements or plea bargaining, the accused performs some act not already required by law.

It is the Appellant's position that she did more than simply agree to comply with the law. Appellant argues that the violations charged against her require more than simply having dogs in the building. Rather, the Appellee must prove that the dogs were within a food operation area. To the extent that there are offices within Appellant's market which are separate from the food operation area and where she may keep her dogs legally, it is Appellant's position that she surrendered her

right to have the dogs in permissible areas within the building in exchange for the dismissal of these charges. Administrative Rule R285.553.14 states in pertinent part:

Animals, Birds, and Vermin Control

Rule 14. Live birds or animals shall not be permitted in an establishment, except that a guide dog accompanying a blind person may be permitted in selling areas, and birds and animals may be permitted in the same building if caged or otherwise restrained and located a safe distance from all food operations as to eliminate the possibility of contamination by any means . . .

Appellee does not dispute the text of the rule or the possibility that Appellant may have dogs on the premises in compliance with the rule. The Appellee alleges that Appellant violated the rule and hence the original charges were brought. Having reinstated the charges on an informant's tip, the Appellee claims its agreement with the Appellant is not subject to review since Appellant only promised to obey the law.

In determining whether the agreement between the Appellant and the Prosecutor is capable of review by the Court, it is first necessary to determine whether the Appellant "gave up a protected right" or simply agreed to comply with the law. At the oral argument, the Assistant Prosecutor who handled this transaction candidly and honorably admitted that it was her intention to create an agreement upon which both parties could rely and which would give rights to each party. The Assistant Prosecutor also candidly acknowledged that she might not have created such an agreement. The Court disagrees.

Administrative Rule 14 acknowledges the possibility of dogs permissibly being in the same building as a food operation so long as they are located at a safe distance from all food operations. It is possible for Appellant to comply with Rule 14 and have her dogs on the Market premises. Accordingly, it is evident that the Appellant gave up a legal right in exchange for the Appellee's decision to dismiss the original charges. Appellant, then, did more than simply agree to comply with the law; she gave up the right to have her dogs in any legally permissible area within the building. Having surrendered this right, it then follows that Appellant is entitled to specific performance of her agreement. A condition precedent to the re-initiation of the original charges would be the completion of an evidentiary hearing before the Trial Court where the Judge would determine whether the agreement was violated by the Appellant allowing her dogs

to enter *any* portion of the Market. If the Trial Court determines that the agreement was so violated, whether or

not the violation would amount to a transgression of Rule 14, then the Appellee may reinitiate charges.

The Court is cognizant of the separation of powers and under no circumstances does it suggest that it has the authority to control a Prosecutor's charging decisions. As the Court of Appeals eloquently wrote in *People v Jackson*, 192 Mich App 10; 480 NW2d 283 (1991),

In light of the prosecutor's expansive powers and the public interest in maintaining the integrity of the judicial system, agreements between defendants and prosecutors affecting the disposition of criminal charges must be reviewed within the context of their function to serve the administration of justice . . . Id, p 14.

People v Walton, 176 Mich App 821; 440 NW2d 114 (1989); *People v Abrams*, 204 Mich App 667; 516 NW2d 80 (1994); *People v Lombardo*, 216 Mich App 500; 549 NW2d 596 (1996).

The Court further recognizes that strict contractual theories and principles are not to be applied to prosecutorial agreements. However, Courts do review such agreements as a whole and give reasonable interpretations to them. The integrity of the judicial system and the provision of fundamental fairness to parties must be the touchstones that guide those interpretations.

Here, an unnamed informant has provided information which suggests that the Appellant violated her agreement with Appellee and allowed one or more of her dogs to return to the Market. If this occurred, then the Prosecutor has every right to refile the original charges -- whether or not the subsequent re-entry of the animals was a violation of the Act. However, if the Trial Court is not satisfied that the agreement was violated, the charges must be dismissed.

This Court holds that the original charges were dismissed pursuant to a valid agreement in which the Appellant surrendered a legal right. The agreement was not intended by either party to be a hollow meaningless promise, and the Appellant is entitled to specific enforcement.

The Court reviews a question of law de novo. The determination of the Trial Court is reversed, and the matter is remanded to the Trial Court for further proceedings. This Court does not retain jurisdiction.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____