

MSC Order List: March 31, 2010

1. April 2010

On Wednesday, March 31, 2010, the Michigan Supreme Court denied nine applications for leave to appeal and denied two motions for reconsideration. The Court also held the cases of *People v. Gagnier*, Case No. 139735, and *People v. Laidlaw*, Case No. 139751, in abeyance pending a decision in *People v. Smith*, Case No. 140371. Our post on the issues presented in *Smith* can be found below. The Court also took substantive action in six criminal cases and one civil matter which are discussed after the jump.

The Court ordered oral argument on the application for leave to appeal in *People v. Waterstone*, Case No. 140775. *Waterstone* concerns the criminal prosecution of a former Wayne County Circuit Court judge. The state is alleging the defendant knowingly permitted witnesses to commit perjury at a criminal trial. This information came to light when one of the two defendants in the underlying criminal action filed a section 1983 action seeking relief based on the judge's decision to allow the perjured testimony to go to the jury. During this civil case, the defendant-judge was represented by the Attorney General. Assistant Attorney General Cabas participated in that defense team.

Following the conclusion of the civil case, the Attorney General conducted an investigation into the conduct and filed the instant criminal action. The defendant thereafter filed a motion seeking to disqualify the Attorney General based on a conflict of interest. She alleged that she had communicated confidential information to Mr. Cabas during the civil proceedings, and therefore the Attorney General was conflicted out of prosecuting this action. The Attorney General responded and asserted that Mr. Cabas had not communicated any confidential information to the Criminal Division and would not be participating in this criminal prosecution. The trial court ruled that the Attorney General should not be disqualified. On appeal, the Court of Appeals reversed that decision.

During the oral argument, the Court directed the parties to address whether the Court of Appeals erred in holding that the attorney general was disqualified from prosecuting this action under MRPC 1.10(a) where he had previously represented the defendant in a federal civil case involving the same facts. The Criminal Section of the State Bar of Michigan, the Prosecuting Attorneys Association of Michigan, and the Criminal Defense Attorneys of Michigan were invited to file briefs amicus curiae. The Court's order can be found [here](#).

The Court also granted the application for leave to appeal in *People v. Smith*, Case No. 140371. In *Smith*, the Court will resolve the question of whether points may be assessed, pursuant to MCL § 777.49 (OV 19), for conduct that occurs after the sentencing offense is completed. The Criminal Defense Attorneys of Michigan and the

Prosecuting Attorneys Association of Michigan were invited to file briefs amicus curiae. The order granting leave to appeal is [here](#).

In *People v. Carlson*, Case No. 140264, in lieu of granting leave to appeal, the Court reversed the judgment of the Court of Appeals that vacated the defendant's convictions of and sentences for first-degree criminal sexual conduct based on oral penetration of the victim and remanded the case back to the Court of Appeals for consideration as on leave granted. The Court directed the Court of Appeals to consider whether the evidence of penetration presented at trial was admissible under the standard articulated in *People v. Meeboer*, 439 Mich. 310 (1992). The Court of Appeals was further directed to determine whether a remand for a new trial is appropriate pursuant to *Lockhart v. Nelson*, 488 U.S. 33 (1988). The Court's order can be found [here](#).

The Court remanded the case of *People v. Armstrong*, Case No. 139889, in lieu of appeal for consideration of the Court of Appeals' September 8, 2009 order denying the defendant's delayed application for leave to appeal. The Court's order is [here](#).

Similarly, the Court remanded the matter of *Harshaw v. Classic Coney Island*, Case No. 139723, to the Court of Appeals. The Court of Appeals was directed to consider its April 19, 2009 order denying Classic Coney Island's delayed application for leave to appeal. The Court's order can be found [here](#).

In *People v. Trakhtenberg*, Case No. 138875, in lieu of granting leave to appeal the Court remanded the case to the Court of Appeals. The Court further directed that the Court of Appeals, while retaining jurisdiction, shall remand this case back to the Oakland County Circuit Court to conduct an evidentiary hearing pursuant to *People v. Ginther*, 390 Mich. 463 (1973), to determine whether the defendant was deprived of his right to effective assistance of counsel and whether he is entitled to a new trial based on newly discovered evidence. Following this evidentiary hearing, the Court of Appeals will resolve the issues presented by the defendant. The Court further denied defense counsel's motion to withdraw, without prejudice. A copy of the Court's order can be found [here](#).