

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANDREW SEKELSKY,

Defendant-Appellant.

UNPUBLISHED

May 27, 2021

No. 352414

Genesee Circuit Court

LC No. 18-043474-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIKADYN MAULAY PAYNE,

Defendant-Appellant.

No. 352415

Genesee Circuit Court

LC No. 18-043472-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TREVOR ANTHONY GRAY,

Defendant-Appellee.

No. 352416

Genesee Circuit Court

LC No. 18-043465-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TREVOR ANTHONY GRAY,

Defendant-Appellant.

No. 352417
Genesee Circuit Court
LC No. 18-043465-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ALEXZANDER MILLER,

Defendant-Appellee.

No. 352475
Genesee Circuit Court
LC No. 18-043471-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MIKADYN MAULAY PAYNE,

Defendant-Appellee.

No. 352476
Genesee Circuit Court
LC No. 18-043472-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK ANDREW SEKELSKY,

Defendant-Appellee.

No. 352477
Genesee Circuit Court
LC No. 18-043474-FC

Before: STEPHENS, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals from an order of the circuit court denying plaintiff's request to *nolle prosequi* charges against defendants following the trial court's rejection of a *Cobbs*¹ plea by each defendant. We reverse and remand to the trial court with directions to grant the *nolle prosequi* and enter an order dismissing the charges.

Our dissenting colleague fully sets out the relevant facts to this case. We need not repeat them here. Rather, we proceed directly to the question whether the trial court erred in denying the request to grant a *nolle prosequi* in this case. We conclude that a trial court's authority to do so is limited and that the trial court in this case exceeded that limited authority.

This Court reviews a trial court's ruling regarding a motion to dismiss, including a motion for *nolle prosequi*, for an abuse of discretion. *People v Grove*, 455 Mich 439, 460; 566 NW2d 547 (1997), superseded by court rule on other grounds as stated in *People v Franklin*, 491 Mich 916; 813 NW2d 285 (2012); *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). An abuse of discretion occurs when a trial court's decision "falls outside the range of reasonable and principled outcomes." *People v Everett*, 318 Mich App 511, 516; 899 NW2d 94 (2017) (quotation marks and citation omitted).

Our Supreme Court in *Genesee Co Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 121; 215 NW2d 145 (1974), discussed both the trial court's authority in reviewing a magistrate's bindover decision as well as a prosecutor's *nolle prosequi* decision:

In deciding whether an examining magistrate acts properly in binding or in refusing to bind over an accused person, and in deciding whether a prosecuting attorney acts properly in deciding not to file an information or in proposing to *nolle prosequi*, discontinue or abandon a prosecution, the circuit judge reviews the action of the magistrate and prosecuting attorney on the record—the record made before the magistrate at the preliminary examination, and the prosecutor's statement of reasons and 'the evidence filed in the case.' Such review is a judicial review, searching the record to determine whether the magistrate's or prosecutor's decision is in accord with the law, facts and reason of the matter.

A circuit judge does not enjoy supervisory power over a prosecuting attorney. He may reverse a magistrate's decision only for abuse of discretion. He may not properly substitute his judgment for that of the magistrate or prosecuting attorney as if he were reviewing the magistrate's decision *de novo* or acting in a supervisory capacity with respect to the prosecuting attorney. He may reverse or revise their decisions only if it appears on the record that they have abused the power confided to them. [Footnotes omitted.]

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

This Court summarized that conclusion in *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995), as follows:

Thus, the 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. *People v Williams*, 186 Mich App 606, 608-613; 465 NW2d 376 (1990). Put differently, a trial court does not have authority to review the prosecuting attorney's decisions outside this narrow scope of judicial function. *Id.* at 612.

The Supreme Court further recognized the circuit court's limited role in *People v Curtis*, 389 Mich 698; 209 NW2d 243 (1973). In *Curtis*, the defendant was initially charged with the sale of marijuana. On the day scheduled for the defendant's preliminary examination in district court, the prosecutor moved to amend the original complaint to add a second count of unlawful possession and to enter a *nolle prosequi* as to the charge of sale of marijuana. The district court allowed the prosecutor's request and the defendant waived examination on the possession charge. 389 Mich at 701-702. Thereafter, the circuit court sua sponte issued an order of superintending control to the district court requiring an examination on the original charge of sale of marijuana and to issue a return on that charge if supported by the evidence at the exam and declared the order of *nolle prosequi* issued by the district court to be null and void. The circuit court further ordered the prosecutor to file an information in accordance with the result reached at the preliminary examination. 389 Mich at 702. The Court stated:

The Court of Appeals, 42 Mich App 652 [202 NW2d 539 (1972)], following our recent decision in *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672 [194 NW2d 693] (1972), held that the circuit court did not have authority to issue an order of superintending control to the prosecutor and his assistants. The circuit court has superintending control only over inferior courts and tribunals, not prosecuting attorneys. [389 Mich at 702-703.]

The Supreme Court affirmed "that part of their opinion without further discussion." 389 Mich at 703. The Supreme Court did, however, review this Court's upholding of the circuit court's determination that the district court did not have the authority to enter the *nolle prosequi*.

After a historical review of the law of *nolle prosequi*, the Court addressed the purpose of the Legislature's limiting *nolle prosequi* by statute in MCL 769.29: "It thus appears clear to the Court that the forerunner of the present statute in question was enacted to protect the interests of the criminal defendant. This it did by requiring that thereafter all *nolle prosequi* would be entered on the record." 389 Mich at 706. The Court then stated that to "next answer whether or not the discretion to dismiss or *nolle prosequi* a felony charge is exclusively that of the circuit court we turn to our previous decisions, no statute being directly determinative of the issue." 389 Mich at 707. Finally, the Court concluded that use of superintending control to reverse the district court's decision to allow the *nolle prosequi* should not be used unless the district court "failed to take into consideration actions by the prosecuting attorney which might amount to malfeasance of his duties in the prosecution of a case, when granting a dismissal or *nolle prosequi* of a case . . ." 389 Mich at 711.

We next turn to the United States Supreme Court's decision in *Rinaldi v United States*, 434 US 22, 29 n 15; 98 S Ct 81; 54 L Ed 2d 207 (1977), where the Court considered the requirement under FR Crim P 48(a) that a dismissal of charges requires leave of the court:

The words "leave of court" were inserted in Rule 48(a) without explanation. While they obviously vest some discretion in the court, the circumstances in which that discretion may properly be exercised have not been delineated by this Court. The principal object of the "leave of court" requirement is apparently to protect a defendant against prosecutorial harassment, e.g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection. See, e.g., *United States v Cox*, 342 F2d 167, 171 (CA 5), cert. denied, sub nom. *Cox v Hauberg*, 381 US 935; 85 S Ct 1767; 14 L Ed 2d 700 (1965); *Woodring v United States*, 311 F2d 417, 424 (CA 8), cert. denied sub nom. *Felice v United States*, 373 US 913; 83 S Ct 1304; 10 L Ed 2d 414 (1963). But the Rule has also been held to permit the court to deny a Government dismissal motion to which the defendant has consented if the motion is prompted by considerations clearly contrary to the public interest. See *United States v Cowan*, 524 F2d 504 (CA 5 1975); *United States v Ammidown*, 162 USApp.D.C. 28, 33, 497 F2d 615, 620 (1973).

This statement in *Rinaldi* is consistent with the Michigan Supreme Court's observation in *Curtis* that the statute "was enacted to protect the interests of the criminal defendant." 389 Mich at 706. This is in line with the statement in *Rinaldi* that the "principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment, e.g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection. 434 US at 29 n 15. And nothing suggests that this is at issue in the case at bar.

First, defendants have not objected to the prosecutor's requesting a *nolle prosequi*. Indeed, the prosecutor's request was prompted by an agreement between the prosecution and the defense that the best course of action was a juvenile disposition rather than adult incarceration, including the availability of rehabilitation services in the juvenile justice system. Moreover, we are not persuaded that there is any indication of an improper motive by the prosecutor or that granting leave of the court to dismiss the charges would in any way be contrary to the public interest.

The trial court's denial of the request to dismiss the charges seems to be rooted in the trial court's view that doing so would infringe upon the trial court's role in sentencing. We disagree. As this Court observed in *People v Williams*, 244 Mich App 249, 251-252; 625 NW2d 132 (2001), the prosecutor has the "exclusive authority to decide whom to prosecute" and a trial court commits "a violation of the constitutional separation of powers" when it interferes with that authority. And "the decision whether to dismiss a case or proceed to trial ultimately rests in the sole discretion of the prosecutor." *Id.* at 252. It is axiomatic that a prosecutor's charging decision affects the sentence that a trial court may impose. See *People v Conat*, 238 Mich App 134, 149-150; 605 NW2d 49 (1999). If a prosecutor chooses to charge a lesser offense, then it follows that the trial court will, upon conviction, only have the possibility of a lesser sentence available. *Id.* Indeed, in the case at bar, had the prosecutor originally decided to only proceed in the family division, there

never would have been the possibility of there being an adult conviction upon which the trial court could impose an adult sentence.

The dissent looks to the decision in *Grove* for support of the conclusion that the dismissal would intrude upon the trial court's sentencing authority. We believe that reliance is misplaced. While, as noted above, *Grove* did discuss *nolle prosequi*, ultimately it involved the trial court rejecting a plea bargain to a lesser offense that included a sentencing recommendation that the trial court found unacceptable. 455 Mich at 445. That is significantly different than this case where the prosecutor was seeking a dismissal of charges.

In sum, a trial court's authority to deny a *nolle prosequi* is limited. There must be shown that the prosecutor is committing malfeasance, or otherwise is acting in an unconstitutional, illegal, or ultra vires manner. And this must be evaluated in light of the fact that the trial court's authority in the first place to reject a *nolle prosequi* is to safeguard the defendant's rights and to protect against prosecutorial harassment. None of these conditions have been shown in this case. Indeed, we imagine that it would be the rare case where it can be said that a prosecutor's request for *nolle prosequi* would violate the defendant's rights when the defendant agrees to the *nolle prosequi*. Accordingly, the trial court abused its discretion in denying the *nolle prosequi*.

The decision of the trial court is reversed, and we remand the matter to the trial court with directions to grant leave of the court to the *nolle prosequi* and enter an order dismissing all charges against defendants without prejudice to the refile of charges as the prosecutor sees fit. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Jane M. Beckering

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Defendant-Appellant.

No. 352415

Genesee Circuit Court

LC No. 18-043472-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TREVOR ANTHONY GRAY,

Defendant-Appellee.

No. 352416

Genesee Circuit Court

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TREVOR ANTHONY GRAY,

Defendant-Appellant.

No. 352417
Genesee Circuit Court
LC No. 18-043465-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ALEXZANDER MILLER,

Defendant-Appellee.

No. 352475
Genesee Circuit Court
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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MIKADYN MAULAY PAYNE,

Defendant-Appellee.

No. 352476
Genesee Circuit Court
LC No. 18-043472-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK ANDREW SEKELSKY,

Defendant-Appellee.

No. 352477
Genesee Circuit Court
LC No. 18-043474-FC

Before: STEPHENS, P.J., and SAWYER and BECKERING, JJ.

BECKERING, J. (*concurring*).

I concur with the majority opinion to reverse and remand. Where the prosecutor's charging discretion ends and the trial court's sentencing discretion begins in this case conjures up images of anamorphosis art—it seems heavily dependent upon one's vantage point. But for the reasons set forth here and in the majority opinion, I agree that the trial court abused its discretion by denying the prosecutor's request to *nolle prosequi*. The prosecutor's request was not motivated by anything unconstitutional, illegal, or ultra vires. And his decision to charge defendants in juvenile court after the circuit court allowed them to withdraw their *Cobbs*^[1] pleas did not violate the separation of powers doctrine.

Each of the parties in this case argues that the trial court abused its discretion by denying the prosecutor's request for a *nolle prosequi* and that the court violated the separation of powers doctrine in denying that request because charging decisions are within the exclusive authority of the prosecutor. The parties have cited no caselaw where a prosecutor sought to *nolle prosequi* a case that the prosecutor had waived to criminal court under MCL 764.1f² after a juvenile defendant withdrew a *Cobbs* plea so that the prosecutor could refile charges in the juvenile court. And I have found no case on point. Thus, this Court must examine the purpose of the *nolle prosequi* statute as well as the scope of power held by the relevant branches of government.

Const 1963, art 3, § 2, states:

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.

“The conduct of a prosecution on behalf of the [p]eople by the prosecutor is an executive act.” *Genesee Co Prosecutor v Genesee Co Circuit Judge*, 386 Mich 672; 683; 194 NW2d 693 (1972) (*Genesee Prosecutor I*) (citation omitted). As an elected official, the prosecuting attorney is responsible for his or her actions to the citizens of his or her county. Const 1963, art 7, § 4. As chief law enforcement officer of a county, the prosecutor has exclusive authority to decide whether to prosecute a person and what charges to file. *People v Williams*, 244 Mich App 249, 251-252; 625 NW2d 132 (2001). “The prosecution is not for the benefit of the injured party, but for the public good.” *Id.* at 253. Thus, “the decision whether to dismiss a case or proceed to trial is within the prosecutor's sole discretion.” *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995).

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

² MCL 764.1f(1) states that “[i]f the prosecuting attorney has reason to believe that a juvenile . . . has committed a specified juvenile violation, the prosecuting attorney may authorize the filing of a complaint and warrant on the charge with a magistrate concerning the juvenile.”

Entering a *nolle prosequi*³ ordinarily falls within the prosecutor's broad and independent discretion. However, once an information is filed and a prosecution is underway, MCL 767.29 constrains the prosecutor's power to *nolle prosequi*. In pertinent part, MCL 767.29 provides that "[a] prosecuting attorney shall not enter a *nolle prosequi* . . . without stating on the record the reasons for the discontinuance or abandonment and without the leave of the court" This statutory mandate requiring leave of the court replaced the common law principle that dismissal was a prosecutor's prerogative, regardless of the judge's view. *People v Curtis*, 389 Mich 698, 706; 209 NW2d 243 (1973). The statute provides that the prosecutor must state on the record the reasons for seeking a *nolle prosequi* order and must also obtain leave of the court. *People v Glass (After Remand)*, 464 Mich 266, 278; 627 NW2d 261 (2001). Notably, however, the statute is intended to protect the interests of the criminal defendant by preventing repeated dismissals and subsequent reinstatement of the charges against him resulting in "endless vexations" in the prosecution of criminal cases. *Curtis*, 389 Mich at 705-706. See also *Rinaldi v United States*, 434 US 22, 29 n 15; 98 S Ct 81; 54 L Ed 2d 207 (1977) (the purpose of the "leave of court" provision is to protect a defendant against repeated charges from the prosecution, or where the public interest clearly weighs against the dismissal). A court considering a *nolle prosequi* motion must consider whether the prosecution's reasons for the decision are in concert with the law, the facts, and reason of the case. *Genesee Co Prosecutor v Genesee Co Circuit Court Judge*, 391 Mich 115, 121; 215 NW2d 145 (1974) (*Genesee Prosecutor II*). And a trial court may not substitute its judgment for that of the prosecuting attorney as if it were acting in a supervisory capacity. *Id.*

In the present case, the prosecutor's motion was prompted by an agreement between the prosecution and the defense that the best course for these defendants is juvenile incarceration, rather than adult incarceration. The prosecutor's interest was not in a particular sentence but, rather, in seeking rehabilitation services available only in the juvenile system. Each defense counsel agreed with that goal. There is no hint in the record of improper motive on the part of the prosecuting attorney. Nor is there anything that would permit the conclusion that defendants' interests would be in jeopardy if the *nolle prosequi* request were allowed. Moreover, there has been no suggestion that the public interest clearly weighs against the dismissal, *Curtis*, 389 Mich at 706, where the public interest arguably is served by defendants remaining under juvenile supervision until they are 21.⁴ After defendants withdrew their pleas, the parties essentially returned to a pretrial posture. The prosecution chose to exercise its charging discretion by changing the nature of the prosecution from an adult criminal case to a juvenile proceeding. This case is in contrast to cases in which the prosecution exceeded its authority, such as where the prosecution unilaterally attempted to derail trial after the trial court denied a motion to adjourn,⁵

³ "In Michigan, normally *nolle prosequi* is a dismissal without prejudice which does not preclude initiation of a subsequent prosecution." *People v McCartney*, 72 Mich App 580, 585; 250 NW2d 135 (1976).

⁴ Of course, defendants are still subject to the judicial imposition of their sentences in juvenile court.

⁵ See *People v Borowka*, unpublished per curiam opinion of the Court of Appeals, issued September 17, 2019 (Docket No. 346398). Although unpublished opinions are not binding on this

or where the prosecution reneged on a binding agreement to dismiss charges against a defendant if the defendant passed a polygraph examination.⁶

It appears that the trial court determined that the prosecutor's request to *nolle prosequi* was based on an ultra vires and unconstitutional exercise of authority. That is, the court found that the prosecution exceeded its authority because granting a *nolle prosequi* in order to refile charges in juvenile court after the circuit court allowed defendants to withdraw their *Cobbs* pleas was an "attempt to evade the Court's ruling rejecting juvenile sentencing to seek it in another forum." The trial court also seemingly viewed the prosecutor's request as a violation of the separation of powers; namely, it viewed the request as an attempt to usurp the trial court's sentencing discretion and to seek a more desirable resolution in the forum provided by the juvenile court. However, the request for *nolle prosequi* does not appear to be ultra vires or unconstitutional because it falls squarely within the prosecutor's constitutional role. See Const 1963, art 7, § 4. As earlier noted, the decision whether to dismiss a case or proceed to trial rests in the sole discretion of the prosecutor, see *Williams*, 244 Mich App at 252, as does a charging decision. Moreover, "[t]he exercise of the prosecutor's charging discretion routinely affects the sentence that the court may impose upon conviction." *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999). Indeed, in *Conat*, 238 Mich App at 147-153, this Court held that MCL 764.1f, giving prosecutors discretion to charge juveniles as adults for certain enumerated crimes, and to seek imposition of adult sentences with respect thereto, does not violate the constitutional separation of powers and is a permissible legislative limitation on the sentencing discretion of courts. While the timing of the request to *nolle prosequi* appears suspect in this case, that does not mean that the prosecutor committed an unconstitutional, illegal, or ultra vires act.

As the amicus, Michigan Judges Association,⁷ notes in its brief, it appears that the prosecution was using its authority to determine the scope of defendants' sentencing exposure—that is, that defendants would receive the benefits of juvenile incarceration and rehabilitation and not be exposed to adult prison.⁸ The prosecution sought to *nolle prosequi* to exercise its charging discretion after defendants withdrew their *Cobbs* pleas in circuit court when the court declined to sentence defendants as juveniles in accordance with those pleas. In other words, the decision to request *nolle prosequi* was a consequence of defendants' withdrawal of their pleas.⁹ At that point, the prosecution exercised its charging discretion under MCL 764.1f and chose to refile the charges in juvenile court—admittedly so that the parties' negotiated goal of confinement combined with

Court, MCR 7.215(C)(1), they may be considered instructive or persuasive. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 139 n 3; 783 NW2d 133 (2010).

⁶ See *People v Reagan*, 395 Mich 306; 235 NW2d 581 (1975).

⁷ The amicus brief was filed in defendant Gray's appeal in Docket No. 352416.

⁸ This case does not raise a challenge to the propriety of the parties' initial sentencing agreement.

⁹ The prosecution seems to agree that if defendants had not withdrawn their pleas and were poised to be sentenced, "it would be too late to change their charging decision."

juvenile rehabilitative treatment could be achieved.¹⁰ The prosecutor's charging decision after the pleas were withdrawn will affect the sentencing options, but as already explained, it will do so without offending the constitutional doctrine of separation of powers.

Under the presenting circumstances, the prosecutor's act does not appear to be unconstitutional, illegal, or ultra vires, nor does it appear to violate the separation of powers. Thus, I agree with the majority that the trial court abused its discretion by denying the prosecution's request to *nolle prosequi*.

/s/ Jane M. Beckering

¹⁰ Further supporting that the trial court recognized that the matter involved a charging decision are the suggestions from the trial court that the prosecution could reduce the charges to acquire a different set of sentencing guidelines that would not call for a prison sentence, or could bring other adult charges, such as an attempt to commit malicious destruction of property.

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Before: STEPHENS, P.J., and SAWYER and BECKERING, JJ.

STEPHENS, P.J. (*dissenting*).

Given the procedural posture of this case and the timing of the prosecutor's request for *nolle prosequi*, I cannot agree with the majority's conclusion that the prosecutor did not act in an ultra vires manner.

I. BACKGROUND

At an August 20, 2019 hearing, the court told defendants that they had three options: (1) affirm the plea and be sentenced as an adult that day, (2) withdraw the plea and have the matter set for trial, or (3) make a new *Cobbs* proposal in writing. Counsel for defendant Payne argued that the court was violating the separation of powers where MCR 6.301(D) clearly "state[d] that the prosecution is the one that determines whether or not there will be a plea other than to the charged offense and what that charge may be." Each defendant moved to withdraw his plea, which the court permitted.¹ The order stated that "[p]ursuant to MCR 6.312,² the Court will allow the People to seek to reinstate any charges reduced or dismissed in accordance with the plea agreement, in the People's discretion."

At the next hearing on September 24, 2019, the prosecution declined to revise or reinstate any charges. The parties instead moved to remand the matter to the district court for a preliminary examination on the manslaughter charge. The circuit court said that it did not have authority to remand the matter to district court because each defendant had validly waived his preliminary examination. The prosecution then orally moved to dismiss the matter without prejudice so that charges could be refiled in juvenile court. The court did not wish to decide the matter until a written motion was filed and additional research was conducted. The court added that the prosecution may wish to reduce the charges to acquire a different set of sentencing guidelines that would not call for a prison sentence. The prosecution later filed a written motion of *nolle prosequi* in each case, moving to dismiss the criminal cases against defendants as juvenile delinquents in order to refile and proceed under the jurisdiction of the family division. Defendants each agreed with the prosecutor that resolving this matter through a prosecution in the juvenile court was in their best interests.

The court issued a written opinion in which it addressed the request to remand, the motion for *nolle prosequi*, and its earlier decision to sentence the defendants as adults. The court noted that the prosecution did not move to dismiss until the rejection of juvenile sentencing, which was "[a] clear case of avoidance of the Court's sentencing decision."

¹ MCR 6.310(B)(2) provides that a defendant is entitled to withdraw a plea if "the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose." MCR 6.310(B)(2) pertains to an agreement between the defendant and the trial court and is known as a "*Cobbs*" agreement.

² MCR 6.312 states, "If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered."

The court's refusal to grant the prosecutor's *nolle prosequi* forms the basis for these consolidated appeals.

II. SEPARATION OF POWERS

I begin my dissent with the points of agreement with the majority, the concurrence, the parties, and the amici. Those key points of agreement are: 1) The pre-trial negotiations between the parties were extensive and followed the prosecution's initial decision to automatically waive the juveniles to adult court; 2) The court repeatedly declined to agree to juvenile sentencing without a juvenile sentencing hearing; 3) The court conducted that hearing and orally ruled with extensive fact finding that it would not sentence the juveniles as juveniles; 4) The court's ruling under MCR 6.931(3) and MCL 769.1(4) was subject to appeal under an abuse of discretion standard but no such appeal was filed nor was the ruling a subject of asserted error in this appeal; and 5) The sole purpose of the prosecution's *nolle prosequi* motion was to refile the cases in the family division where adult sentencing was not an option.

The majority and the concurrence assert that the prosecution's motive for the stipulated motion to dismiss was not ultra vires. Under most circumstances, I would concur. However in this case where the motion followed an unchallenged ruling by the trial court, I must disagree. In accord with MCR 6.931, a juvenile sentencing hearing was held over several days between February 2019 and May 2019.³ The court heard testimony from 13 witnesses concerning whether the juveniles should be sentenced as juveniles or adults, including from the officer in charge, adult probation officers, psychologists, juvenile justice workers, the juveniles' families, and the victim's family. The media reported on the matter extensively.⁴ On July 23, 2019, the court gave its ruling on the record. The court considered the seriousness of the offense, the juveniles' culpability, prior delinquency records, the juveniles' programming history, adequacy of punishment, and dispositional options.⁵ The court rejected the parties' proposal for juvenile sentencing. The court gave the defendants until August 20, 2019, to withdraw their pleas or make additional *Cobbs* proposals. There was no challenge to the court's exercise of discretion in declining juvenile sentencing.

³ Hearings were held on February 21, 2019, March 6, 2019, April 18, 2019, May 1, 2019, May 31, 2019, and June 19, 2019. The transcript of the February 21, 2019 hearing has not been provided. The register of actions reflects that a hearing was noticed for March 6, 2019, but does not reflect the hearing on that date.

⁴ As three examples, see <<https://www.cbsnews.com/news/michigan-judge-rejects-juvenile-sentencing-for-teens-in-highway-rock-toss-death/>>; <<https://abcnews.go.com/US/teens-deadly-michigan-highway-rock-throwing-case-sentenced/story?id=64516770>>; <<https://www.fox2detroit.com/news/juvenile-rejection-judge-will-sentence-4-teens-in-i-75-rock-throwing-death-as-adults>> (accessed July 30, 2020).

⁵ The court was required to consider each of these factors in determining whether to sentence a juvenile as a juvenile or an adult offender. MCL 769.1(3).

I am keenly aware that the rejection of a motion to *nolle prosequi* has been rarely upheld.

The court's statutory power to veto the prosecutor's decision to discontinue a criminal proceeding was not meant to significantly impair the common-law rule that only the prosecutor could exercise the power to enter a *nolle prosequi*. Rather, the statute was enacted primarily to protect defendants by not allowing prosecutors to exercise this power unless the reasons therefor were stated on the record and leave of the court was obtained and recorded. While the statute, by requiring the trial court's permission, does effect some infringement on the prosecutor's exclusive common-law power, the initial decision as to whether or not to enter a *nolle prosequi* nevertheless remains an executive function and a part of the duties of the prosecutor. [*People v Heiler*, 79 Mich App 714, 718-719; 262 NW2d 890 (1977) quoting *People v Nelson*, 66 Mich App 60, 64; 238 NW2d 201 (1975).]⁶

I cite *Grove*⁷ not because I misperceive it as discussing a *nolle prosequi* motion, but because it offers insight into the purpose and scope of MCL 767.29. There, the Court wrote:

this statute reflects a legislative understanding of the trial judge's role in ensuring that the public's interest in bringing criminals to justice is not defeated by unconstitutional, illegal, or ultra vires acts by the prosecutor. The authority to impose sentence [sic] is vested exclusively in the trial courts. Were the prosecutor and defendant able to compel the trial judge to accept an underlying plea in the presence of a sentence recommendation, no matter how severe the departure from the original charge and its sentencing framework, the interests served by the *nolle prosequi* statute would be defeated. Moreover, like the *nolle prosequi* statute, the trial judge's authority to decide whether to accept or reject a plea, while reviewable for an abuse of discretion, encourages the prosecutor to carefully consider the relevant facts when initially exercising prosecutorial charging discretion. [*People v Grove*, 455 Mich 439, 459; 566 NW2d 547 (1997)].

Both *Grove* and *People v McCartney*, 72 Mich App 580, 585; 250 NW2d 135 (1976), emphasize the judge's role in protecting the public's interest in reviewing a *nolle prosequi* motion. As in this case, the parties in *McCartney* concurred with the motion and the trial court's declination was upheld. "The trial court was particularly interested in seeing that justice was done and in achieving a determination as to 'whether or not the defendant had served two and a half years in

⁶ MCL 767.29 was intended for the protection of the defendant by preventing repeated dismissals and subsequent reinstatement of the charges against him resulting in "endless vexations" in the prosecution of criminal cases. *People v Curtis*, 389 Mich 698, 705; 209 NW2d 243 (1973). See also *Rinaldi v United States*, 434 US 22, 29 n 15; 98 S Ct 81; 54 L Ed 2d 207 (1977) ("The principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment, e. g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection.").

⁷ *People v Grove*, 455 Mich 439, 460; 566 NW2d 547 (1997), superseded by statute on other grounds as stated in *People v Franklin*, 491 Mich 916; 813 NW2d 285 (2012).

state prison as an innocent man or as a guilty man’.” *Id.* at 589 (citation omitted). I acknowledge that the prosecution’s independent basis for the motion was not articulated in *McCartney*, unlike in this case. I do not in any way believe that anyone, not the parties nor the trial court, took this case lightly as the opinion asserted was done in *McCartney*. Rather, *Grove* and *McCartney* are cited to underscore that the trial court is not required to automatically grant such a motion .

It is important to focus on when the prosecution asked for dismissal in the instant case. The trial court twice rejected proposed pleas that included sentencing agreements. No motion was filed after those rejections. Only after the court held a multi-day hearing, made findings of fact, and reached a conclusion of law under MCL 769.1 and MCR 6.931 was the motion made. A party aggrieved by a judicial decision has the right to appeal that decision. In *People v Hazzard*, 206 Mich App 658; 522 NW2d 910 (1994), such an appeal was successfully prosecuted as it has been in numerous unpublished cases. While the briefs in this case from the prosecutor and the defense disagree with the trial court’s decision to decline juvenile status, they did not argue that the judge’s fact finding was erroneous. They did not assert an abuse of discretion. Instead, they attempted to circumvent direct appeal of that decision by filing the *nolle prosequi* motion to refile the case as a juvenile petition where adult punishment was not possible. The court afforded the defendants their right to withdraw their pleas. This is, as was noted in *People v Malotunis*, 60 Mich App 143; 230 NW2d 347 (1975), one of those “situations in which the public interest and the proper administration of justice justify such a decision.” *Id.* at 148-149. I understand that the only temporal constraint on the prosecutor’s request to abandon prosecution under a *nolle prosequi* recognized by law is “upon an indictment”. MCL 767.29; *Genesee Co Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 120 n 10; 215 NW2d 145 (1974). However, the timing in this case supports the trial court’s determination that the purpose of the motion was to circumvent, rather than appeal a court ruling. It is that attempt that is ultra vires. I would affirm.

/s/ Cynthia Diane Stephens