

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

COURT OF APPEALS NO. 296559

Lower Court No. 08-10777-01

& 08-10496-01

-vs-

KWAME KILPATRICK

Defendant-Appellant.

WAYNE COUNTY PROSECUTOR
Kym L. Worthy (P38875)
Attorney for Plaintiff-Appellee

DANIEL HAJJI (P63815)
Attorney for Defendant-Appellant

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COURT OF APPEALS
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MOTION FOR IMMEDIATE CONSIDERATION

ACTION REQUIRED BY FEBRUARY 24, 2010

The Defendant-Appellant, Kwame Kilpatrick, by and through his attorney, Daniel D. Hajji, and in support of this motion states:

1. After an extensive restitution hearing held in this case, based on the prosecution's request for increased payments based on Defendant-Appellant's ability to pay more, the lower court issued an opinion and order, on January 20, 2010, requiring Defendant-Appellant to make additional restitution payments of \$79,011.00 by February 19, 2010, and \$240,000.00 by April 22, 2010, knowing that Defendant-Appellant did not have the financial resources to make such payments.

2. The trial court had ordered Mr. Kilpatrick to take the stand, explaining that the restitution hearing was civil in nature and not a probation violation hearing; therefore, he did not have the right to not take the stand.
3. After the hearings, the trial court made no determinations concerning Defendant-Appellant's ability to pay, despite that fact that the evidence presented by the prosecution clearly established he did not have the financial ability to pay the amounts ordered.
4. The only determinations made by the trial court were that Defendant-Appellant had violated his probation orders.
5. On February 19, 2010, Defendant-Appellant filed a motion to stay proceedings pending application for leave to appeal, a motion for immediate consideration, and an application for leave to appeal.
6. **Plaintiff-Appellee responded by basically alleging that, because the restitution order only imposed restitution, and enforcement of the order was not yet being sought, the Defendant-Appellant's request was premature.**
7. In approximately 2 hours, this Court rendered its decision in a 2-1 decision, in pertinent part, granting the Defendant-Appellant's motion for immediate consideration and denying the stay without prejudice, while holding the application for leave to appeal in abeyance pending receipt of the transcript.
8. Within a short time of this Court's decision, the prosecution issued a statement indicating that it would be seeking a probation violation hearing, if the payment was not made by the end of day Friday, February 19, 2010.

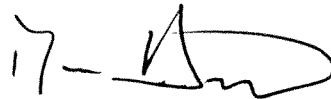
9. On Monday, February 22, 2010, the lower court ordered the appearance of undersigned counsel, Prosecutors, the Probation Officer, Brett Roach, and his Supervisor, Beverly Smith.
10. On Tuesday, February 23, 2010, the trial court, indicated that it would be issuing a warrant for a probation violation hearing, based on Defendant-Appellant's failure to make the required payment on February 19, 2010.
11. Mr. Kilpatrick's it now facing enforcement proceedings for violating the very order he seeks to appeal.
12. Further, it would be antithetical to the very principles of due process to believe that the prosecution and the courts could save the expense of providing due process for a probation violation hearing, by allowing the prosecution to schedule a restitution hearing instead, forcing a probationer to testify concerning alleged violations, making determinations that probation was violated, and formalizing those findings at a later hearing.
13. And to allow the foregoing to take place without the ability to challenge the contested provisions prior to formalization of those previous findings will compound the due process deprivation in this case.
14. Without a stay of the proceeding in the trial court, Defendant-Appellant and his family will suffer continuing public contempt, scorn, ridicule and stigmatization that will jeopardize his employment, his rehabilitation, and his ability to fulfill his restitution obligation.
15. And without a stay, Defendant-Appellant also faces a very real possibility of incarceration and additional sanctions, without meaningful review.

16. Action is necessary by February 24, 2010 because Defendant-Appellant resides and is employed in the State of Texas and has been ordered by the lower court to appear on Friday, February 26, 2010 for purposes of arraignment on a probation violation.

WHEREFORE, Defendant-Appellant, Kwame Kilpatrick, respectfully requests that the Court reconsider its order of February 19, 2010, and grant him a stay of proceedings pending leave to appeal.

Respectfully submitted,

Dated: February 23, 2010

A handwritten signature in black ink, appearing to read "17- [unclear]", written over a horizontal line.

Daniel D. Hajji (P63815)
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(248) 865-4700

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Attorney for Plaintiff-Appellee

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DANIEL HAJJI (P63815)
Attorney for Defendant-Appellant

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MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER
DENYING WITHOUT PREJUDICE A STAY OF PROCEEDINGS
PENDING APPLICATION FOR LEAVE TO APPEAL

Within minutes of this Court's decision denying Mr. Kilpatrick a stay of proceedings a news reporter asked, "What does this mean for your client?" Only a short time earlier a different news reporter had asked for a comment on the prosecution's response to the motion. I downloaded the response from the internet, my office had not yet received anything. The prosecution's response basically stated that the request was premature, until such time as consequences are imposed, *citing* People v Jackson, 483 Mich 271 (2009.) Within a short time of this Court's decision the prosecution issued a statement indicating that it would be seeking a probation violation hearing, if the payment was not made. This case had already become a farce, yet here the prosecution adds another layer of absurdity.

Counsel had attempted to get this Court to just maintain the status quo, allow this Court time to examine the record, ensure that standards of due process are being met, so that when this case is finally resolved, the City of Detroit and its citizens can agree that the proceedings were handled fairly and justly. The realities of this case speak louder than the legal analysis. The entire purpose of the plea agreement in this case was to let the City of Detroit heal and move forward, to require Mr. Kilpatrick to pay for his mistakes, and also to allow him to move forward. Mr. Kilpatrick wishes to move on, even if the City of Detroit does not. He only asks that his family be left alone. When the tapes of his conversations with his wife, while he was incarcerated, were played at the hearings, Mr. Kilpatrick's tears were real. He had not allowed his children to see him behind bars, he had brought shame and disgrace not only to himself but his family as well.

Yet Mr. Kilpatrick is not being allowed to move forward. And the divisiveness caused by the underlying case remains and grows. As counsel dodges reporters, at his office, at the Circuit Court, and at the Court of Appeals, he can hear the various opinions circulating among the populace. Viewpoints seem to vary concerning the situation, yet there are distinct divisions along racial lines. This is not good for the City of Detroit.

In addition, the trial court and the prosecution do not seem to be concerned with getting the restitution paid. The trial court has been antagonistic to the very undertakings that are necessary to fulfillment of the restitution payments. The trial court even disapproved of the manner in which Mr. Kilpatrick secured employment because it did not arise in the exact manner that Mr. Kilpatrick thought and represented it would. Undersigned counsel and legal experts would agree that it is unheard of a judge chastising a criminal defendant for the manner in which he secured employment. The trial court also disapproves of the assistance provided by friends and supporters of the Kilpatrick family. Indeed, Mr. Kilpatrick has reached out to friends and

acquaintances for help; he has in the past borrowed to make the monthly restitution payments. The trial court appears to infer that it wants Mr. Kilpatrick to live a middle class existence, when such an existence is inconsistent with earning a sufficient amount to fulfill his restitution obligation.

The reality is that Mr. Kilpatrick would have to pay an average of \$200,000 a year to fulfill the restitution requirement during the five years of probation. Now the trial court has shortened that period to within four-years from the time of the plea. Mr. Kilpatrick would have to average more than \$250,000 a year, to fulfill the restitution requirement. It does not take a legal scholar or a rocket scientist to figure out that to clear an extra \$250,000 a year Mr. Kilpatrick is going to have to function in the upper echelons of society. Yes, Mr. Kilpatrick has expended considerable sums to keep up appearances.

However, the clientele he must establish a rapport with are likely to be the privileged and the affluent. The deals he must close to fulfill the restitution obligation require considerable time and he is going to have to cater to sophisticated clients-- Burgers and beer at the local bar is not going to be sufficient. In addition, the trial court's scrutiny of a sales meeting during the restitution hearing, which Mr. Kilpatrick had to attend, is the very type of scrutiny that such clients are likely to avoid. If the trial court really wants the restitution paid, it should exercise a little common sense and at least try to not spoil any possible deals.

Yet, while issuing his opinion and order, after the much publicized restitution hearing, the derision and scorn is apparent, as The trial court tells the cameras that Mr. Kilpatrick had requested that his restitution payment be lowered to \$6.00. The trial court goes on to state Mr. Kilpatrick is living in a mansion and driving a fancy SUV, even though he owes the City of

Detroit a million dollars. The trial court states that Mr. Kilpatrick has been deceitful and hidden assets.

However, **the truth**, which the trial court so readily avoided, is that Mr. Kilpatrick did not request that his restitution be lowered. The trial court even acknowledged this during the restitution hearings. The pleading referred to only indicated that based on Mr. Kilpatrick's current income from his employment versus his expenses, there is only \$6 left over. Yet the trial court statements to the cameras subjected not only Mr. Kilpatrick to derision, ridicule and scorn, but his family as well.

And the assets were not hidden. The restitution hearings did not disclose any hidden slush funds, offshore accounts, or financial accounts under assumed names. Basically all the alleged hidden assets were in his wife's name.

Why? **Because they were his wife's.**

They were not hidden, they just had not been disclosed to the court's satisfaction. Mr. Kilpatrick had explained that he had asked his wife about her finances. The essence of his testimony regarding those conversations was that she told him she was not giving him that information, **conversation over**. Is it hard to believe that Mrs. Kilpatrick might take that stance in this matter? She never wanted to be involved, still doesn't want to be involved. The prosecution had wanted to know how come Mr. Kilpatrick had not sought a subpoena for her records. Wouldn't such a requirement be contrary to the rationale underlying the marital privilege doctrine? The prosecution was able to subpoena the documents, the information was available.

The hearings even disclosed that Mrs. Kilpatrick had an elective surgical procedure to repair some type of hernia that was caused by childbirth, and may have had some additional plastic surgery. This is more than undersigned counsel really cares to know about Mrs.

Kilpatrick's personal issues. While this may be appropriate fodder for tabloids, its significance is trivial in relationship to the magnitude of the restitution obligation in this case. During the hearings the prosecution also attempts to refute Mr. Kilpatrick's contention that Mrs. Kilpatrick handles the finances, and seems to try and portray Mrs. Kilpatrick as being unable to handle the finances. However, Mrs. Kilpatrick does not appear too dumb to handle the financials to undersigned counsel. She paid \$71,500 for a one-year lease, and you can probably bet that the trial court is not going to throw her and the kids out in the street anytime soon.

Moreover, the allegedly hidden money was **given specifically to her and the children** to provide for her and the children. Mrs. Kilpatrick and the children were the **intended beneficiaries** of loan that was allegedly fraudulently conveyed to her. Even though the trial court seems to blatantly ignore her rights in this matter, she probably is not going to turn over any of her assets, nor is she going to use gifts specifically given to her to pay Mr. Kilpatrick's restitution. She still sends her children to summer-camp, she still tithes, donates to charities and carries on with as much dignity as she can.

Mr. Kilpatrick reiterates the foregoing, because that is what this appeal is primarily about, the rights and dignity of his wife and children. What must he do to protect them? Must he go to the extremes of a separation or even a divorce? Should he recommend such to her? Should that even be necessary or required? A family court would surely recognize that as his wife Mrs. Kilpatrick has claims to a share of the marital assets, and Mr. Kilpatrick has obligations to her and the family.

However, this appeal is also about a trial judge standing the law on its head, and making a mockery of the justice system. This case is about a trial judge who has repeatedly maligned Mr. Kilpatrick, and even vilified him to the press. This case is about a trial judge who has repeatedly

insisted that he is not trying to set Mr. Kilpatrick up for failure, while at the same time issuing an order that the evidence clearly indicated could not be complied with. This case is about a trial judge who creates stipulations and agreements out of thin air, to infer additional terms in a plea agreement. A trial judge that orders Mr. Kilpatrick to pay a percentage of any gifts and benefits **he receives** towards restitution, then determines that Mr. Kilpatrick violated probation because **his wife has received gifts and benefits**. This case is about a restitution order that automatically adjusts upward to include any gifts or benefits Mr. Kilpatrick receives, and as far as we can tell even his family, within its determination of income. Yet the same order apparently requires a motion before the automatic adjustment can trigger a downward departure. Mr. Kilpatrick needs a psychic to properly advise him in this matter.

This case is about the prosecution requesting an order to appear for the Michigan Department of Corrections and the Texas Department of Corrections to appear and explain why they have not sought a probation violation warrant. The case is about a trial court transferring Mr. Kilpatrick's probation back to the State of Michigan contrary to the rules and procedures of the Interstate Compact for the Supervision of Parolees and Probationers. This case is about a request by the prosecution to hold a restitution hearing, and to modify Mr. Kilpatrick's restitution upward based on his ability to pay, even though there is no statutory authority for such a request.

Finally this case is about a sham restitution hearing, where Mr. Kilpatrick was ordered to take the stand, and informed that he did not have the right not to take the stand, because the hearing was civil in nature, **and not a probation violation hearing**. The restitution hearing was ordered to determine whether the restitution payments were appropriately set, based on the prosecution's allegations that he could pay more based on his financial resources.

Yet the only determinations the trial court made were that Mr. Kilpatrick had violated the orders of probation. There were absolutely zero determinations made concerning Mr. Kilpatrick's present ability to pay. And the trial court further ordered Mr. Kilpatrick to pay close to \$80,000 within 30 days and an additional \$240,000 within 90 days, despite the fact that the very evidence presented by the prosecution indicated that he does not have the present financial resources to comply with the order. Moreover, the trial court stated that it was not setting Mr. Kilpatrick up for failure, when the evidence clearly indicates that it did. The Prosecution's response to the Motion for a Stay of Proceedings, claiming that it was premature was a specious attempt to elevate form over substance, because the first deadline has now passed, the order was not met, probation violation proceedings have begun.

The public interest and scrutiny of this case is intense. Counsel has not tried to be impertinent, but rather counsel is just trying to illustrate the character and significance of this case. The underlying victim in this case is the City of Detroit, it always was and it continues to be. The town is divided, with many of the opinion that Mr. Kilpatrick is nothing more than a darker version of Bill Clinton, many of the opinion that he was corrupt, and many of the opinion that this is just another giant fiasco that is accomplishing little more than giving Detroit another black eye.

Detroit is being re-victimized, and this time the trial court and the prosecution are lending a hand. It should come as no surprise to the City of Detroit, if Mr. Kilpatrick loses his job as a result of the scrutiny in this matter. And it should also come as no surprise if he fails to satisfy his restitution obligations, because the trial court does not want him to have sufficient financial

resources to be able to work the crowd so to speak, and little more than six-months to be successful.

And there are valid and significant legal issues here that should be resolved. Counsel has yet to find a case that states that a wife and children cannot validly receive gifts or benefits from strangers whose husband owes restitution and that a wife and children cannot be the intended beneficiaries of a loan specifically arranged to provide for their support whose husband owes restitution.

Further, it would be antithetical to the very principles of due process to believe that the prosecution and the courts could save the expense of providing due process for a probation violation hearing, by allowing the prosecution to schedule a restitution hearing instead, forcing a probationer to testify concerning alleged violations, making determinations that probation was violated, and formalizing those findings at a later hearing.

Moreover, to allow a court to issue an order requiring a probationer to pay a significant sum almost immediately, that it clearly knows cannot be complied with, except by some purely imaginary means, is antithetical to the very principles and concepts embodied in the term "Justice."

WHEREFORE, Defendant-Appellant, Kwame Kilpatrick, respectfully requests that the Court reconsider its order of February 19, 2010, and grant him a stay of proceedings pending leave to appeal.

Respectfully submitted,

Dated: February 23, 2010



Daniel D. Hajji (P63815)
Attorney for Defendant-Appellant

Court of Appeals, State of Michigan

ORDER

People of MI v Kwame Kilpatrick

Docket No. 296559

LC No. 08-010496-01; 08-010777-01

Karen M. Fort Hood
Presiding Judge

Kurtis T. Wilder

Christopher M. Murray
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The application is HELD IN ABEYANCE pending receipt of the transcript. The transcript from the hearing on January 20, 2010, ordered by defendant shall be produced in accordance with MCR 7.210, and the application shall be considered thereafter.

The motion for stay is DENIED without prejudice.

This Court retains jurisdiction.

Fort Hood, P.J., would grant the motion for stay.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

FEB 19 2010

Date

Sandra Schultz Mengel
Chief Clerk