

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Court of Appeals

Judges: Elizabeth L. Gleicher, Amy Ronanyne Krause, and Michael J. Riordan

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

MSC No 149040
Court of Appeals No 314890

vs

Lower Court No 11-29652 FC

MANTREASE DATRELL DEQUAN SMART,
Defendant-Appellee

Judge: Yuille

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**PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL**

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Prosecuting Attorney

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Assistant Prosecuting Attorney



Table 51

negotiations to be reopened was no chance for his statement to cause bias concerning him or to cause any other defendant's interest in the case because defendant made the statement knowing that his presence of Dr. Mitch Brown is significant of his defendant's statement made on June 8, 1977 in the

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inapplicable to the current version of MRE 410 on a previous version of MRE 410. People v Dunn is the Michigan Supreme Court decided People v Dunn passed

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makes his statement. regard of the prosecuting authority at the time defendant the statement but instead authorizes an agent to act on authority is not present at the time the defendant makes statement, applies even if an attorney for the prosecuting discussions with an attorney for the prosecuting defendant's statement made in the course of his MRE 410(a) which prohibits the admission of a

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Statement of Jurisdiction

The trial court suppressed a statement defendant made to police Sgt. Mitch Brown on June 8, 2011. The People filed an interlocutory application. In a 2-1 opinion issued February 11, 2014, the Court of Appeals Affirmed. *People v Smart*, 304 Mich App 244; ___ NW2d ___ (2014). The People are seeking leave to appeal with this Honorable Court. This Court has jurisdiction pursuant to MCR 7.301(B)(1).

On September 17, 2014, this Court entered an order directing the parties to:

submit supplemental briefs within 42 days of the date of this order addressing whether the defendant's statement to the police on June 8, 2011 should be suppressed under MRE 410. In briefing this issue, the parties should include in their discussion whether, pursuant to MRE 410(4), "plea discussions" must directly involve a prosecuting attorney or whether a prosecuting attorney's agent may act on behalf of the prosecuting authority and, if so, under what circumstances the agent's discussions constitute "plea discussions." The parties should also address whether this Court's two-part analysis for determining if a statement was made "in connection with" a plea offer, established in *People v Dunn*, 446 Mich 409 (1994), should continue to guide the application of MRE 410, and if not, what test should be applied in its stead.

Statement of Questions Presented

Issue I

MRE 410(4), which prohibits the admission of a defendant's statement made "in the course of plea discussions with an attorney for the prosecuting authority," applies even if an attorney for the prosecuting authority is not present at the time the defendant makes the statement but instead authorizes an agent to act on behalf of the prosecuting authority at the time defendant makes his statement.

Plaintiff-Appellant says yes.
Defendant-Appellee says no.
Trial court did not address

Issue II

The Michigan Supreme Court decided *People v Dunn* based on a previous version of MRE 410. *People v Dunn* is inapplicable to the current version of MRE 410.

Plaintiff-Appellant says yes.
Defendant-Appellee says no.
Trial court did not address

Issue III

Defendant's statement made on June 8, 2011, in the presence of Sgt. Mitch Brown, is admissible at trial because defendant made the statement knowing that plea negotiations on defendant's unrelated carjacking case concluded prior to June 8, 2011 and defendant knew there was no chance for his statement to cause plea negotiations to be reopened

Plaintiff-Appellant says yes.
Defendant-Appellee says no.
Trial court did not address

Statement of Facts

The Genesee County Prosecutor charged defendant Mantrease Smart with:

Count 1: Felony Murder, for the death of Megan Kreuzer, MCL 750.316;

Count 2: Armed Robbery, involving victim Megan Kreuzer, MCL 750.529;

Count 3: Armed Robbery, involving victim Blake Hickman, MCL 750.529;

Count 4: Assault with Intent to Murder, involving victim Blake Hickman, MCL 750.83;

Count 5: Felony Firearm, MCL 750.227b.

PRELIMINARY EXAMINATION

Jamario Mays testified at the preliminary examination. He had also been charged with murder for the death of Megan Kreuzer. At the time of the preliminary examination, Mays had entered into an agreement with the prosecutor to plea to the amended charge of second-degree murder and armed robbery and felony firearm. There was also an agreement for Mays to receive a minimum sentence of 12 years for murder and an additional 2 years for felony firearm. (PE Vol I of III p 6).

Mays testified that on May 31, 2010, at approximately 10:55 p.m., he was at Jackson St and Alexander St. in the City of Flint, Genesee County. (*Id.*, pp 6-7). He lived two blocks away on Genesee St. with his sister Keisha Mays and her boyfriend Anthony Michael. He walked to Jackson and Alexander streets with Anthony Michael. (*Id.*, pp 7-8).

Mays had a sawed-off shot gun and Anthony Michael had an AK-47 assault rifle. (*Id.*, p 9). Defendant Mantrease Smart, a.k.a. "Trell", was with Mays and Michael. (*Id.*, pp 11-10). Mays told Smart that they were going over to Jackson and Alexander Streets to rob Megan Kreuzer. (*Id.*, p 11). Mays expected to steal marijuana that he believed Kreuzer would have with her. (*Id.*, p 12). Mays had previously talked to Kreuzer and arranged for her to sell him a half ounce of marijuana. (*Id.* pp 12, 28).

Mays testified that a condition of his plea agreement was to testify against Anthony Michael, but the agreement did not include testimony against Smart. (*Id.*, p 29).

Mays testified that it was his idea to rob Kreuzer, and he talked to Anthony Michael about it. (*Id.*, p 13). Mays had called Smart to bring a gun to him and Michael. Mays told Smart he planned to rob somebody. (*Id.*, pp 14-15). Smart brought an AK-47 to Mays's home. (*Id.*, p 15, 22).

Kreuzer was in a vehicle at Jackson and Alexander Streets when Mays approached the passenger side of the car where Kreuzer was sitting. (*Id.*, p 15). She gave Mays the marijuana. Anthony Michael approached the driver's side door and pointed a gun at the victims. Mays kept his gun in his jacket sleeve and did not pull it out. (*Id.*, p 16). Michael ordered the victims to "give me everything." Mays did not see if Michael got anything because he walked away. (*Id.*, p 17). Mays claimed that Megan didn't know he was robbing her and he "just thought of just to walk away from her and

play it off." (*Id.*, p 18). Mays looked back toward the vehicle and saw Anthony Michael shoot into the driver's side of the car two to three times. (*Id.*, p 18-19). Anthony Michael threw the AK-47 in the bushes. (*Id.*, p 27)

Defendant Smart was at the corner when Michael and Mays approached the car. (*Id.*, p 19). Mays ran back towards Genesee St. (*Id.*, p 20). Mays saw defendant early the next day at his (Mays's) house. Mays told defendant about the robbery but defendant did not respond or participate in planning the robbery. There was no plan to give defendant a portion of the marijuana Mays obtained during the robbery. (*Id.*, p 33). There was no plan for Smart to act as a lookout. (*Id.*, p 35).

On redirect, Mays testified that the defendant's AK-47 was loaded when defendant brought it to Mays and Michael. Defendant showed Michael how to rack the head back. (*Id.*, p 37).

The examining magistrate found probable cause and the matter was bound over to circuit court for trial. The trial court scheduled trial for April 10, 2012. On that day, defendant made an oral motion to suppress statements he made to police on March 15, 2011, and on June 8, 2011. The trial court scheduled an evidentiary hearing. (Tr April 10, 2012).

Defendant's Carjacking Case

Before the People charged defendant with murder in this case, they had charged him with carjacking in lower court number 10-27149-FC. The parties ultimately entered in to a plea agreement in that case. The

agreement was reduced to writing and signed by the prosecutor on May 11, 2011. Defendant signed the written agreement on May 23, 2011. (Tr April 10, 2010 p 17). The written agreement further required defendant to "testify truthfully consistent with a proffer statement given to [Flint Police Department] Det. Mitch Brown regarding a homicide and a conspiracy count would not be scored for guideline purposes. (*Id.*, p 18).

EVIDENTIARY HEARING ON DEFENDANT'S MOTION TO SUPPRESS STATEMENTS HE MADE TO POLICE ON MARCH 15, 2011 AND JUNE 8, 2011

Defendant Mantrease Smart

Defendant Mantrease Smart testified that on March 15, 2011, he made a statement to Sgt. Mitch Brown in the presence of his attorney at the time, Patricia Lazzio. (Hrg April 11, 2012 p 8, 12). At that time he had pending charges of Armed Robbery, Carjacking, and Felony Firearm. It was the only case he had pending at that time. (*Id.*, p 9). Smart testified that he was supposed to get "a deal on my case [carjacking] for some information I knew about this [the case at bar] case." (*Id.*, pp 11-12).

Smart believed that the charges on his carjacking case would be amended to unarmed robbery and felony firearm in exchange for the information that Smart would provide to Sgt. Brown. (*Id.*, pp 12-13). Smart admitted that when he spoke to attorney Lazzio about the information he did not tell her the entire truth. (*Id.*, pp 14).

On March 15, 2011, defendant told Sgt. Brown more than he told his attorney and there came a point during the interview that the attorney stopped the interview and Sgt. Brown left the room. (*Id.*, p 16). Defendant spoke with his attorney; after which Sgt. Brown returned to the room and the interview continued. (*Id.*, p 17).

Sometime after this interview, defendant entered into a written plea agreement for his carjacking case. One term of the agreement required defendant to testify truthfully "consistent with a proffer statement given FPD Detective Mitch Brown, regarding the homicide." (*Id.*, 22). Defendant testified that, when he made his statement on March 15th he understood that he would not be charged for murder if he testified against Anthony Michael. (*Id.*, p 24-26). However, Smart refused to testify against Michael. (*Id.*, pp 31-32).

Attorney Patricia Lazzio

Attorney Patricia Lazzio represented Mantrease Smart on an unrelated carjacking case. She talked to him about this homicide case but she never represented him on it. (*Id.*, p 40).

At some point Smart told Lazzio that he had information about a homicide and would testify in exchange for "some type of consideration initially on the armed robbery/carjacking case." (*Id.*, p 41). Lazzio set up a meeting with Sgt. Brown through the prosecutor's office.

Defendant initially told Lazzio that he was a witness to the homicide. He claimed he had been selling drugs on the street corner at the time. He said nothing to her to suggest he was involved with the homicide. (*Id.*, p 42).

Lazzio made attempts to call Assistant Prosecuting Attorney Richmond Riggs. He did not return her calls. After a couple of attempts to contact Riggs, defendant advised Lazzio that he had changed his mind. Later, defendant changed his mind again and told Lazzio he would be willing to testify. Lazzio renewed her attempts to contact Riggs. (*Id.*, pp 42-43).

Lazzio finally spoke to Riggs and relayed the information that Smart had given her. (*Id.*, p 44). Lazzio told Riggs that she did not want anything defendant said during an interview to be used against him. Riggs told Lazzio that it would not be a problem and that he was interested in defendant as a witness. As per common practice in the Genesee County Prosecutor's Office, Riggs made no commitment about whether or not defendant would receive a reduction in charges on his carjacking case. Typically the prosecutor's office obtains an individual's statement before deciding if there will be an offer to resolve that individual's case with a plea to reduced charges. Lazzio reiterated to Riggs, that "the understanding" was that defendant's statement in an interview would not be used against him. (*Id.*, p 45).

Eventually a meeting was set up between Lazzio, Smart and Sgt. Brown. There was no prosecutor at the meeting. (*Id.*, p 64). At the

meeting, Lazzio stated that Smart's statements to Brown would not be used against Smart. (*Id.*, p 47). During the interview Smart made statements that Lazzio had not been aware of beforehand. (*Id.*, p 47). Specifically, Smart told Brown he sold the gun that was used by the two people who actually committed the murder. Lazzio did not expect defendant to incriminate himself in the murder and stopped the interview to speak with Smart privately. (*Id.*, p 49). Lazzio spoke with Brown before the interview resumed. (*Id.*, pp 50-51). Brown took notes of the interview. Smart reviewed the notes and signed the notes. (*Id.*, pp 52-53).

Lazzio discussed with defendant the possibility of resolving his carjacking case with a plea to unarmed robbery. She told defendant that the prosecutor had not yet made an offer. She also told him that any plea agreement with the prosecutor would require Smart to testify on the murder case. (*Id.*, p 55). On May 23, 2011, the parties entered into a written plea agreement. (*Id.*, p 56 admitted as Exhibit 1 and attached).

After the parties signed the written plea agreement, Lazzio arranged a second interview between defendant and Sgt. Brown because defendant questioned whether or not Lazzio secured the best possible plea agreement for him. Lazzio spoke to Sgt. Brown and asked him to tell defendant that his offer would not get better. (*Id.*, p 57). The second meeting occurred June 8, 2011. During the second statement, defendant implicated a female and

stated that she had more knowledge about the crime than he had stated in his first interview. (*Id.*, p 58).

There was no prosecutor at either the March 15th nor the June 8th meeting. (*Id.*, p 64).

Lazio testified that when the time came for defendant to testify on the murder case, he refused to do so. Lazio advised him that a refusal to testify would nullify the plea agreement. Defendant was upset because his codefendant in the carjacking case got the same offer to plea that had been given to him. (*Id.*, p 61).

On cross-examination, Lazio testified that the plea agreement she worked out was for the carjacking case. There was no discussion concerning whether or not defendant would be charged with murder if he did not testify. (*Id.*, pp 68-70). Defendant was not advised of his "Miranda" rights¹ during either of his interviews with Brown because of the agreement that his statement would not be used against him. (*Id.*, p 70). At the times defendant met with Brown, he had not been charged with the murder of Kreuzer. Therefore he was not in custody on the homicide case. (*Id.*, p 71)

Former Assistant Prosecutor Richmond Riggs

Richmond Riggs was an assistant prosecutor who supervised the circuit court trial division and the circuit court family division. (*Id.*, p 74). He

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L ed 2d 691 (1966)

denied any direct involvement in Smart's carjacking case. The carjacking case was assigned to another prosecutor.

He recalled receiving information from Attorney Lazzio advising that her client had information about a murder case. Riggs did not think that the information Lazzio provided implicated Smart as a perpetrator. Per office policy, Riggs did not make a plea agreement until he knew what testimony Smart could offer. Riggs testified that he may have contacted Sgt. Brown to ask him to interview someone. Riggs was aware that there was at least one interview between Brown and Defendant Smart. (*Id.*, p 75).

Riggs thought the information Smart gave was "second-handed" and inconsistent with other information Sgt. Brown had. However, Riggs acknowledged that the details of this case were not fresh in his mind. (*Id.*, p 77). Riggs had no recollection of working out a plea agreement on Smart's case. (*Id.*, p 78). Riggs denied making any promise that Smart would not be charged with homicide. (*Id.*, p 79).

Sgt. Mitch Brown

Retired Flint police detective Mitch Brown was the officer in charge of the investigation of the death of Megan Kreuzer. (Hearing April 12, 2012, p 84). Approximately in the beginning of 2011, Richmond Riggs contacted Brown who advised that Mantrease Smart may have some information about the case. Brown also spoke to attorney Patricia Lazzio. (*Id.*, p 5, 8).

On March 15, 2011, Brown met with Lazzio privately before beginning the interview with Smart. Lazzio stated her belief that Smart witnessed the homicide but was not involved. She also told Brown that defendant had a carjacking case that was in the process of plea discussions. Brown was unaware of any agreement involving the homicide. (*Id.*, pp 10-11).

Brown testified that there was no discussion between himself and Lazzio about whether or not defendant would be charged with the homicide in the event he admitted involvement during the interview. Before the interview began, Lazzio stated her belief that defendant was an eyewitness and if he were to make a statement to implicate himself, she wanted the interview to stop so she could speak to defendant. (*Id.*, pp 10-11 and 15).

The interview with defendant occurred in an interview room at the Genesee County jail. Lazzio was present. Brown did not advise defendant of his Miranda rights. Brown testified there was some discussion that defendant's statements would not be used against him. Brown told defendant that if he was involved in the homicide he could be charged, and that the decision to charge would be made by the prosecutor. (*Id.*, pp 12-13).

Brown testified that defendant was free to leave the interview room, but Brown did not specifically explain that fact to defendant. (*Id.*, p 14). Brown did not advise defendant of his Miranda rights because Smart was not

a suspect, he was not in custody for the homicide, and his attorney was present throughout the interview. (*Id.*, p 15).

Smart initially told Brown that he was "in the vicinity of the crime scene kind of meandering about." Brown responded by telling Smart that his statement did not make sense. Brown testified that Smart began to chuckle and shift then he admitted that he supplied the gun that was used in the homicide. (*Id.*, p 17). After Smart admitted his involvement, Brown left the interview room to give Lazzio and Smart a chance to talk privately. (*Id.*, p 18).

After Lazzio and Smart spoke privately, Lazzio stepped out of the room to speak to Brown. Brown told her that while he was waiting he received an email from Riggs advising that Jamarion Mays wanted to cooperate with the investigation and talk to the police. (*Id.*, p 19). Lazzio and Brown went back into the interview room with defendant. Brown did not tell him that Mays was going to cooperate with the investigation. (*Id.*, p 19).

Once they were back in the interview room that if Brown intended to continue the interview she would advise defendant to stop the interview if he were to make any more incriminating statements. (*Id.*, p 20). The interview continued and defendant stated that Mays had called him looking for a gun. Defendant denied knowledge of why Mays would want a gun. Defendant agreed to sell Mays an AK-47 and brought it over to Mays's house. Defendant gave the gun to Mays and Anthony Michael. (*Id.*, p 21).

He then went to a nearby house on Dartmouth St. He left the house to sell some crack. Mays also called him and stated he was going to give defendant a quarter pound of marijuana for the rifle. (*Id.*, pp 21-22).

Smart told Sgt. Brown that he ran into Mays and Anthony Michael. Mays walked up to the passenger side of a station wagon, while Michael approached the driver's side of the vehicle and said "give it up." Michael was pointing the rifle at the occupants of the vehicle. Smart heard a series of gun shots and the vehicle sped off. Michael tried to return the rifle to Smart, but Smart refused to take it because he had seen a state police cruiser was approaching. Smart left the area. (*Id.*, pp 23-24).

Brown did not participate in plea discussions with Lazzio and Riggs but knew that defendant was going to plead guilty on another case. (*Id.*, p 31). Prior to the March 15th meeting, Lazzio told Brown she was hoping to work out a favorable plea agreement on the carjacking case. (*Id.*, p 32).

Sometime after the first interview, Lazzio asked Brown to tell Smart that the plea agreement on the carjacking case was not going to get any better. (*Id.*, p 35). Brown received a request from assistant prosecutor Riggs to speak to defendant a second time and find out if he had more information about the homicide. Brown testified that Riggs made this request because Brown was not involved with the plea discussions. (*Id.*, pp 36-37).

Brown scheduled a second meeting with Smart and Lazzio for June, 2011. Brown did not advise Smart of his Miranda rights. Brown advised Smart that he did not think the agreement that Smart had worked out with the prosecutor's office was going to get any better. (*Id.*, pp 37-38). During this interview Smart admitted knowing Mays and Michael were about to commit an armed robbery. His previous statement that he went to a house on Dartmouth was a lie. Instead, Smart admitted that he stayed at Mays house, and walked with them [Mays and Michael] because he didn't think that they would go through with the robbery and Smart wanted to see for himself. (*Id.*, p 40).

On cross-examination, Brown testified that he did not meet with Smart on June 8th for the purpose of taking a statement about the homicide. He met with Smart on June 8th to advise him that his plea agreement was not going to get better. Smart gave Brown an additional statement.

On redirect, Brown testified that Smart was not in custody for the homicide and his attorney was present. Lazzio had told Brown that Smart wanted to talk to him. (*Id.*, pp 64-65).

The People withdrew its opposition to defendant's challenge to the admission of the statement he made to Sgt. Brown on March 15, 2011. The People argued that the June 8, 2011 statement was admissible in the People's case-in-chief.

The Trial Court's Findings and Order

In making its ruling, the trial court summarized the evidence presented during the hearing. The court found that there was a meeting between the defendant, his attorney and Sgt. Brown on March 15, 2011, "to discuss the possibility of a plea agreement" for an unrelated carjacking case defendant had pending at the time. (Tr 12/12/12 p 4). A second meeting occurred on June 8, 2011. The trial court found that defendant "was of the belief that if he were to meet with Mitch Brown again [on June 8th], he might be able to secure a better plea agreement. (Tr 12/12/12 p 6). The trial court found that neither defendant's attorney nor Det. Brown believed that a plea offer that had been made after March 15, 2011 but before June 8, 2011 would be changed. (Tr 12/12/12/ p 6) On the issue of whether or not defendant would be able to secure a more favorable plea offer, the trial court found:

There was very little discussion about whether a plea agreement was going to be altered and it was pretty apparent that it wasn't. But there was a lot of discussion concerning the homicide case in my Court [homicide of Megan Kreuzer].

(Tr 12/12/12 p 6)

The trial court found it "clear that from the defendant's perspective that second meeting was requested in order to secure a better plea deal in Neithercut's court." The court also stated,

"I'm not sure of the perspective of the police and prosecutor. I can't speculate. But if one were to speculate, one could look at what occurred at that second meeting and conclude that Det. Brown believed that Mr. Smart was gaming the system, which he very well may have been. It would not be hard to reach that conclusion..."

The trial court granted defendant's motion to suppress his June 8th statement to Sgt. Mitch Brown. (See order attached). The trial court held that MRE 410 prohibited the admission of defendant's statement during the People's case-in-chief. (Tr 12\12\12 p 10). The trial court also held that suppression would not be required had Detective Brown advised defendant of his "Miranda" rights. (Tr 12\12\12 p 9).

The People filed an application for leave to appeal with the Michigan Court of Appeals, which the Court granted. The Court of Appeals affirmed the trial court's order granting defendant's motion to suppress his statement. The People filed an application for leave to appeal with this Honorable Court. On September 17, 2014, this Court entered an order

directing the parties to:

submit supplemental briefs within 45 days of the date of this order addressing whether the defendant's statement to the police on June 8, 2011 should be suppressed under MRE 410. In briefing this issue, the parties should include in their discussion whether, pursuant to MRE 410(4), "plea discussions" must directly involve a prosecuting attorney or whether a prosecuting attorney's agent may act on behalf of the prosecuting authority and, if so, under what circumstances the agent's discussions constitute "plea discussions." The parties should also address whether this Court's two-part analysis for determining if a statement was made "in connection with" a plea offer, established in *People v Dunn*, 446 Mich 409 (1994), should continue to guide the application of MRE 410, and if not, what test should be applied in its stead.

The People will further supplement the facts as needed in their argument.

Issue I

MRE 410(4), which prohibits the admission of a defendant's statement made "in the course of plea discussion with an attorney for the prosecuting authority," applies even if an attorney for the prosecuting authority is not present at the time the defendant makes the statement but instead authorizes an agent to act on behalf of the prosecuting authority.

Standard of Review

Questions relating to the rules of evidence are questions of law calling for *de novo* review. *People v Carpentier*, 446 Mich 19; 521 NW2d 195 (1994).

Argument

MRE 410 precludes admission of a statement made in various situations including:

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn.

The rules of statutory construction are used when interpreting the court rules. Court rules are "construed in accordance with the ordinary and approved usage of the language; it should also be construed in light of its purpose and the object to be accomplished by its operation." *Taylor v Anesthesia Associates of Muskegon, PC*, 179 Mich App 384, 386; 445 NW2d 525 (1989).

A plain reading of the rule shows that the rule does not require the actual physical presence of the prosecuting attorney at the time the

defendant made his statement. Had the drafters intended the prosecuting attorney to be physically present when defendant made his statement, they could have easily drafted the rule to read "to an attorney for the prosecuting authority" or "in the presence of the prosecuting authority." They did not.

Instead, the rule requires the following:

- 1) A statement made by defendant
- 2) Statement is made during the course of plea discussions with the prosecuting authority.

An example of when MRE 410 would apply is illustrated in defendant's first statement. Prior to defendant making the first statement, the prosecutor and defense attorney had discussions concerning a potential plea in defendant's unrelated carjacking case which was pending at the time. The prosecutor and defense attorney negotiated the terms under which defendant would make a statement concerning the murder and how that statement would impact the carjacking case. Those terms included an agreement not to charge defendant with murder and to consider defendant's statement in determining whether defendant would receive an offer to reduce charges on the carjacking case in exchange for a plea. The prosecutor contacted the detective assigned to the murder case for the purpose of obtaining defendant's statement.

The facts of this case indicate that there was a meeting of the minds between the prosecutor's office and the defense concerning how defendant's

statement would be used as consideration of a plea offer on the carjacking case.

The facts concerning defendant's first statement illustrates the type of scenario contemplated by MRE 410, i.e., there was an agreement between the prosecutor's office and the defense that the statement would affect what would happen on the carjacking case. This is a statement made during the course of plea negotiations with an attorney for the prosecuting authority. The presence or lack of presence of the prosecuting attorney was irrelevant.

Contrast the circumstances of the first statement with the circumstances surrounding the second statement on June 8, 2011, which is the statement the People seek to admit at trial. After the first statement but before the second statement, the parties had reached an agreement for a plea resolution on the carjacking case, but the defendant insisted on talking to the detective again in hopes of securing a better offer. The defense attorney clearly advised defendant that the offer would not change; i.e., a second statement would not afford him a more favorable disposition on his carjacking case and would not reopen negotiations. The defense attorney then arranged a meeting between defendant and the detective, basically for the purpose of having the detective corroborate what she had just told defendant; i.e., an additional statement would not prompt the prosecutor to give him a more favorable offer on the carjacking case.

Knowing that plea negotiations were over and that there was no hope of reopening negotiations, defendant chose to go ahead and make the second statement. Unlike, his first statement, defendant's second statement was not made during the course of plea negotiations with an attorney for the prosecuting authority.

As a matter of fairness, MRE 410 should not be limited to situations where the prosecuting attorney was physically present at the time defendant made his statement unless the rule is amended to specifically require the actual physical presence of an attorney for the prosecuting authority.

It was with this sense of fairness that the prosecutor agreed that it would not seek to introduce defendant's first statement at trial as the circumstances of the first statement clearly show that the first statement was made as part of the plea discussions. The People to ask this court to hold that MRE 410 applies even where a statement is made to an agent authorized by the prosecuting authority. Such a holding will further require a clear set of factors that courts in the future can use to determine if a defendant's statement was indeed made during the course of plea discussions, which will be discussed in Issue II.

Issue II

***People v Dunn*, stands for the principle that MRE 410 applies where a defendant has a subjective and reasonable expectation to negotiate his plea. The Michigan Supreme Court based its decision in *People v Dunn* on a previous version of MRE 410, which lacks any practical application to the current version of MRE 410. The determination of whether the current version of MRE 410 applies must be based on an objective determination of whether a defendant's statement was actually made in the course of plea discussions with an attorney for the prosecuting authority.**

Standard of Review

The question of how to interpret and apply a court rule is a question of law for de novo review. *People v Carpentier*, 446 Mich 19; 521 NW2d 195 (1994)

MRE 410

No Reasonable Expectation Test

In *People v Dunn*, 446 Mich 409, 415-416; 521 NW2d 255 (1994), the Court examined the language in MRE 410 as it existed before the 1991 amendments. Prior to the 1991 amendments, MRE 410 read:

Inadmissibility of Pleas, Offers of Pleas, and Related Statements.

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to

the crime charged or any other crime is admissible in a criminal proceeding for perjury or false statement.

Dunn 446 at 414.

The Court in *Dunn* held that the rule applied only where (1) defendant has a subjective expectation to negotiate a plea when he made his statements and (2) defendant's subjective expectation was reasonable under the circumstances.

The test set forth in *Dunn* simply does not work for the current version of MRE 410. First, a defendant will always be in a position to say that he made the statement expecting to negotiate a plea. Very likely, most defendants who make statements do so with the hope that cooperation will earn them a measure of leniency for their crime. The hope of leniency is the only true motivation a defendant has when he makes a statement.

The test set forth in *Dunn* is not practical, because it would potentially require suppression of nearly every statement made by a criminal defendant. Obviously, every statement made since *Dunn* has not been suppressed. Nonetheless, just as requiring the actual physical presence of the prosecuting attorney is not fair to defendant, using a defendant's subjective expectation as a standard for admissibility is not fair to the People, as it is virtually impossible for the people to present evidence to show defendant's subjective state of mind. Even with the reasonableness standard, the subjective prong of the *Dunn* test is not a reliable way to determine if a statement is made in the course plea negotiations. If the

drafters of MRE 410 intended to apply whenever a defendant had a subjective expectation that his statement would result in plea negotiations, they would have drafted to rule to reflect that standard.

The test in *Dunn* applies even if a defendant makes a statement before even negotiations begin. The test set forth in *Dunn* is incompatible with the current version of MRE 410, which comes into play once plea discussions begin. The rule clearly states that a statement is not to be used if made "in the course of plea discussions." That means plea discussions must have already begun before a defendant makes a statement.

This Court should abandon the test in *Dunn* and adopt a test that is compatible with MRE 410. The test of whether MRE 410 applies to a defendant's statement should be whether, as a matter of fact, the statement was made in the course of plea negotiations. Factors to consider include:

- Whether there were any discussions between the prosecutor and the defense as to how the defendant's statement would impact any charges he would be facing;
- Whether any promises were made;
- What were the conditions under which the statement was given, was defendant advised that his statement could be used against him if plea negotiations fell through?

The above test is a more just means of determining whether a defendant makes a statement during the course of plea negotiations without placing either the defendant or the People at an unfair disadvantage. This

test will protect all parties and, unlike the test set forth in *Dunn*, is consistent with MRE 410.

Issue III

Defendant's statement made on June 8, 2011, in the presence of Sgt. Mitch Brown, is admissible at trial because defendant made the statement knowing that plea negotiations on defendant's unrelated carjacking case concluded prior to June 8, 2011 and defendant knew there was no chance for his statement to cause plea negotiations to be reopened.

Standard of Review

The admissibility of defendant's statement made on June 8, 2011, is question of law for de novo review. *People v Carpentier*, 446 Mich 19; 521 NW2d 195 (1994)

Argument

Defendant's statement on June 8, 2011, is admissible at trial. Applying the plain language of MRE 410, it is clear, that plea negotiations concluded. Defendant was repeatedly advised that plea negotiations had concluded and that an additional statement would not earn him more lenient treatment. Regardless, defendant made a conscious decision to make a statement to Sgt. Mitch Brown. Since plea negotiations concluded, the June 8th statement was not made in the course of plea negotiations.

The suppression of defendant's June 8th statement would only reward his attempt to harbor "error" as an appellate parachute and has the potential to encourage every defendant to make a claim that they had a "subjective expectation" they would obtain more favorable treatment if they made a statement. Defendant Smart's and any other defendant's subjective expectations or hopes at

the time they make a statement are irrelevant according to the plain language of MRE 410.

Finally, defendant's statement on June 8, 2011 is admissible even under *Dunn*. The record is clear that both defendant's attorney and Detective Brown told defendant that plea negotiations had concluded and his statement would not bring about further negotiations. There is no credibility in defendant's claim that he had a "subjective expectation" that his statement would result in further plea negotiations. As the trial court noted, one could easily conclude that defendant was "gaming the system." (Transcript December 12, 2012 p 11). Moreover, any "subjective expectation" fails to pass *Dunn*'s test of reasonableness. Therefore, independent on whether *Dunn* will continue to apply to MRE 410 or if an objective test will be adopted, Defendant's statement is admissible at trial.

Relief

For the reasons stated above, the People ask this Honorable Court to grant leave to appeal and reverse the Court of Appeals majority opinion and reverse the trial court's order granting defendant's motion to suppress.

Dated: October 23, 2014

Respectfully submitted,
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Prosecuting Attorney

By


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Assistant Prosecuting Attorney

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs

MSC No 149040
Court of Appeals No 314980
Lower Court No 11-29652 FC

MANTREASE DATRELL DEQUAN SMART,
Defendant-Appellee

Judge: Yuille

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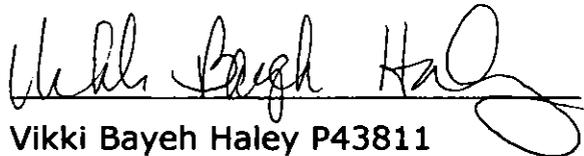
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Statement of Service

Vikki Bayeh Haley states that on October 23, 2014 she served copies of the PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO BRIEF ON APPEAL ON:

Attorney Daniel Bremer
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Burton, MI 48529

by depositing the same in a Government mail receptacle at Flint, Michigan, enclosed in a sealed envelope addressed to such persons at the said addresses.



Vikki Bayeh Haley P43811
Assistant Prosecuting Attorney

