Court of Appeals, State of Michigan

ORDER

Michigan Department of Health and Human Services v Karl Manke

Docket No. 353607

LC No. 20-004700-CZ

Stephen L. Borrello
Presiding Judge

Amy Ronayne Krause

Brock A. Swartzle
Judges

At issue are two emergency applications for leave to appeal filed from two orders of the trial court. The first order, entered May 11, 2020, denied appellant's emergency motion for issuance of a temporary restraining order (TRO) preventing appellee from continuing to operate his barbershop. The second order, entered May 21, 2020, denied appellant's motion for issuance of a preliminary injunction preventing appellee from operating his barbershop.

The motions for immediate consideration are GRANTED.

The case is REMOVED from abeyance.

In response to the COVID-19 virus, the Governor issued a series of Executive Orders (EO). EO 2020-69 prohibited certain businesses from operating, including "non-essential personal care services." § 1 of EO 2020-69. Section 3.a of EO 2020-69 provides that non-essential personal care services "includes but is not limited to hair, nail, tanning, massage, traditional spa, tattoo, body art, and piercing services, and similar personal care services that require individuals to be within six feet of each other." Appellee held a license which allowed him to operate a barbershop in Owosso, Michigan. On May 4, 2020, admittedly in contravention of the EO, appellee opened his barbershop and offered his services as a barber to the general public. Appellee refused to close his barbershop despite repeated warnings to do so by state and local authorities eventually leading to appellant's director's issuance of an Imminent Danger and Abatement Order calling on appellee to immediately close his barbershop to the public. Appellee refused to comply. Appellant then requested that the trial court issue a TRO, to be followed by a preliminary injunction, ordering appellee to immediately cease all operation of the barbershop. The trial court denied the request for a TRO. Appellant sought leave to appeal, and this Court ordered that the application be held in abeyance and that the trial court hold a hearing and issue an opinion and order on appellant's request for a preliminary injunction. In accordance with the order of this Court, the trial court held a hearing and issued an opinion and order concluding that appellant's request "presented a close call" but that it was "not fully convinced of the need for an injunction."

Appellant thereafter sought leave to appeal from the order denying the preliminary injunction.

"The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Michigan AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 145; 809 NW2d 444, 446 (2011). The status quo has been defined as " 'the last actual, peaceable, noncontested status which preceded the pending controversy.' " *Buck v Thomas Cooley Law*

School, 272 Mich App 93, 98 n 4; 725 NW2d 485 (2006), quoting *Psychological Services of Bloomfield, Inc v Blue Cross & Blue Shield of Michigan*, 144 Mich App 182, 185; 375 NW2d 382 (1985). Here, on May 4, 2020, when appellee provided his services to the public, the status quo was that non-essential personal care services such as barbershops were closed. In lieu of commencing a legal challenge to the constitutionality of EO 2020-69, appellee instead opened his barbershop and provided his services as a barber to the general public. Appellee continues to provide his services as a barber to the general public despite having his license summarily suspended by the State of Michigan.

When presented with a request for preliminary injunctive relief, a court should consider four factors:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012).]

Turning to the likelihood that the party seeking the preliminary injunction will prevail on the merits, we note appellant's request for injunctive relief is premised on assertions that appellee's actions create an imminent danger to the public health, necessitating the issuance of what is entitled an Imminent Danger and Abatement Order. The power of appellant's director to issue the Imminent Danger and Abatement Order in response to an imminent danger to the public health comes from § 2251(1) of the Public Health Code (PHC), MCL 333.1101 *et seq*. An "imminent danger" is defined to mean an existing "condition or practice . . . that could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided." MCL 333.2251(5)(b). The PHC recognizes the singular danger that an epidemic presents to the public health and welfare and the need to take exceptional action to control the rapid spread of the disease. MCL 333.2253(1).

The statute authorizes the director to issue orders to abate "imminent dangers" "upon a determination that an imminent danger to the health or lives of individuals exists in this state[.]" In the face of a declared public health emergency, the Legislature vested the Department with the power to exercise its discretion to decide whether an "imminent danger" exists, and in light of the Department's expertise in this realm, to "abate" the danger as the Department's experts see fit.

This expansive power easily encompasses the closing of defendant's barbershop. Thus, once the Governor declared a public health emergency, the Legislature determined that it was up to the *Department* to issue orders protecting the public health. Accordingly, in order to challenge the exercise of that authority, appellee had to present evidence that appellant overstepped the statutory boundaries. Appellee failed to present *any* evidence to rebut the Department's conclusion that operation of the barbershop posed a serious public health danger.

Here, appellant presented the trial court with evidence in the form of affidavits from Sarah Schultz, a paralegal working in the Corporate Oversight Division of the Michigan Attorney General's Office, and Joneigh Khaldun, MD, plaintiff's Chief Medical Executive and Chief Deputy Director for Health.

Schultz averred that she had been "tasked with gathering photographs and videos related to" defendant's operation of the barbershop since he opened on May 4, 2020. Along with her affidavit, Schultz provided copies of photographs from Internet news articles; she identified web addresses for the photos, news articles and the internet videos. These photographs depict multiple people clearly within six feet of each other, some wearing masks and others not wearing masks. The trial court indicated that it had no reason to doubt Schultz's representations, but stated "there's no allegation that Ms. Schultz could authenticate the pictures." However, appellant made Schultz available to testify and the trial court could have verified the photos simply by visiting the websites listed by Schultz. Additionally, the trial court seemingly treated evidence derived from news sources differently depending on which party the evidence favored. When deciding against the issuance of a TRO, the trial court relied heavily on the fact that "[w]hile Defendant worked at this place of business, Plaintiff served the abatement order on him, employing troopers of the Michigan State Police as process servers," a factual finding with respect to which the trial court noted it "ha[d] no personal knowledge of these facts, but gleaned them from local and national news coverage." However, when adjudicating the merits of appellant's evidence derived from similar sources, the trial court dismissed appellant's proffered evidence for lack of authentication. This conclusion was additionally erroneous because defendant never disputed the accuracy of this evidence.

Regarding Dr. Khaldun's affidavit, it averred as follows:

> 4. COVID-19 is a novel coronavirus . . . . The is no human immunity to COVID-19, and there is no available treatment or vaccine for COVID-19.
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> * * *
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> 6. COVID-19 is thought mainly to spread person-to-person (1) between people who are in close contact with a person infected with COVID-19 and (2) through respiratory droplets produced when an infected person coughs or sneezes. It may also be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their mouth, nose, or eyes.
>
> 7. Close contact is defined as being within approximately six feet of an infected person for a long period of time or having direct contact with infectious secretion. Examples of close contact include . . . being near someone who has COVID in a confined space if that person is not wearing a mask; and being coughed or sneezed on by someone who has COVID-19.
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> * * *
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> 9. As of May 12, 2020, 1 in every 10 people diagnosed with COVID-19 in Michigan has died.
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> 10. People of all ages can be infected. . . . The age range for people dying from COVID-19 in Michigan rages from age 5 to 107.
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> 11. The disease often first infects the lungs and starts off mild with a cough, fever and fatigue. Some people quickly, within days, progress to severe disease including Acute Respiratory Distress Syndrome and a severe inflammatory response that can lead to multi-organ failure and death. No one knows exactly how a particular person will respond. There

are also reports of children across the country, including in Michigan, having a severe illness called Pediatric Multi-System Inflammatory Syndrome related to COVID-19. Some children have died from it.

12. In addition to being spread by symptomatic individuals, COVID-19 can also be spread by persons without any symptoms . . . .

13. As of May 11, 2020, Michigan has 47,552 confirmed cases of COVID-19 and 4,584 deaths. This is the 7th highest in the country in terms of confirmed cases and 3rd highest in terms of deaths. Those numbers do not reflect all cases of COVID-19. . . .

14. As of May 11, 2020, Shiawassee County has 211 confirmed cases of COVID-19 and 17 confirmed deaths.

15. Social distancing is currently the only effective means to slow the spread of COVID-19 and save lives. . . .

* * *

18. I have reviewed the recent news coverage, including pictures of the operation of Karl Manke's Barbershop and the congregation of people outside the barbershop. The photos demonstrate that appropriate social distancing is not taking police inside the barbershop or outside of it. The photos further demonstrate that many individuals, including at times Karl Manke himself, are not wearing masks and are coming in close contact with one another.

19. Close contact, like that occurring both within Karl Manke's Barbershop and outside the barbershop, is an imminent danger to the public health. The practices could reasonably be expected to cause death, disease, or serious physical harm to individuals and the public at large.

* * *

21. Given the number of known cases of COVID-19 in Michigan and how the disease is spread, there is a high likelihood that the continued operation of Karl Manke's barber shop will result in irreparable harm to the public health. . . .

The trial court criticized Dr. Khaldun's affidavit for not explaining how the doctor concluded that appellant's barbershop presents a public health risk, even though the trial court believed this conclusion makes sense at face value. Such a finding was error as it was premised on the trial court second-guessing Dr. Khaluden's medical and administrate conclusions. See *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002) ("Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views."). Additionally, the trial court's repudiation of Dr. Khaluden's affidavit was made despite appellee offering no evidence to rebut Dr. Khaldun's assertions. Hence, the only evidence before the trial court was evidence which supported appellant's assertion that there exists an imminent danger.

Rather than contest the factual underpinnings which establish an imminent danger, appellee's entire defense is premised on objections to the constitutional validity of the EO. Appellee raises several constitutional arguments. Relying on *Texas v Johnson*, 491 US 397; 109 S Ct 2533; 105 L Ed2d 342, appellee argues that the EO violates his First Amendment rights because the EO infringes on his freedom of speech. Appellee argues that continued operation of his barbershop is tantamount to a protest of the EO, in that his conduct is expressive similar to the flag burning in *Johnson*. However, unlike the defendant in *Johnson*, here, appellee was not singled out based on his expression of dissatisfaction with the EO. Additionally, as instructed by the Supreme Court, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v O'Brien*, 391 US 367, 376; 88 S Ct 1673; 20 L Ed2d 672 (1968). "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id*. Here, the State has an important governmental interest in containing the spread of COVID-19 and the EO is directed at that interest and not at any speech or expressive conduct that may be expressed by appellee in continuing to provide services as a barber. This has been precedent for over a century. "That until Congress has exercised its power on the subject, such state quarantine laws and laws for the purpose of preventing, eradicating, or controlling the spread of contagious or infectious diseases, are not repugnant to the Constitution of the United States, although their operation affects interstate or foreign commerce, is not an open question." *Compagnie Francais de Navigation a Vapeur v Louisiana State Board of Health*, 186 US 380, 387; 22 S Ct 811; 46 L Ed 1209 (1902). Hence, appellant is likely to prevail on the issue of whether the EO violates appellee's First Amendment rights. *O'Brien*, 391 US at 376; *Davis*, 296 Mich App at 613.

Appellee also argues that implementation of the EO violates his constitutional right to equal protection under the law because some businesses are allowed to remain open whereas others are closed. However, appellee does not claim to be a member of a protected class; or that a fundamental right has been infringed. This leaves the rational basis test as the proper foundation for analysis. Rational basis applies to social and economic regulation, of which this is an example. *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174, 185 (2004). As previously indicated, the evidence submitted by appellant is sufficient to pass the rational basis test. Hence, on the pleadings before us, appellant is likely to prevail on this issue. *Davis*, 296 Mich App at 613.

Although appellee raises a myriad of additional issues, we cannot glean from any of the arguments set forth any bases on which appellee would prevail in his challenges to the authority of the Governor to issue EOs.

Regarding factor (2), the trial court only considered two affidavits provided by appellant. As previously discussed, the trial court ignored the findings and determination of appellant's chief medical executive, which establish the danger of irreparable harm. Moreover, as previously indicated, the trial court mishandled both affidavits.

The trial court also erred in concluding that factor (3) did not weigh in appellant's favor. While the trial court acknowledged the potential of harm to the public, it nonetheless substituted its judgment for that of the experts by concluding that this "harm does not justify the issuance of an injunction on such scant evidence." Again, the trial court rejected uncontested evidence when it reasoned that "an affidavit by a doctor who recited general facts about the virus and read a newspaper article" did not tip the scales in favor of issuing the injunction, "no matter how great the public emergency." As discussed and cited

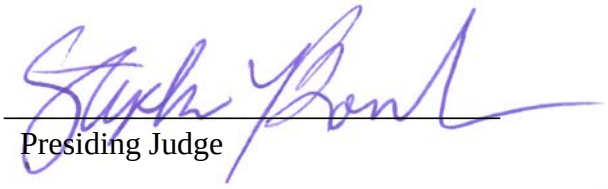
above, the evidence before the trial court was not scant. Chief medical executive Khaldun is a highly trained and experienced public health physician and administrative professional. Uncontroverted evidence clearly revealed that COVID-19 is a highly communicable illness. Uncontroverted evidence revealed that COVID-19 is spread by infected persons showing no symptoms that could serve to warn others of the possibility of infection. Uncontroverted evidence clearly revealed that COVID-19 can be spread from person-to-person quickly and reach people separate from an area of contamination. From this record, the trial court should have concluded that the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief. *Davis*, 296 Mich App at 613.

Finally, we agree with the trial court that factor (4) weighs in appellant's favor.

For the reasons set forth in this order, the emergency application for leave to appeal from the trial court's May 21, 2020 denial of appellant's request for a preliminary injunction is GRANTED. The decision of the trial court is REVERSED and the case is REMANDED for the trial court to enter a PRELIMINARY INJUNCTION ordering appellee to immediately cease all operations at the barbershop, to be enforced through the court's general contempt powers, MCL 600.1711.

The application for leave to appeal filed from the trial court's May 11, 2020 denial of appellant's request for a TRO is DISMISSED as moot.

We retain jurisdiction to verify entry of the preliminary injunction.



Presiding Judge

Swartzle, J., I concur in part and dissent in part. Specifically, I agree with my colleagues that the appellant's application for leave related to the denial of a TRO should be DISMISSED as moot. I also agree that the motions for immediate consideration should be GRANTED. Finally, I agree that the appellant's emergency application for leave related to the trial court's denial of a preliminary injunction should be GRANTED (but only in part), as both parties raise jurisprudentially significant issues that warrant review by this Court and, ultimately, our Supreme Court.

Where I diverge from my colleagues is with the additional relief that they grant on an immediate basis. Under our court rules, a "peremptory reversal" is proper where "reversible error is so manifest that an immediate reversal of the judgment or order appealed from should be granted without formal argument or submission." Importantly, the decision to grant such relief "must be unanimous." MCR 7.211(C)(4). As I read the majority's language, the majority has ordered "an immediate reversal" of the trial court's denial of preliminary injunctive relief without formal submission to a merits panel drawn randomly from the entire court, without oral argument, without the opportunity for amici briefs, and without a unanimous vote by this motions panel. The majority's order reads more like an in-depth opinion of this Court issued

by a merits panel, rather than the type of summary order normally issued by a motions panel. To my reading, the majority's relief appears to be a peremptory reversal, which seems procedurally irregular given that the panel's vote was not unanimous on this issue. Be that as it may, the majority has ruled.

With respect to the merits, both parties raise important issues—in my opinion, maybe the most jurisprudentially significant issues this State has seen in years or decades. The arguments raised in this case overlap with similar arguments in other cases, see, e.g., *Michigan House of Representatives v Governor*, Court of Claims, Docket No. 20-000079-MZ; *Michigan United for Liberty v Governor*, Court of Claims, Docket No. 20-000061-MZ. One of the most significant arguments is over the question of the constitutional and statutory validity of the Governor's post-April 29, 2020, Executive Orders.

The people of this State are constitutionally guaranteed a republican form of government, one with a separation of powers balanced between the three branches. US Const, art IV, § 4, cl 1; Const 1963, art 3, § 2. Simply put, the Legislature is supposed to legislate, the Executive is supposed to execute, and the Judiciary is supposed to judge. As set forth in our state Constitution, "No person exercising powers of one branch shall exercise powers belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. This case and others like it raise legitimate questions of whether the separation of powers between the Legislative and Executive branches has been impermissibly eroded during our government's response to the Covid19 pandemic.

For example, one source of authority cited in recent Executive Orders related to Covid19 is the Emergency Management Act, 1976 PA 390 (EMA). This act requires that, after the initial 28 days of an emergency or disaster declared by the Governor, the Legislature has a necessary and critical role in determining whether to extend the emergency/disaster and, if so, how best to address it. It has been reported that, near the end of the 28-day period, the Governor declared the Covid19 emergency/disaster terminated under the EMA, but then just a minute later, declared a new emergency/disaster with a purported new 28-day period. Was this a faithful execution of the EMA or, rather, an attempt to avoid the Legislature's role under the EMA?

As another example, the Governor has also relied on the Emergency Powers of Governor Act, 1945 PA 302 (EPGA). This WWII-era law is broadly worded, which could be viewed as a virtue or a vice. On the one hand, the act seems to grant the Governor unilateral authority to declare an emergency for an indeterminate duration, with broad powers to address the emergency. On the other hand, because the EPGA appears to have few, if any, real restrictions on the Governor's authority or even standards to guide that authority, this may mean that the Legislature unconstitutionally delegated its law-making authority to the Governor. As for the argument made by the Attorney General in one of the related cases that the Legislature could just add restrictions to the EPGA if it sees fit, the force of this argument is undercut if those restrictions can be avoided by, for example, terminating a declaration of emergency, waiting a minute, and then declaring a "new" emergency.

The validity of the recent Executive Orders is a key question in this and related cases. I have serious doubts, for example, whether the administrative order in this case would have been issued absent the Executive Orders related to Covid19, including those issued after April 29, 2020. Even setting those doubts aside, there is, at the very least, a sufficient basis to submit the case to a merits panel for a fuller analysis with the benefit of oral argument.

One need not question the motives for or wisdom of certain actions to question the underlying authority of those actions. In my opinion, the issues raised in this and related cases deserve more attention by the Judiciary than has been provided to-date. Therefore, rather than grant peremptory relief to the appellant, I would have joined in an order submitting this case for plenary review, on an expedited basis, by a merits panel randomly drawn from the entire Court with the opportunity for oral argument. See *Weisgerber v Ann Arbor Center for the Family*, 447 Mich 963; 521 NW2d 601 (1994) (LEVIN, J, dissenting).

Accordingly, for these reasons, I cannot join my colleagues in full, and therefore I concur in part and dissent in part.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

May 28, 2020
Date

Chief Clerk