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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2286**

State of Minnesota,
Appellant,

vs.

Hope Amanda Theis,
Respondent.

**Filed July 27, 2010
Reversed and remanded
Johnson, Judge**

Clay County District Court
File No. 14-CR-08-6149

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Pamela L. Harris, Assistant County Attorney,
Moorhead, Minnesota (for appellant)

Brian P. Toay, Wold Johnson, P.C., Fargo, North Dakota (for respondent)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Hope Amanda Theis pleaded guilty to a misdemeanor violation of an order for
protection (OFP). The district court ordered a stay of adjudication over the prosecutor's

objection. The state appeals, arguing that the district court erred by staying adjudication over the prosecutor's objection without finding that the prosecutor committed a clear abuse of discretion in the exercise of the charging function. We agree and, therefore, reverse and remand.

FACTS

In October 2009, Theis pleaded guilty to a misdemeanor violation of an OFP. *See* Minn. Stat. § 518B.01, subd. 14(b) (2008). At the sentencing hearing in November 2009, the district court informed Theis that, as part of her sentence, she would be prohibited from possessing firearms. Theis's attorney then urged the district court to "stay that portion of the order" because the firearms prohibition would present problems in light of Theis's employment by the Minnesota National Guard. The prosecutor objected to Theis's request that the district court order a stay of adjudication. The district court rescheduled the sentencing hearing to the following month.

At the second sentencing hearing, the following discussion occurred:

THE COURT: [I]s the State willing to do anything that might avoid that firearms prohibition?

[THE STATE]: No, Your Honor. There isn't much that the state can do to avoid that.

THE COURT: You feel that's crucial, the firearms prohibition?

[THE STATE]: I guess my opinion whether it's crucial, considering it's the law, doesn't really matter. It's the law. Federal and state.

Theis's attorney again requested that the district court order a stay of adjudication to avoid potential adverse consequences for Theis's employment. Over the prosecutor's objection, the district court orally ordered a stay of adjudication for one year, subject to certain conditions.

That same day, the district court issued a written order staying adjudication. The district court found that Theis, who is single, is the legal guardian and custodian of an 11-year-old girl with "significant" health concerns; that Theis "hopes to pursue commission as an officer within the next two years"; that Theis has no prior criminal record; and that Theis's commission of the present offense, which was conducted by telephone calls and text messages, "involved no assaultive behavior, no threatening behavior, no personal contact and no weapons." The district court provided the following additional reasons for staying adjudication:

Despite the fact that the offense did not involve weapons, assaultive behavior or threatening behavior, that defendant has no history of violence nor criminal record, and that a firearms prohibition would likely cause her to lose her job in the National Guard, the prosecutor has refused to consider amending the charge to one for which the same penalties could be imposed, without requiring a firearms prohibition, and has refused to agree to a stay of adjudication, which would provide for the same period of probation, the same conditions and the same financial penalty, yet spare the defendant the firearms prohibition. At the sentencing hearing the court asked the prosecutor why she believed that a firearms prohibition was essential in this case. She could give no reason.

. . . .

The court believes that . . . an abuse of prosecutorial discretion exists in this case by virtue of the prosecutor's

refusal to consider the special circumstances of the case and of the defendant, and refusing to amend the charge to one which would avoid the totally unnecessary and excessively punitive firearms prohibition.

The state appeals.

DECISION

The state argues that the district court erred by ordering a stay of adjudication over the state's objection. The state's appeal is authorized by Minn. R. Crim. P. 28.04, subd. 1(1), which applies to pretrial orders. *See State v. Allinder*, 746 N.W.2d 923, 924-25 (Minn. App. 2008).

"Generally, a prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the prosecutor's exercise of that discretion." *State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996). A district court has limited authority to order a stay of adjudication, but that authority should be "relied upon *sparingly* and only for the purpose of avoiding an injustice resulting from the prosecutor's *clear abuse of discretion* in the exercise of the charging function." *Id.* at 541. Thus, a stay of adjudication "may be ordered 'only for the purpose of avoiding an injustice resulting from the prosecutor's *clear abuse of discretion* in the exercise of the charging function.'" *See State v. Lee*, 706 N.W.2d 491, 496 (Minn. 2005) (quoting *Foss*, 556 N.W.2d at 541). Whether a district court's stay of adjudication violates the constitutional principle of separation of powers is a question of law, to which we apply a *de novo* standard of review. *See State v. Strok*,

____ N.W.2d ____, ____, 2010 WL 2813579, at *5 (Minn. App. July 20, 2010) (citing *State v. Lemmer*, 736 N.W.2d 650, 657 (Minn. 2007)).

In this case, the district court did not find that the prosecutor committed a clear abuse of discretion in the exercise of the charging function. Rather, the district court stated that the prosecutor “refused to consider” an amended charge that would not result in a sentence containing a firearms prohibition. We construe the district court’s stated rationale to describe not an actual refusal by the prosecutor to exercise prosecutorial discretion but, rather, the district court’s disagreement with the decision that arose from the prosecutor’s exercise of discretion. But “mere disagreement . . . with the prosecutor’s exercise of the charging discretion” is insufficient to establish a clear abuse of prosecutorial discretion in the exercise of the charging function and, thus, insufficient to justify a district court’s stay of adjudication. *Foss*, 556 N.W.2d at 541. The underlying basis of the district court’s disagreement with the prosecutor’s discretionary decision is the likely adverse impact on Theis’s employment after the district court imposes sentence. But this court previously has stated that “[t]he possibility that a defendant may lose her job as a result of a conviction” does not “allow[] a [district] court to stay adjudication over the prosecutor’s objections.” *State v. Leming*, 617 N.W.2d 587, 589 (Minn. App. 2000). ““Rather, it is the sort of consequence that commonly attends a conviction”” *Id.* (quoting *State v. Twiss*, 570 N.W.2d 487, 487 (Minn. 1997)).

Theis contends that the district court’s order is not erroneous because it was based on “special circumstances.” But the existence or nonexistence of special circumstances is not the focus of the proper inquiry. In its most recent opinion on this subject, the

supreme court made clear that “special circumstances” alone do not justify a district court’s stay of adjudication. *See Lee*, 706 N.W.2d at 496. The supreme court stated, “We do not believe it is possible to read *Foss* as permitting a stay of adjudication whenever there are *either* special circumstances *or* an abuse of the charging function.” *Id.* Rather, a district court may stay adjudication only if there is a “clear abuse of the prosecutorial charging function.” *Id.* “Thus, special circumstances may be relevant to a district court’s stay decision only to the extent that those circumstances tend to establish a clear abuse of the prosecutorial charging function.” *Strok*, ___ N.W.2d at ___ n.4, 2010 WL 2813579, at *5 n.4. Likewise, “special circumstances” have limited relevance to a district court’s decision to order a continuance for dismissal. As stated above, the circumstances concerning Theis’s employment do not support the conclusion that the prosecutor committed a clear abuse of discretion in charging the case and in seeking to pursue the case to adjudication.

Theis also urges this court to refer to and rely on a written guideline issued by the American Bar Association concerning the exercise of discretion in the charging function. *See ABA Standards for Criminal Justice Prosecution Function and Defense Function*, Standard 3-3.9(b) (3d ed. 1993). The Minnesota Supreme Court never has adopted or relied on the guideline cited by Theis. We decline the invitation to do so because “the task of extending existing law falls to the supreme court . . . , not to this court.” *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 472 n.1 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). In addition, we see no obvious reason why application of the ABA guidelines would lead to a different result.

In sum, nothing in the record supports a conclusion that the prosecutor committed a ““*clear abuse of discretion* in the exercise of the charging function.”” *Lee*, 706 N.W.2d at 496 (quoting *Foss*, 556 N.W.2d at 541). Thus, the district court erred by ordering a stay of adjudication over the prosecutor’s objection.

Reversed and remanded.