

IN THE MISSOURI SUPREME COURT

CASE NO. SC88709

STATE ex rel. HEIDI PARKER BURNS,
PETITIONER,

v.

THE HONORABLE WILLIAM S. RICHARDS,
RESPONDENT.

BRIEF OF PETITIONER

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JURISDICTIONAL STATEMENT

This matter comes before the Court on Petitioner's Petition for Writ of Prohibition filed in regard to a case currently pending before the Respondent. Petitioner contends that Respondent acted beyond his jurisdiction in failing to grant Petitioner's motion to disqualify prosecuting attorney Syd Weybrew. This Court has jurisdiction over this matter by virtue of Article V, § of the Missouri Constitution that vests jurisdiction in all appellate courts in the state of Missouri to issue and hear original remedial writs.

STATEMENT OF FACTS

Heidi Parker Burns, Petitioner herein, is a defendant in a criminal matter currently pending in the associate circuit court of Holt County, Missouri. (Paragraph 1 of Petitioner's Petition for Writ of Prohibition. Admitted in paragraph 1 of the Answer of Respondent to the Petition for Writ of Prohibition.) She is currently awaiting a preliminary hearing on a felony complaint that has been filed against her by Syd Weybrew, the prosecuting attorney of Holt County, Missouri. (Admitted in paragraph 1 of Respondent's Answer to Petitioner's Petition for Writ of Prohibition.) (A copy of said complaint is included in the Appendix at page A-1.) That complaint alleges:

Syd Weybrew, Prosecuting Attorney of the County of Holt, State of Missouri, charges that the defendant, either acting alone or in concert with another, then and there willfully and unlawfully, in violation of Section 195.202, RSMo, 3245099.0 (sic) committed the class C felony of possession of a controlled substance....

Respondent is the judge assigned to petitioner's case. (Admitted in paragraph 1 of Respondent's Answer to Petitioner's Petition for Writ of Prohibition.)

Petitioner is also a defendant in a criminal matter currently pending in the Circuit Court of Nodaway County, Missouri that bears Case No. 06ND-CR00132-01. (Admitted in paragraph 1 of Respondent's Answer to Petitioner's Petition for Writ of Prohibition.) (A copy of the Information in that case is included in the Appendix at page A-3). That Information contains two counts. In Count I it is alleged that "defendant, individually or in concert with another, knowingly attempted to obtain a controlled substance by possessing a false or forged prescription with the purpose of obtaining dolophine (a generic methadone), a controlled substance." Count II contains an allegation of fraud relating to the same circumstances as alleged in Count I.

In the Nodaway County case, Petitioner was originally represented by Syd Weybrew. (Admitted in paragraph 1 of Respondent's Answer to Petitioner's Petition for Writ of Prohibition.) In that case, attorney Weybrew entered his appearance on behalf of Heidi Burn on August 7, 2006 and continued his representation of her until his withdrawal on November 15, 2006. (See Docket Sheets from Case Net for cases 06ND-CR00132 and 06ND-CR00132-01 that are included in the Appendix at pages A-5.)

During the time that attorney Weybrew represented Ms. Burns, he represented her during her preliminary hearing and during her arraignment

in both the Associate Circuit Court and in the Circuit Court. (See Docket Sheets from Case Net for cases 06ND-CR00132 and 06ND-CR00132-01 that are included in the Appendix at pages A-5.) This is the same Syd Weybrew who filed the Complaint against Petitioner in Holt County, Missouri on April 10, 2007 – five months from the date he last represented Ms. Burns. (See Felony Complaint on page A-2 of the Appendix.)

The charge in the Nodaway County case claims that Petitioner was attempting to obtain a controlled substance while the Holt County Complaint claims that Petitioner possessed a controlled substance. (See Exhibits A and B attached to the Petition for Writ of Prohibition which are included in the Appendix at pages A-2 – A-4.) Both alleged offenses claim that Petitioner violated Chapter 195 of the Revised Statutes of the State of Missouri. (See Exhibits A and B attached to the Petition for Writ of Prohibition which are included in the Appendix at pages A-2 –A-4.) Both alleged offenses relate to controlled substances that are legal pharmaceuticals if prescribed by a physician – Dolophine in Nodaway County and Percocet in Holt County. (See Exhibits A and B attached to the Petition for Writ of Prohibition which are included in the Appendix at pages A-2 – A-4.)

While Mr. Weybrew was representing Petitioner in the Nodaway County matter, he had meetings with Petitioner in a confidential setting

wherein facts were related to attorney Weybrew concerning the charge of attempting to procure a controlled substance by fraud. (Admitted in Respondent's Answer to Petitioner's Petition for Writ of Prohibition and affidavit of Petitioner attached to Motion to Disqualify – Exhibit C attached to Petition for Writ of Prohibition. In that confidential setting information pertinent to the defense of Petitioner was given to Mr. Weybrew. (Affidavit of Petitioner attached to Motion to Disqualify – Exhibit C attached to Petition for Writ of Prohibition.)

Therefore, on July 6, 2007, the Petitioner filed in the Holt County matter her motion to disqualify prosecuting attorney Weybrew. (See Exhibit C attached to Petition for Writ of Prohibition.) On July 17, 2007, Respondent took up petitioner's motion to disqualify and denied the motion. (Admitted in paragraph 1 of Respondent's Answer to Petitioner's Petition for Writ of Prohibition.) On July 25, 2007, Petitioner petitioned the Missouri Court of Appeals, Western District, for a Writ of Prohibition on the basis that Respondent had exceeded his jurisdiction in refusing to grant Petitioner's Motion to Disqualify Prosecuting Attorney Syd Weybrew. (Admitted in paragraph 1 of Respondent's Answer to Petitioner's Petition for Writ of Prohibition.) On the same day, the Missouri Court of Appeals, Western District per Judge Newton, denied Petitioner's Petition for Writ of

Prohibition. (Admitted in paragraph 1 of Respondent's Answer to Petitioner's Petition for Writ of Prohibition.) As a result, Petitioner filed this action asking this Court, *inter alia*, to issue its Writ of Prohibition in which Respondent would be directed to grant Petitioner's Motion to Disqualify.

In her Petition for Writ of Prohibition, Petitioner contends that her former attorney, Syd Weybrew, has a clear conflict of interest and that he should be disqualified from any further participation in the Holt County matter. (See Petition for Writ of Prohibition and Petitioner's Affidavit attached to Motion to Disqualify that is Exhibit C.) Furthermore, Petitioner contends that she does not have an adequate remedy at law for the refusal of Respondent to grant the Motion to Disqualify.

POINT AND AUTHORITIES

THIS COURT SHOULD ISSUE ITS WRIT OF PROHIBITION PROHIBITING RESPONDENT FROM PROCEEDING IN THE UNDERLYING CASE UNTIL SUCH TIME AS HE GRANTS PETITIONER'S MOTION TO DISQUALIFY PROSECUTING ATTORNEY WEYBREW BECAUSE THE RESPONDENT EXCEEDED HIS JURISDICTION OR EXPOSED PETITIONER TO IRREPARABLE HARM IN DENYING THE MOTION TO DISQUALIFY IN THAT ATTORNEY SYD WEYBREW HAS A CONFLICT OF INTEREST AS A RESULT OF HIS PRIOR REPRESENTATION OF PETITIONER ON CHARGES IN A CASE IN NODAWAY COUNTY, MISSOURI THAT ARE SUBSTANTIALLY SIMILAR TO A CHARGE THAT HE FILED AGAINST PETITIONER IN HOLT COUNTY, MISSOURI WITHIN FIVE MONTHS OF HIS REPRESENTATION OF HER AND IN THAT PETITIONER RELATED CONFIDENTIAL INFORMATION TO ATTORNEY WEYBREW CONCERNING HER NODAWAY COUNTY CASE THAT IS ALSO APPLICABLE TO THE HOLT COUNTY CASE.

Rule 4-1.9 of the Rules of Professional Conduct.....10,16,17

State ex rel. Wilfong v. Schaeperkoetter, 933 S.W.2d 407, 408
(Mo.banc 1996).....11,13
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ARGUMENT

THIS COURT SHOULD ISSUE ITS WRIT OF PROHIBITION PROHIBITING RESPONDENT FROM PROCEEDING IN THE UNDERLYING CASE UNTIL SUCH TIME AS HE GRANTS PETITIONER'S MOTION TO DISQUALIFY PROSECUTING ATTORNEY WEYBREW BECAUSE THE RESPONDENT EXCEEDED HIS JURISDICTION OR EXPOSED PETITIONER TO IRREPARABLE HARM IN DENYING THE MOTION TO DISQUALIFY IN THAT ATTORNEY SYD WEYBREW HAS A CONFLICT OF INTEREST AS A RESULT OF HIS PRIOR REPRESENTATION OF PETITIONER ON CHARGES IN A CASE IN NODAWAY COUNTY, MISSOURI THAT ARE SUBSTANTIALLY SIMILAR TO A CHARGE THAT HE FILED AGAINST PETITIONER IN HOLT COUNTY, MISSOURI WITHIN FIVE MONTHS OF HIS REPRESENTATION OF HER AND IN THAT PETITIONER RELATED CONFIDENTIAL INFORMATION TO ATTORNEY WEYBREW CONCERNING HER NODAWAY COUNTY CASE THAT IS ALSO APPLICABLE TO THE HOLT COUNTY CASE.

Standard of Review

In determining whether a court should issue a writ of prohibition an appellate court must determine whether a judicial officer has abused his or her discretion or whether action must be taken to avoid irreparable harm to a party, or to prevent a judicial official from acting beyond his or her jurisdiction. *State ex rel. Linthicum v. The Honorable Michael B. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001).

Appropriateness of Prohibition

This case involves the question of whether a prosecuting attorney should be disqualified from acting as the prosecuting attorney in a case because the defendant was represented by him within five months of the date when he filed a felony complaint against his former client that involved issues that are substantially similar to the allegations in the earlier case. Therefore, there is the question of whether the prosecuting attorney has a conflict of interest based upon the Rules of Professional Conduct and there is the question of the protection of information that is provided in the context of an attorney-client relationship.

Other cases have held that a writ of prohibition is particularly appropriate in cases in which a privilege is at issue. *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407, 408 (Mo.banc 1996). It has been held that

a writ of prohibition was appropriate to protect a physician from an overly broad subpoena duces tecum that requested the production of confidential information. *State ex rel. Pooker v. Kramer*, 216 S.W.3d 670 (Mo.banc 2007) In the case of *State ex rel. Dean v. Cunningham*, 182 S.W.3rd 561 (Mo. banc 2006), it was held that a writ of prohibition was appropriate to protect a party's physician- patient privilege. In the case of *Hill v. Kendrick*, 192 S.W.3d 719 (Mo. banc 2006), it was held that a writ of prohibition was appropriate to protect a party's Fifth Amendment right against self-incrimination. In the case of *State ex rel. Madlock v. O'Malley*, 8 S.W.3d 890 (Mo. banc 1999), it was held that a writ of prohibition was appropriate to protect a party's right to privacy in employment records. In addition, although the court did not grant a writ of prohibition in the case, in the case of *State ex rel. Wallace v. Munton*, 989 S.W.2d 641 (Mo.App. 1999), the Missouri Court of Appeals, Southern District held that a writ of prohibition was appropriate in cases where a party sought to disqualify an attorney from acting in a case in order to enforce the Rules of Professional Conduct.

Therefore, in this case, since there is a question of whether prosecuting attorney Syd Weybrew should be disqualified because of the conflict of interest rules contained in the Rules of Professional Conduct and since there is a question of whether information provided to him that was

confidential and in the context of the attorney-client relationship should be protected by disqualification, a writ of prohibition is an appropriate remedy for the Petitioner.

Analysis of the Facts

Most of the facts that are recited in Petitioner's Petition for Writ of Prohibition have been admitted by the Respondent. The Petitioner was represented by prosecuting attorney Weybrew within five months of the date when he filed a felony complaint against the Petitioner. Although Respondent has denied Petitioner's statement that the two cases in which attorney Weybrew was involved were substantially similar. The fact is that both cases involve allegations that Petitioner was involved with controlled substances; both cases allege a violation of Chapter 195 of the Revised Statutes of the state of Missouri; and both cases involve drugs that may be legally prescribed by a physician. Petitioner contends that the two cases involve substantially related matters. In addition, Petitioner stated in her affidavit that she divulged confidential information to attorney Weybrew during the time that he represented her. Surprisingly, Respondent admits that there was a confidential attorney-client relationship between attorney Weybrew and Petitioner, but Respondent denies that Petitioner divulged any confidential information to attorney Weybrew. How is it possible for

Respondent to deny such an obvious fact? Certainly, any information disclosed to attorney Weybrew during the course of his representation of Petitioner would be confidential and subject to the attorney-client privilege. It is impossible to believe that Petitioner did not disclose any information to attorney Weybrew. Therefore, the information that was disclosed was privileged and confidential despite Respondent's denial.

In light of the fact that attorney Weybrew represented Petitioner in a matter that was substantially similar to the matter in which he filed a Felony Complaint against Petitioner and in light of the fact that Petitioner did disclose confidential and privileged information to attorney Weybrew, it is clear that Rule 4-1.9 of the Rules of Professional Conduct is applicable. That rule provides in pertinent part:

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6

would permit with respect to a client or when the information has become generally known.

The section of Rule 4-1.9 that refers to using acquired information from a client adversely to the client is also incorporated in Rule 4-1.8 (b).

Petitioner contends that prosecuting attorney Weybrew must be disqualified in order to protect the information that she disclosed to him when he represented her and in order to prevent irreparable harm to her. There is no Missouri case that has identical facts to this case. However, there is a case from the state of Texas that has substantially the same facts. *In re Goodman*, 210 S.W.3d 805 (Tex.App. 2006).

In the *Goodman* case, the question presented was whether a prosecuting attorney should be disqualified based on the fact that he had previously represented the defendant in another criminal case. In *Goodman*, the prosecuting attorney who was the subject of the disqualification motion had represented the current defendant four years earlier. Both cases involved allegations of driving while intoxicated. The evidence established that the defendant had had confidential communications with the prosecuting attorney when the prosecuting attorney had represented him. Based on that information, the court held that the prosecuting must be disqualified based on the applicable Rules of Professional Conduct. The applicable Texas Rules

of Professional Conduct are the same that have been adopted in Missouri. Therefore, it is suggested that there should be the same result in this case. In fact, the facts in this case are even more compelling. In *Goodman* there had been a lapse of four years from the time that the prosecuting attorney had represented the defendant. In this case, there was only a lapse of five months.

It is noted that Respondent in his Answer, argues that Petitioner did not testify in regard to her Motion to Disqualify. However, Petitioner did provide an affidavit that provided the facts that should have caused Respondent to disqualify prosecuting attorney Weybrew. The fact is that prosecuting attorney Weybrew filed no response to the Motion to Disqualify and did not provide any affidavit to counter the affidavit of Petitioner. The contention of Respondent that Petitioner should have testified concerning the confidential information that was revealed during the time that he represented Petitioner is highly unfair.

What counsel for Respondent is arguing is that Petitioner should be subject to cross-examination on the record in regard to the confidential information that she provided to attorney Weybrew. That would mean that Petitioner should be required to reveal all information that is privileged and confidential as part of her motion. Of course, if Petitioner did that then there

would be no privileged or confidential information because it would have been placed on the record and could then be used by attorney Weybrew or any other attorney against her. Such a recommended procedure by Respondent is highly unfair and prejudicial. Clearly there is or should be a presumption that whenever there are matters that are substantially similar, then communications about those matters should be protected.

CONCLUSION

The attorney-client relationship is part of the backbone of the Anglo-American judicial system. As a result, that relationship must be protected and any efforts to erode that important relationship must be defeated. In this case, it would be manifestly unfair for an attorney to prosecute the Petitioner when that same attorney represented Petitioner in a substantially similar case a few months before he filed criminal charges against her. Petitioner should not be required to isolate any and all information that she related to her attorney that could be used against her in a subsequent prosecution. Petitioner is entitled to rely on the privilege that is essential to making our system of justice work. Therefore, the Court should make its Writ of Prohibition permanent and order the Respondent that he may not proceed until he grants the motion disqualifying prosecuting attorney Weybrew.

Respectfully submitted,

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APPENDIX

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**CERTIFICATE PURSUANT TO
MO.R.CIV.PRO. 84.06**

I, G. Spencer Miller, counsel for Petitioner certify upon my oath in accordance with Mo.R.Civ.Pro. 84.06 as follows:

1. That to the best of my knowledge, information and belief formed after an inquiry reasonable under the circumstances that

a) The claims, requests, demands, contentions and arguments in Petitioner's Brief are not presented or maintained for any improper purpose such as to harass, cause unnecessary delay or needless increase in the cost of litigation;

b) The claims and other legal contentions in Petitioner's Brief are warranted by existing law or by a non-frivolous argument; and for the

extension, modification or reversal of existing law or the establishment of new law; and

c) The allegations and other factual contentions in Petitioner’s Brief have evidentiary support; and

2. That Petitioner’s Brief complies with the limitations contained in Mo.R.Civ.Pro. 84.06(b); and

3. That the number of words in Petitioner’s Brief are 3,438; and

4. That the number of lines of monospaced type in the brief are 656;

and

5. That the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Further affiant saith naught.

G. Spencer Miller

STATE OF MISSOURI)
)ss.
COUNTY OF NODAWAY)

Now on this ___ day of _____, 200____, there personally appeared before me G. Spencer Miller, a person known to me who state that he was signing the foregoing Certificate freely and voluntarily and with full knowledge of its contents.

Notary Public

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**THE HONORABLE WILLIAM S. RICHARDS,
RESPONDENT.**

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2007, a
copy of Petitioner's Brief was mailed by first class mail to:

Syd Weybrew
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Attorney for Petitioner