In the
Supreme Court of Missouri

No. SC97026

STATE OF MISSOURI ex rel.
KIMBERLY M. GARDNER
CIRCUIT ATTORNEY OF
THE CITY OF ST. LOUIS,
Relator,

v.

HON. TIMOTHY J. BOYER,
CIRCUIT JUDGE, 22nd CIRCUIT
(City of St. Louis),
Respondent.

On Petition in Prohibition

RELATOR'S REPLY BRIEF

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State v. Lemasters, 456 S.W.3d 416 (Mo.banc 2015)

State v. White, 462 S.W.3d 915 (Mo.App.W.D. 2015)

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Mo.R.Ct. 4

ARGUMENT

I. Respondent and *amicus* Attorney General fail to show that a reasonable person would perceive an "appearance of impropriety" in relator's continued review of witness A.F.'s conduct in using force against defendant Davis, relying on a series of independently permissible actions of relator that, in the aggregate, do not provide an objective basis for finding an appearance of impropriety.

Neither respondent nor the Attorney General succeeds in demonstrating that the disqualification of relator was warranted by the purported "potential conflict" and "appearance of impropriety" created by relator's exercise of her prosecutorial discretion in the prosecution of intervenor/defendant Davis.

Respondent's argument (although not all of his findings) and the Attorney General rely on the following facts to support respondent's finding of an "appearance of impropriety":

Relator declined to submit the Davis case to the grand jury;

Relator's investigation or review of A.F.'s conduct has been too slow;

Relator has refused to entertain warrant applications from some police officers who have refused to do their duty in assisting prosecutions;

Relator has declined to respond to queries from A.F.'s counsel about the status of the review of A.F.'s conduct ("lack of transparency");

Defendant Davis has been prejudiced by relator's slow investigation of A.F.'s conduct;

Relator has not established a sufficient "wall" between her public integrity section, reviewing A.F.'s conduct, and the prosecutors assigned to proceed against defendant Davis; and, seemingly most important,

Relator argued during her campaign for office that police shootings should be investigated by special prosecutors.

None of these facts[1] warranted a finding of an appearance of impropriety, because none of the facts show any improper conduct whatsoever.

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[1] Some "facts" alleged by respondent are not admitted by relator or alleged in the petition in prohibition in this Court (to which no return or answer has been made in proper form). Nevertheless, relator sees no point in requiring a special master's findings in this case and, with one exception, is willing assume the truth of the allegations for purposes of this proceeding, since many of them are immaterial. The exception is the allegation that police officers have not refused to testify in the grand jury as well as in preliminary hearing in use-of-force cases. Relator represents that officers have so refused and vigorously disputes respondent's assertion to the contrary.

The parties agree in substance that *State v. Lemasters*, 456 S.W.3d 416 (Mo.banc 2015) provides the most guidance from this Court on the standards applicable here, although relator observes that *Lemasters* turned on a due process analysis rather than specifically on the rules of professional conduct. In any event, this Court opined:

> Society's confidence in the judicial system—and, in particular, the criminal justice system—depends on society's perception that the system is fair and its results are worthy of reliance. For that reason, it is essential that trials be fair. See *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). But that alone is not sufficient. Instead, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (emphasis added). A procedure that appears to be unfair can jeopardize society's confidence in the judicial system as a whole even if the procedure is—in fact—fair. Accordingly, this Court must pursue fairness both in the law's substance and in its appearance.
>
> That said, an appearance of impropriety judged only from the defendant's perspective cannot be sufficient for relief. Instead, the touchstone for claims that present a real threat to the apparent fairness of the system is what knowledge of all the facts and circumstances would suggest to a reasonable

person. When reviewing similar claims concerning judicial disqualification, therefore, this Court has held that the trial judge must disqualify herself when "a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court." *Anderson v. State*, 402 S.W.3d 86, 91 (Mo. banc 2013). The same standard applies here. *Ross*, 829 S.W.2d at 949. Accordingly, even if an assistant prosecutor's conflict is not imputed to the remainder of the office under the Rules of Professional Conduct, the remainder of the prosecutor's office must be disqualified if a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness of the trial. [456 S.W.3d at 422-23.]

It is at once apparent that *Lemasters* is concerned with fairness to the criminal defendant, not to witnesses, even police officer witnesses. Neither Respondent nor the Attorney General can show that any conduct of relator in the underlying case is unfair to the defendant—with the possible exception of the delay in completing a review of A.F.'s conduct, discussed below. Every complaint about relator's actions in the underlying case springs from Officer A.F. and his counsel, and every one of these complaints rests on conduct that, by law, is within relator's discretion. Indeed, respondent himself expressly found no improper conduct by relator, confining himself to a finding of an "appearance" based on "potential conflict." Petition in Prohibition, Ex. 7, p. E35. However, respondent's arguments in his brief appear to

inject the complaints raised by the motion to disqualify, and so relator is constrained to address them.

First, neither respondent nor a police officer has the authority to decide which criminal cases shall be presented to the grand jury and which will be presented at a preliminary hearing. The fact that cases such as this are commonly prosecuted in the City of St. Louis by way of indictment reflects no impropriety or unethical behavior. To allow a witness to dictate the forum in which probable cause is to be determined is truly remarkable--unheard of, unique and uncalled for.

Second, the pace of the review or investigation of Officer A.F.'s conduct is largely outside relator's control. The St. Louis Metropolitan Police Department is the investigative agency on which relator must rely to gather facts in cases in which an officer has used force in apprehending a defendant—as well as in nearly all other criminal cases. Indeed, difficulties in obtaining information from the Police Department have led to considerable litigation over discovery sanctions and practices. See State ex rel. St. Louis City Trial Office v. Gardner, 22nd Cir. No. 1822-CC00814; State v. Morgan, 22nd Cir. No. 1722-CR03697-01.[2] Be that as it may,

[2] This Court can, if it chooses, take judicial notice of the records of the Circuit Court. See Forsyth/Schroeder, 33 *Missouri Practice: Courtroom Handbook on Missouri Evidence* §201.2 (2017).

Officer A.F.'s irritation with his employer does not show any impropriety on relator's part. (To be sure, relator once again acknowledges an ethical duty to notify A.F. if he becomes a target of a grand jury inquiry or is likely to charged, but the record does not show that A.F. is in that situation at this time; moreover, if that situation developed, relator could be obliged to recuse from the case against A.F., not the case against defendant Davis.)

Third, respondent's brief argues impropriety in relator's treatment of other officers who have refused to cooperate in criminal prosecutions, but respondent's order makes no finding that relator has "punished" any police officer or otherwise acted beyond her discretion in declining to entertain warrant applications by certain officers deemed unreliable. Relator has an absolute statutory discretion to refuse criminal charges for any legitimate reason, and there is no ethical duty of relator to file complaints on the basis of officer testimony that she deems unreliable—quite the reverse.

Fourth, respondent complains that relator declined to respond to queries from A.F.'s counsel about the status of the review of A.F.'s conduct ("lack of transparency"). Again, respondent did not rely on this fact in finding an appearance of impropriety, and it is wholly irrelevant. Relator represents the State of Missouri, not Officer A.F.

Fifth, respondent asserts that defendant Davis has been prejudiced by relator's slow investigation of A.F.'s conduct, but defendant Davis does not so argue in his brief in this Court. Rather, he argues that the delay in litigating relator's disqualification has prejudiced his rights. Relator agrees that respondent's order has delayed disposition of the charges against defendant Davis and agrees that defendant Davis should be accorded a speedy preliminary hearing after respondent's order is annulled.

Finally, respondent argues that relator has not established a sufficient "wall" between her public integrity section, reviewing A.F.'s conduct, and the prosecutors assigned to proceed against defendant Davis; and, seemingly most important, relator argued in campaign statements that police shootings should be investigated by special prosecutors.[3]

Relator acknowledges that her approach to police use-of-force cases has evolved, and the record below is now somewhat misleading concerning her current practice of insulating her public integrity attorneys from regular prosecutors in such cases. Regardless, the issue of special prosecutors in such cases has more than one dimension. Relator's campaign statements, in context, related to the difficult issues

[3] Relator cannot forebear to observe that A.F.'s union (which is providing counsel in this case) has adamantly opposed special prosecutors in such cases.

created when an officer uses force, especially deadly force, against a citizen who is not charged with a crime. The issues in the underlying case here, though partaking of some of the same difficulties, are readily distinguished from the former cases. Simply put, relator has elected to rely on A.F. in the underlying case and proceed with the prosecution. If, and only if, evidence comes to light that casts doubt on A.F.'s credibility will relator be obliged to reconsider her actions, and it is here that the crux of this case is found.

Relator made no campaign statement that directly or indirectly creates an appearance of impropriety in this case, warranting her disqualification. Cf. *State v. White,* 462 S.W.3d 915 (Mo.App.W.D. 2015). Respondent's allusion to relator's campaign statements merely reinforces the plain truth that the only conflict of interest in this case rests with A.F. Defendant Davis can attack A.F.'s credibility regardless of what opinion relator finally forms about A.F.'s use of force. Relator, however, has an ethical and legal duty to prosecute defendant Davis only if she has probable cause, which necessarily requires belief in A.F.'s truthfulness. Mo.R.Ct. 4-3.8(a). A special prosecutor would have precisely the same duty. It is A.F., not relator, who is conflicted: he must decide if he wishes to do his duty as a law enforcement officer and testify truthfully or exercise his prerogative to refuse to testify.

Respondent's finding of a "potential conflict" creating an "appearance of impropriety" is tethered to no fact showing anything that could be deemed improper.

It is well established that a cumulation of non-errors cannot amount to error. *State v. Miller,* 372 S.W.455, 476 (Mo.banc 2012). Likewise, a catalog of non-improprieties does not create the appearance of impropriety. The prosecution of defendant Davis is the responsibility of relator. In conducting that prosecution, it is relator who decides how to evaluate the evidence and what charges to pursue. Cf. *State ex rel. Dowd v. Nangle,* 276 S.W.2d 135 (Mo.banc 1955). Respondent has improvidently substituted his own judgment for that of relator in this matter. Prohibition is the proper corrective.

II. Respondent and *amicus* Attorney General, while conceding that witness A.F. lacks standing to seek disqualification of relator, advance a standard for judicial disqualification of an elected prosecutor in police use-of-force cases that is at variance with prevailing professional norms under the rules and decisions of this Court, and will undermine, not enhance, public confidence in the administration of justice, by unintentionally creating a perception that police officers can dictate how and by whom prosecutions of defendants can be conducted, whenever officers use force against the defendant.

Neither respondent nor the Attorney General seriously contends that witness A.F. had standing to seek disqualification of relator in the underlying criminal case, but rely on the respondent's "inherent power" to do so in order to protect society's belief in the fairness of the judicial system. Brief of Attorney General at

p. 11. However, respondent and the Attorney General overlook that the deployment of this inherent power in the context of this case likely will have the opposite effect.

The only "prevailing professional norms" that govern this case are those articulated by this Court in its opinions and its rules, specifically Mo.R.Ct. 4, the rules of professional conduct. Significantly, the rules do not use the phrase "appearance of impropriety," although that phrase recurs in reported cases. Nevertheless, the "prevailing professional norms" cited by respondent and the Attorney General do not support respondent's actions. Rather, they are focused on the issues raised when police officers are themselves the targets of criminal investigations on account of their use of force against a citizen who is not also a defendant.

The questions raised when a prosecutor charges a criminal defendant against whom an officer has used force are significantly different than those raised when the officer is the actual or prospective defendant. None of the authorities cited by respondent or the Attorney General give any guidance in this situation. In particular, none of the authorities address the appearance that is created when a court disqualifies a prosecutor because a police officer witness complains about the manner in which the prosecutor is handling the case in which the officer used force. Respondent chose to craft his own remedy in this situation, declaring that he

saw his decision here as "the most prudent way to protect the rights of the defendant and ensure that the public maintains faith and trust in our system of criminal justice." In so doing, he usurped the prerogative of this Court to promulgate ethical standards for prosecutors, and invaded the executive branch's discretion in how to prosecute this sort of case.

The parties are in agreement that cases involving use of force by a police officer can present special problems, and that the paramount interest is in protecting the integrity of judicial process. However, as the Attorney General recognizes, the disqualification of the elected prosecutor in such cases is an exceptional action, trenching on separation of powers, and not to be undertaken on the basis of some "relaxed standard" of disqualification. Unfortunately, respondent and the Attorney General would have this Court undermine, rather than conserve, the established principles governing disqualification of a prosecutor in a criminal case.

The facts marshaled in support of respondent's finding of an "appearance of impropriety" have been delineated above. Beyond the reality that these facts do not warrant a finding of an appearance of impropriety, they are significant in showing what is at work here: an appearance of judicial deference to complaints by a police officer about the way a prosecutor does her job in a case involving use of force. Such deference to such complaints does nothing to buttress public

confidence in the administration of justice and does nothing to dispel any doubt about the fairness of the prosecution of defendant Davis. On the contrary, respondent's order unintentionally sends the opposite message to the public: when a criminal defendant has been subjected to the use of force in the course of his arrest, the elected prosecutor has no right to examine critically that use of force, but must either delegate the prosecution to a special prosecutor or must ignore any issues presented by the use of force. Relator submits that respondent's order is wrong as a matter of law and policy.

CONCLUSION

For the foregoing reasons, and as set forth in relator's original brief, relator respectfully prays that the preliminary order herein be made permanent, and that the permanent writ of prohibition forbid respondent from enforcing his order of disqualification and from taking any action other than vacating said order and permitting the underlying cause to proceed with relator and her office as counsel of record.

Respectfully submitted,

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Certificate of Service and Certification under Rule 84.06(c)

The undersigned counsel certifies that the foregoing reply brief was served on counsel for all parties by e-mail on the 6 day of July, 2018, and counsel further certifies that the brief includes the information required by Rule 55.03, with a signed original in counsel's possession, that the brief complies with the limitations contained in Rule 84.06(b), and that the total number of words is 3238.

/s/Robert H. Dierker 23671