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, DIVISION 25, TWENTY-SECOND JUDICIAL CIRCUIT,

Respondent.

On Writ Application from the Circuit Court of St. Louis City, Missouri
Cause No. 1722-CR03687

BRIEF OF AMICUS CURIAE THE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Respectfully submitted:

MISSOURI ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

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STATEMENT OF INTEREST & RULE 26(1) DECLARATION

The Missouri Association of Criminal Defense Lawyers (MACDL) is an organization dedicated to protecting the rights of persons accused of crimes in Missouri, and to fostering and enhancing the ability of Missouri lawyers to effectively represent those persons. MACDL also works to improve the criminal justice system to those ends. MACDL is an affiliate organization of the National Association of Criminal Defense Lawyers.

Amicus Curiae Missouri Association of Criminal Defense Lawyers states that consent to participate in this briefing was sought and obtained from all parties, including counsel for intervenor Wendell Davis.

STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

The filing of the Office of the Circuit Attorney is an original remedial writ seeking relief from the ruling of a Circuit Court. This Court has discretion to issue and determine original remedial writs. Mo. Const. art. V, § 4.1.

Amicus Curiae adopts and incorporates by reference the generally uncontested statements of fact set forth by the parties.

INTRODUCTION

While MACDL disagrees with the practice of prosecutors investigating police officers who regularly appear in their circuits (including the Circuit Attorney investigating police officers who regularly appear in the 22nd Judicial Circuit), even considering the trial court's "inherent authority," there was no ethical conflict of interest at play which negatively affected the defendant in the underlying matter. In the absence of statutory authority or a clearly defined ethical conflict of interest affecting the rights of the named defendant, the disqualification of the Circuit Attorney in this matter was an abuse of the trial court's discretion.

DISCUSSION

I. Standard of Review

When a trial judge improperly disqualifies a prosecutor, prohibition is the appropriate remedy. *See, e.g., State ex rel. Director of Revenue v. McBeth*, 366 S.W.3d 95 (Mo.App.W.D. 2012)(prohibition granted to preclude enforcement of order disqualifying prosecutor); *State v. Eckelkamp*, 133 S.W.3d 72 (Mo.App.E.D. 2004)(same); *cf. State ex rel. Thompson v. Dueker*, 346 S.W.3d 390 (Mo.App.E.D. 2011)(writ granted in civil case where counsel for party disqualified). A writ of prohibition is appropriate when a judge's denial of a motion to disqualify counsel amounts to an abuse of discretion. *State ex rel. Burns v. Richards*, 248 S.W.3d 603 at 604 (Mo. 2008).

II. The Trial Court Erred in Disqualifying the Elected Prosecutor.

The trial court erred in disqualifying the elected prosecutor because (a) the witness-officer A.F. had no standing to raise or trigger the disqualification; (b) there was no statutory or common law authority to support the disqualification; and (c) the use of "inherent authority" to justify the disqualification was an abuse of discretion given the underlying facts.

A) Witness A.F. Did Not Have Standing to Intervene in the Underlying Proceedings, nor did the Trial Court Have Jurisdiction to Grant Relief on the Basis of That Intervention.

MACDL agrees with the threshold issue argued by counsel for Defendant Wendell Davis that Witness A.F. lacked standing to petition the court for the disqualification of the Circuit Attorney (See Response of Davis (filed 05/08/2018), pp. 7-12). Witness A.F. is not a party to the underlying proceeding, he is a witness. As such, Witness A.F. did not have standing to insert himself into the criminal case, nor did the court have jurisdiction to consider those arguments as raised or to disqualify the Circuit Attorney on the basis of the concerns raised by Witness A.F.

Allowing witnesses to intervene in criminal prosecutions to disqualify the prosecutor has a negative impact on the right of defendants to a speedy trial. This is evidenced from the facts of this case. While this defendant is critical of the actions and policies of the prosecutor, he supports her assertion that she should not have been disqualified. While *this* defendant is no longer in custody, due to his serious injuries, that is frequently not the case.

(B) The Trial Court had no Statutory or Common Law Authority to Disqualify the Circuit Attorney.

The Circuit Attorney of the City of St. Louis shall manage and conduct all criminal cases, business and proceedings of which the circuit court of the city of St. Louis shall have jurisdiction. §56.450 R.S.Mo.

The sole statute discussing disqualification of a state prosecuting attorney is §56.110 R.S.Mo., and provides for prosecutorial disqualification in only two instances: if the prosecutor (a) has been employed as counsel in any case where such employment is inconsistent with the duties of his or her office; or (b) is related to the defendant in any

criminal prosecution, either by blood or by marriage. These are the two statutorily allowable grounds for disqualification and neither is present in the underlying case.

(C) The Trial Court Abused its Discretion in Exerting its "Inherent Authority" to Disqualify the Circuit Attorney.

With the absence of statutory authority, the trial court seemingly acted under its perceived "inherent authority." Missouri courts have not only the duty to dispense justice, but the equally important duty to maintain the integrity of the judicial system. *Polish Roman Catholic St. Stanislaus Parish v. Hettenbach*, 303 S.W.3d 591, 597 (Mo. App. E.D. 2010). The court has the inherent power to do what is reasonably necessary for the administration of justice, including disqualifying an attorney where a conflict of interest clearly calls into question the fair or efficient administration of justice. *State ex rel. Humphries v. McBride*, 220 W. Va. 362, 647 S.E.2d 798, 805 (W.Va. 2007); *State ex rel. Horn v. Ray*, 325 S.W.3d 500, 511 (Mo.App. 2010).

Disqualification of a prosecutor is generally only called for when (a) a personal interest of a nature which might preclude [the prosecutor] according the defendant the fair treatment to which he is entitled. *Brewster v. State*, 577 S.W.2d 911, 914 (Mo. App. 1979); or (b) there is another ethical prohibition under the Model Rules of Professional Conduct.

i. Any Conflict of Interest in this Matter Would Apply to the Circuit Attorney's Potential Future Prosecution of Witness A.F., not to the Charged Defendant.

Witness A.F. sought the disqualification of the Circuit Attorney because he did not want to (a) testify at the preliminary hearing and risk self-incrimination; or (b) exert his 5th Amendment rights at that hearing and risk possible consequences related to his continuing employment as a police officer. While the choice of Witness A.F. may not be enviable (and highlights the problem with the Circuit Attorney investigating SLMPD officers), Witness A.F. has the same option as any witness in this position – he may testify at the preliminary hearing or he may exercise his right against self-incrimination and may assert his Constitutionally enshrined right. Sometimes there are collateral consequences in asserting the right against self-incrimination, and that is something Witness A.F. will have to factor into his decision making.

Witness A.F. also raises complaints with the procedure the Circuit Attorney is utilizing to apparently force his testimony in open court and has said he would prefer to testify in a grand jury setting. Witness A.F., however, has no authority to dictate how the Circuit Attorney chooses to investigate and prosecute cases (i.e., grand jury versus preliminary hearing). It is likely that should the Circuit Attorney choose to criminally charge Witness A.F., he will have a well-founded motion to disqualify her office from his criminal case.

There is no ethical conflict of interest which could trigger prosecutorial disqualification in this matter. This Court in *State ex rel. Horn v. Ray*, 325 S.W.3d 500, 511 (Mo.App. 2010) engaged in a detailed analysis of a "conflict of interest" supporting disqualification of a prosecuting attorney. That decision centered on an analysis of the Rules of Professional Conduct set forth in Missouri Supreme Court Rule 4. None of the

factors outlined in Rule 4-1.7 exist in this case as there is no attorney-client relationship between Witness A.F. and the Circuit Attorney. Witness A.F. is just that – a witness.

The trial court found that there existed "competing interests" between Witness A.F. and the Circuit Attorney. That is probably true. However, the mere potential of prejudice to a possible witness or lack of transparency by the Circuit Attorney does not create an ethical conflict of interest *impacting the defendant* that would warrant a disqualification of the prosecutor in this instance.

With no ethical "conflict of interest" impacting the defendant directly, the trial court abused its discretion in disqualifying the prosecutor's office.

III. There is a Definite Harm with the Circuit Attorney Investigating Use of Force Complaints Against St. Louis Metropolitan Police Department Officers.

While MACDL believes that the trial court lacked authority to disqualify the prosecuting attorney in this instance, we also believe that, in general, prosecutors should not investigate officers who appear regularly in courts in the prosecutors' circuits. Concern about prosecutorial conflict of interest in handling allegations of excessive force by police is widespread. Peter A. Joy & Keven C. McMunigal, *Prosecutorial Conflicts of Interest and Excessive Use of Force by Police*, 30-SUM Crim. Just. 47 (2015). Many scholars and practioners in the field say that independent review by special prosecutors in police excessive force cases is necessary in order to increase public confidence in the

criminal justice system. *Id*. Some scholars, like Butler and Freedman[1], argue that without a special prosecutor there is unequal justice, that is, different justice for police officers than for others in the community. *Id*.

Conflict of interest rules emphasize avoidance of unacceptable risks to a lawyer's representation of his or her client. In the view of MACDL and numerous scholars and attorneys opining on the subject, the ethics rules and other authorities, such as the Restatement and the Criminal Justice Standards, require local prosecutors such as the Circuit Attorney to withdraw and allow the state attorney general or a special prosecutor to handle investigations of the police. Withdrawal is required because there is significant and substantial risk of impairment to the prosecutor's ability to represent the government's interests, and there is no good reason for taking this risk. *Id*. Criminal prosecution of law enforcement officers [in a prosecutor's own judicial circuit] is fraught with actual or potential conflicts of interest and political issues that threaten to undermine the legitimacy of the criminal justice system. See: Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 Wash. U. J.L. & Pol'y 137.

The risk of impairment to the prosecutor's ability to represent the government's interests is substantial for several reasons. *Id*. First, the prosecutor works closely with the police and depends on police cooperation both in pending cases and in future cases. *Id*. Second, the prosecutor has a past relationship of working with the police. *Id*. This close

[1] Monroe Freedman & Paul Butler, Ferguson Prosecutor Should Have Bowed Out, NAT'L L.J., Dec. 8, 2014, at 30.

working relationship and the familiarity between the prosecutor and the police are exactly the type of factors that underlie the development of a bias in favor of the police. *Id*. See also: Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 Wash. U. J.L. & Pol'y 137. Maintaining this close relationship is in a prosecutor's self-interest. *Id*. The working relationship between the prosecutor and the police, the resulting favorable bias toward the police, and the prosecutor's own self-interest in maintaining a good working relationship with the police, are very likely to contribute to an ethical blindness on the part of the prosecutor to appreciate the substantial risk that the prosecutor's representation of the government may be adversely affected as the result of the investigation into wrongdoing by the police. Joy and McMunigal at 48.

To be clear, this is a separate issue than whether or not a police officer witness may intervene in a criminal case of another defendant. The problem with the Circuit Attorney investigating officers in her own judicial district is the fear that the prosecutor will fail to prosecute police officers to the full extent of the law in a fair and impartial way similar to other citizens.

CONCLUSION

While disagreeing with the practice of the Circuit Attorney investigating police officers in her own judicial circuit, Witness A.F. lacked the legal right to intervene in this case, there was no ethical conflict of interest between the prosecutor and the defendant in the underlying matter, nor was there any statutory authority allowing for disqualification of the Circuit Attorney. Therefore, the trial court abused its discretion in disqualifying the Circuit Attorney.

For the reasons set forth herein, Amicus respectfully suggests that the trial court exceeded its inherent authority in disqualifying the Circuit Attorney and thereby abused its discretion.

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was sent via U.S. mail on this 8th day of June, 2018, to:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that the foregoing Brief of Amicus Curiae includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06.

Relying on the word count of the Microsoft Word Program, the undersigned certifies that the total number of words contained in the Brief of amicus Curiae is 2,080 exclusive of the cover, signature block and certificates of service and compliance.