

IN THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

vs.

Case No. 13-F-48
Thomas C. Evans, III, Judge

PETER LIZON,
Defendant.

MOTION TO DISMISS INDICTMENT

Now comes the State of West Virginia by Special Prosecuting Attorney, R. Craig Tatterson, pursuant to Rule 48 of the West Virginia Rules of Criminal Procedure and moves to dismiss this matter based on the following:

- 1. THE PROSECUTOR WHO PRESENTED THIS CASE TO THE GRAND JURY LATER MOVED TO DISQUALIFY HIMSELF AND THE CIRCUIT COURT OF JACKSON COUNTY, WEST VIRGINIA, ENTERED AN ORDER DISQUALIFYING THE JACKSON COUNTY PROSECUTING ATTORNEY'S OFFICE DUE TO A CONFLICT OF INTEREST.**

Defendant was charged by criminal complaint on July 5, 2012, in the Jackson County Magistrate Court. James McHugh was the Jackson County Prosecuting Attorney at that time. Kennad L. Skeen, II, took office as the Jackson County Prosecuting Attorney on January 1, 2013.

Prosecuting Attorney Skeen presented the case to the Jackson County grand jury on June 25, 2013, and the grand jury found a true bill against the defendant

indicting him on three felony counts of malicious assault and three counts of domestic battery.

Prosecuting Attorney Skeen then moved the Circuit Court to disqualify his office from the instant case due to representing the "Defendant and the victim in this matter in criminal and civil matters in the recent past and that both the Defendant and the victim have/had developed a relationship with Kennad L. Skeen, II, and his previous law firm that established an ongoing lawyer/client relationship that would likely serve to erode public confidence in the impartiality of the criminal justice system should Kennad L. Skeen, II, continue to prosecute this matter." The order disqualifying Prosecuting Attorney Skeen was entered July 9, 2013. See attached Exhibit A.

The West Virginia Supreme Court has not ruled on whether an indictment presented by a prosecuting attorney who was later disqualified would invalidate the indictment. In Syllabus pt. 2 of *State v. Hatcher*, 210 W.Va. 307, 557 S.E.2d 361 (2001), our Supreme Court stated that a "prosecutor is disqualified from representing the State in a recidivist proceeding...where such lawyer acted as defense counsel in connection with the prior felony convictions that are the basis for such proceeding." The Court continued in Syllabus pt. 3 "[w]here a recidivist proceeding has previously been initiated against a criminal defendant by an information filed pursuant to W.Va. Code 61-11-18 &19, and it is later determined that the prosecuting attorney who initiated the charge was disqualified from acting in the case at the time such instrument was filed, the recidivist information is invalid and may not serve as a basis for further proceedings." The State fears that when the prosecutor has a conflict of interest at the

beginning and the prosecutor indicts or presents for indictment anyway, the only proper remedy is dismissal of the indictment.

The State also relies on the cases cited by defense counsel in support of the contention that an indictment should be dismissed where the indictment was presented by a prosecutor laboring under a conflict of interest. See *Sinclair v. State*, 363 A.2d. 468 (Md. 1976) and *People v. Zimmer*, 51 N.Y.2d 390 (N.Y. 1980).

2. THE STATE LACKS SUFFICIENT ADMISSIBLE EVIDENCE TO PROCEED TO TRIAL.

The State contends that it lacks sufficient admissible evidence to proceed to trial. Although hearsay evidence is admissible at the grand jury stage, hearsay is barred by the West Virginia Rules of Evidence unless it falls within certain limited exceptions. The only witness testifying at the grand jury was Chief Deputy Herb Faber. Faber testified to what the victim, Stephanie Lizon, allegedly told Jacqueline Adkins, while both were residents at the Family Crisis Intervention Center in Parkersburg, West Virginia. A copy of the indictment is attached hereto as Exhibit B. Exhibit B also contains photographs and an affidavit from Stephanie Lizon, both of which are discussed below. For privacy purposes, the photographs are being submitted in a sealed envelope.

The sum of allegations made by Ms. Adkins was that Stephanie Lizon told her that her husband Peter Lizon brutally wounded and tortured her. She allegedly told her that she had been chained up off and on for 10 years; her husband routinely beat her; her husband burnt her with a frying pan; and her husband left numerous bruises on her body.

The statements Stephanie Lizon allegedly made to Ms. Adkins are textbook hearsay and are not subject to any exception. Accordingly, the State cannot introduce the same at trial.

Ms. Adkins observed injuries to Stephanie Lizon and the same injuries were later photographed by workers at the Family Crisis Intervention Center. The State contends that the photographs would be admissible into evidence upon a proper foundation but for the reasons stated below, cannot prove that the Defendant committed the offenses of either malicious assault or domestic battery.

Stephanie Lizon was treated at St. Joseph's Hospital. A copy of the medical records are attached hereto as Exhibit C and are placed in a sealed envelope for privacy purposes. The State contends the medical records would be admissible under Rule 803(4) of the West Virginia Rules of Evidence as a statement for purposes of medical diagnosis or treatment. However, the medical records indicate "she was assaulted"; lists "domestic abuse"; lists the history as '[a]ssault'; but never lists the defendant, or anyone else, as the perpetrator of the assaults

Following Defendant's arrest, a preliminary hearing was held on July 13, 2012, in which Stephanie Lizon testified. She testified that the burn to her back was accidental and happened when she and her husband collided with each other. She testified that the bruises to her side were caused by her goat. She testified that the injury to her knees was caused by her tripping. She testified that the injury to her feet was caused by a farming accident. Upon cross-examination she specifically testified that her injuries were not caused by any intentional act of her husband.

Stephanie Lizon presented a notarized affidavit explaining away all the injuries and specifically stated that her "husband did not intentionally inflict any of the injuries...."; specifically stated that "I never stated to anyone at the Family Crisis Intervention Center in Parkersburg, West Virginia, that my husband intentionally injured me"; and specifically stated that "I never stated to anyone at St. Joesph's Hospital in Parkersburg, West Virginia, that my husband intentionally injured me." See Affidavit of Stephanie L. Lizon contained as part of Exhibit B.

Finally, undersigned counsel, an assistant prosecutor, and the victim's advocate from the special prosecuting attorney's office have met with Stephanie Lizon, and Mrs. Lizon adamantly denied any crimes were committed against her by the defendant and stated that if she testified at trial, her testimony would be consistent with her preliminary hearing testimony and consistent with the Affidavit of Stephanie L. Lizon.

Accordingly, the State is faced with a situation where the victim specifically and for a long period of time has denied the allegations against the defendant; where the victim never made the allegations to a law enforcement officer; where the victim has specifically denied making and allegations against the defendant ; where the majority of the evidence is inadmissible hearsay; and where the admissible evidence would not be sufficient to obtain a conviction at trial.

The standard for whether or not the court should grant the State's request for dismissal is contained in *Myers v. Frazier*, 173 W.Va. 658 (1984) and is basically whether the dismissal is "consonant with the fair administration of justice." Syl. pt. 12 Myers. The Myers Court further stated that it is not sufficient for a "prosecutor to generally conclude that the case is difficult and might be lost, because uncertainty is

inherent in any litigation. What is needed from a prosecutor is a statement of the salient facts and specific reasons that would provide a trial court with some basis for concluding that the dismissal of criminal charges is warranted." Myers at 670.

In footnote 16, the Myers court mentioned *State v. Lundeen*, 297 N.W.2d 232 (Iowa App. 1980) and cited twelve factors to consider in considering whether a dismissal is proper. Those factors and the State's analysis are as follows:

1. Weight of the evidence of guilt or innocence;

As stated above, the weight of the admissible evidence heavily supports a not guilty verdict.

2. Nature of the crime involved;

The crimes alleged in the indictment are of a very serious nature.

3. Whether defendant has been incarcerated awaiting trial;

The defendant has spent some time incarcerated and a longer period of time on home confinement.

4. Whether defendant has been sentenced in a related or similar case;

The defendant has not been charged or sentenced in any similar or related case.

See attached Exhibit E for defendant's criminal background. The same shows misdemeanor arrests in 2004, but no convictions.

5. Length of such incarceration;

N/A

6. Possibility of harassment;

The possibility of harassment appears minor. The victim has consistently claimed the Defendant's innocence and has asked the Court to allow contact between herself and the defendant. The victim has asked the undersigned to ask the Court to remove the condition of bond prohibiting contact between herself and the defendant.

7. Likelihood of new or additional evidence at trial;

It does not appear there would any substantial probability of new or additional evidence at trial.

8. Effect on the protection to society in case the defendant should actually be guilty;

As shown by Exhibit E, defendant has no prior criminal convictions. Defendant is charged in Case No. 13-M-494 in the Magistrate Court of Jackson County, West Virginia, with Obstructing an Investigation. A copy of the Criminal Complaint is attached as Exhibit F.

It does not appear that defendant is a danger to society.

9. Probability of greater incarceration upon conviction of another offense;

N/A

10. Defendant's prior record;

See Exhibit E.

11. The purpose and effect of further punishment;

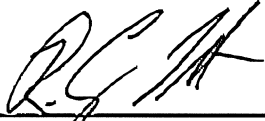
N/A

12. Prejudice to defendant by the passage of time.

The State sees no prejudice to the passage of time.

WHEREFORE, for the reasons stated above, the State respectfully requests that the Court allow the State to dismiss the instant indictment.

Respectfully Submitted,



R. Craig Tatterson (WV # 7802)
Special Prosecuting Attorney

CERTIFICATE OF SERVICE

I, R. Craig Tatterson, Special Prosecuting Attorney for Mason County, West Virginia, do hereby certify that I have served a true and correct copy of the foregoing "MOTION TO DISMISS INDICTMENT" upon Benjamin L. Bailey and Michael B. Hissam, counsel for defendant, by first class mail to Bailey & Glasser LLP, 209 Capitol Street, Charleston, West Virginia 25301.



R. Craig Tatterson
Special Prosecuting Attorney