

IN THE CIRCUIT COURT
LASALLE COUNTY, OTTAWA, ILLINOIS

FILED
MAY 11 2012

Joseph M. Lewis
LA SALLE COUNTY CIRCUIT CLERK
THIRTEENTH JUDICIAL CIRCUIT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff,)
)
vs.)
)
JOHN HULS,)
)
Defendant.)

No. 2011-CF-666

**RESPONSE TO MOTION TO REMOVE LASALLE COUNTY STATE'S ATTORNEY
AND TO APPOINT SPECIAL PROSECUTOR**

NOW COME the People of the State of Illinois, by and through Brian J. Towne, State's Attorney of LaSalle County, in response to Defendant's MOTION TO REMOVE LASALLE COUNTY STATE'S ATTORNEY AND TO APPOINT SPECIAL PROSECUTOR, the State offers the following:

1. The defendant, through his attorney, alleges that State's Attorney is an interested party pursuant to 55 ILCS 5/3-9008 and cites the Illinois Rules of Professional Conduct Rule 1.8 in support of his position. The defendant also alleges that "Mr. Towne's office is benefiting by creating their own police force, contrary to the powers and duties of County State's Attorneys to make money."

2. The LaSalle County State's Attorney is not an interested party under section 55 ILCS 5/3-9008. A prosecutor is deemed "interested" under section 3-9008 in three situations: (1) where the attorney is interested as a private individual in the litigation, (2) where the attorney is an actual party to the litigation, and (3) where the attorney's continued participation would create the appearance of impropriety in the prosecution of the defendant. *People v. Bickerstaff*, 403 Ill.App.3d 347, 352 (2nd Dist. 2010).

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The first two situations for determining whether a prosecutor is "interested" under section 3-9008 do not apply, as the State's Attorney has no interest in his private capacity and he isn't an actual party to the litigation.

Defendant asserts that there is an inherent conflict of interest because the SAFE unit is made up of special investigators employed by the State's Attorney. He argues that this creates a conflict between the constitutional rights of individuals in LaSalle County and of the State's Attorney to fund his office, citing *Bickerstaff*.

In *Bickerstaff*, a candidate for State's Attorney specifically commented on a pending case on a website during his campaign, attacking the inability of the current State's Attorney based on evidence that was suppressed. That individual was later elected State's Attorney and the defendant moved to have that individual disqualified based on the comments made about defendant's case. The Court ruled the pre-election statements, combined with comments made on a website after the election, were insufficient to establish an appearance of impropriety. Other than defining the issue of conflict of interest, *Bickerstaff* has no factual connection to the case at hand.

In the instant case, the Defendant's argument rests almost entirely on an article in the Ottawa Times which stated "When a police agency seizes drug money, that agency keeps 65 percent, with the remainder divided among other law enforcement entities, among which is the state's attorney's office, receiving 12 ½ percent. Now, when the state's attorney's drug officers seize money, the 65 percent will go to the state's attorney." Prosecutors Police: Drug money fuels State's Attorney's new anti-drug force, *The Times*, December 30, 2011. This hearsay statement is factually incorrect.

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Pursuant to 730 ILCS 5/5-9-1.2, the arresting agency receives 65% of all property or cash seized from a drug arrest where the seized property is not claimed or the State is successful in forfeiting it. As defendant points out, the statute provides that 12.5% of that amount is to be distributed to LaSalle County.

In every S.A.F.E. case involving the seizure of property or cash, LaSalle County receives only 12.5% as provided by statute. The Spring Valley Police Department provides an experienced narcotics investigator to S.A.F.E. Spring Valley Police Department is the lone "arresting agency" for purposes of the statute and receives the 65% share of property or cash forfeited. LaSalle County receives the same percentage from cash or property seizures by S.A.F.E. as it does for any similar seizure by every other law enforcement agency. The Defendant's argument that the LaSalle County State's Attorney has a different financial interest in S.A.F.E. cases as opposed to other cases has no factual support other than the statements made by a reporter in the Ottawa paper.

3. The defendant also agrees that the LaSalle County State's Attorney does have the power to appoint special investigators, but alleges the S.A.F.E. unit acts outside the authority granted to special investigators. In fact, the S.A.F.E. unit operates within the scope of the powers granted to special investigators.

"The State's Attorney of each county shall have authority to appoint one or more special investigators to serve subpoenas, make return of process and conduct investigations which assist the State's Attorney in the performance of his duties. A special investigator shall not carry firearms except with permission of the State's Attorney and only while carrying appropriate identification indicating his employment and in the performance of his assigned duties." "Subject to the qualifications set forth in this subsection, special investigators shall be peace officers and shall have all the powers possessed by investigators under the State's Attorneys Appellate Prosecutor's Act." 55 ILCS 5/3-9005(b).

No special investigator employed by the State's Attorney shall have peace officer status or exercise police powers unless he or she successfully completes the basic police training course

mandated and approved by the Illinois Law Enforcement Training Standards Board or such board waives the training requirement by reason of the special investigator's prior law enforcement experience or training or both. Any State's Attorney appointing a special investigator shall consult with all affected local police agencies, to the extent consistent with the public interest, if the special investigator is assigned to areas within that agency's jurisdiction.

The State's Attorney's Appellate Prosecutor's Act states that "No investigator shall have peace officer status or exercise police powers unless he or she successfully completes the basic police training course mandated and approved by the Illinois Law Enforcement Training Standards Board or such board waives the training requirement by reason of the investigator's prior law enforcement experience or training or both." "Investigators shall be peace officers and shall have all the powers possessed by policemen in cities and by sheriffs." 725 ILCS 210/7.6

Dan Gillette is a retired Illinois State Police Master Sergeant with over twenty years of experience in law enforcement. He was hired by the LaSalle County State's Attorney's Office as a Special Investigator and received his waiver from the Illinois Law Enforcement Training Standards Board (see attached) thus giving him full police and arrest powers consistent with both the statute governing the powers and duties of the State's Attorney and the State's Attorney's Appellate Prosecutor's Act.

Peace officer means "any person who by virtue of his office or public employment is vested with a duty to maintain public order or to make arrests for offenses" or "any person who, by statute is granted and authorized to exercise police powers similar to those conferred upon any peace officer." 720 ILCS 5/2-13. Special investigators are peace officers as defined by statute. A peace officer may arrest a person when he has reasonable grounds to believe that the person is committing or has committed an offense. 725 ILCS 5/107-2(1)(c).

Special investigators as complaining witnesses have surfaced regularly in Illinois case law. In *People v. Di Nunzio*, the Dupage County State's Attorney prosecuted a case involving illegal gambling machines in a hair salon. The complaining witness, a special investigator for the State's Attorney's Office, went to the beauty parlor in an attempt to verify whether gambling machines were truly there. A search warrant was then issued based on the special investigator's observations and information. As a result, gambling machines were seized and the store owner was prosecuted by the Dupage County State's Attorney's Office. 33 Ill.App.3d 679 (2nd Dist. 1975).

In *People v. Breton*, the Dupage County State's Attorney again prosecuted an offense based on original work by a special investigator in the office. The special investigator in this case posed as a potential hitman in a murder for hire. The undercover work by the special investigator in this case lead to the evidence used to prosecute and convict the defendant of solicitation of murder for hire. 237 Ill.App.3d 355 (2nd Dist. 1992).

In *People v. Morley*, the court refused to appoint a special prosecutor when one of the witnesses was an employee of the State's Attorney's office. "To hold that a special prosecutor must always be appointed whenever a victim or witness is employed by a state, county, or local agency would be an illogical, as well as impractical, encroachment upon the authority of a constitutional officer." 287 Ill.App.3d 499, 505 (2nd Dist. 1997).

In *People v. McGovern*, two investigators with the Dupage County State's Attorney's office purchased cannabis from the minor involved in the case. Based on their work as the complaining, undercover witnesses, the defendant was prosecuted by the Dupage County State's Attorney's Office. 62 Ill.App.3d 1049 (2nd Dist. 1978).

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Conversely, in *People v. Lang*, 346 Ill.App.3d 677 (2nd Dist. 2004), the Court held that the prosecution of that case by the Lake County State's Attorney's Office created an appearance of impropriety where an assistant state's attorney was a key witness in the prosecution against the defendant. In *Lang*, the defendant was in court on a charge of driving with a revoked license. After the proceedings, Lake County Assistant State's Attorney Daniel Kleinhubert followed the defendant to a parking garage. At one point, he hid behind flowers to avoid being seen and also stood behind a shaded glass window to avoid detection. Kleinhubert then informed a police officer that he had seen the defendant drive away and the officer secured a warrant for the defendant's arrest. It should be noted that Kleinhubert personally prosecuted the case for 19 months and testified as a key witness at trial. The court held that an appearance of impropriety existed because of the affirmative steps taken by the prosecutor in order to make himself a key witness in the case. The court also held that a prosecutor as a witness was not a per se conflict but the extreme measures this prosecutor took created an appearance of impropriety.

Lang is distinguishable from the issue before this Court. The facts in *Lang* involved an assistant state's attorney as a witness as opposed to a special investigator with the State's Attorney's Office. The role of an assistant state's attorney involves reviewing reports for charges, determining what charges to file, handling plea negotiations, determining an offer if any, and being instrumental in the outcome of the case. A special investigator is limited to the powers of a peace officer. He or she has the authority to arrest, investigate, and interview witnesses and defendants. An investigator does not possess the ability to file anything but citations and certainly cannot appear as an attorney in court. Essentially, once an arrest is made, the investigator's role is that of any other peace officer.

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Also the Court in *Lang* stated “we emphasize that our holding is based on specific facts of this case. Indeed, in some circumstances, it may not be improper for an assistant’s State’s Attorney to testify as a witness in a case that his office is prosecuting.” The Court went on to say “although the assistant State’s Attorney’s pursuit of the defendant was not wrong in itself, his aggressive behavior toward the defendant created the appearance that the State’s Attorney’s Office was obsessed with finding evidence against the defendant to obtain a conviction against him at all costs. Such an appearance was improper.” The *Lang* case is limited to its facts and the conduct of the assistant State’s Attorney and not that the assistant State’s Attorney was a witness in the case. This holding was effectively upheld in *Bickerstaff* when the court held that the prosecutor’s actions in that case did not rise to the level of conflict, and they cited *Lang* in the opinion and differentiated the case. *Bickerstaff* at 354-5.

The defendant’s argument that the LaSalle County State’s Attorney does not have the authority to use these special investigators in this manner is legally incorrect. The controlling statutes define them as peace officers. The legislature, by using the term peace officer in the empowering statute and the State’s Attorney’s Appellate Prosecutor’s Act, clearly intended special investigators to have all the powers and responsibilities of municipal police and sheriffs, including the ability to initiate cases and act as complaining witnesses. The defendant’s argument would have this Court create a new, conflicting definition of peace officer with that the one already defined by the legislature in 720 ILCS 5/2-13.

Furthermore, special investigators employed by State’s Attorney’s throughout the State of Illinois initiate cases and act as complaining witnesses in reliance on this statutory authority. This is shown not only through the cases cited above but by the affidavits of other State’s Attorneys attached as exhibits.

4. Lastly, defendant alleges a conflict exists because of a "lack of any structural check" on the arrest and prosecution of individuals arrested by S.A.F.E. Again, the defense alleges no specific facts or case law to support his argument. The allegations are factually wrong and based on complete speculation.

The procedure for seeking prosecution is exactly the same for S.A.F.E. cases as it is for all other felony cases in LaSalle County. The S.A.F.E. unit must seek felony approval from an assistant State's Attorney and provide reports in a timely fashion so those reports can be reviewed prior to the filing of a particular case. On several occasions the State's Attorney's Office has declined to prosecute a S.A.F.E. case or ordered certain property or currency returned to an individual. This oversight of local law enforcement has been in existence for years and applies to all agencies including S.A.F.E. The defendant's argument fails as the procedural safeguards for S.A.F.E. are the same as those for all other law enforcement agencies.

5. The decision to appoint a special prosecutor under 55 ILCS 5/3-9008 is within the discretion of the circuit court. However, because the appointment of a special prosecutor infringes upon the State's Attorney's exclusive discretion and implicates separation-of-powers principles, the appointment is only warranted if it is based on specific factual allegations of interest. Speculation and suspicion are insufficient bases on which to strip a State's Attorney of his authority, and petitioner must present sufficient evidence to support that the conflict is so great as to influence the State's Attorney's discharge of his duties. *In re Appointment of Special Prosecutor* 388 Ill.App.3d 220 232-3 (3rd Dist. 2009).


The defendant has alleged facts in his motion that are hearsay, speculative, and wrong as a matter of law. The defendant has cited no statute or case law that truly supports his speculative allegations or his "legal" conclusions. The defendant has not plead or presented facts proving

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any conflict of interest or appearance of impropriety exists that would justify this Court granting a petition to appoint a special prosecutor. The defendant has not remotely met any burden to show that this case as investigated, charged, and prosecuted by the LaSalle County State's Attorney creates a conflict that would influence the proper discharge of his duties or those of his assistants.

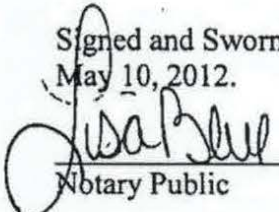
Wherefore, the People of the State of Illinois respectfully ask that defendant's MOTION TO REMOVE LASALLE COUNTY STATE'S ATTORNEY AND TO APPOINT SPECIAL PROSECUTOR be denied.

Respectfully Submitted,



Brian J. Towne
State's Attorney

Signed and Sworn before me this
May 10, 2012.



Notary Public



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