

FILED

JUN 11 2018

CLERK OF CIRCUIT COURT #31
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

**IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS**

IN THE MATTER OF THE ISSUANCE)
OF A SEARCH WARRANT SERVED) No. 18-MR-500173
ON COUNTY OFFICERS AND EMPLOYEES)

IN THE MATTER OF THE ISSUANCE)
OF A SEARCH WARRANT SERVED) No. 18-MR-500233
ON COUNTY OFFICERS AND EMPLOYEES)

ORDER

On May 10, 2018 this matter came on for hearing on all pending motions filed by the parties hereto, to wit: Petitioners' Motion For Order Finding A Conflict Of Interest And For Appointment Of Counsel, Respondent's Motion To Strike Or Dismiss Motion For Order Finding Conflict Of Interest And For Appointment Of Counsel, Respondent's Motion To Stay All Discovery. The Petitioners in 2018-MR-50173 also filed Petitioners' Response To Respondent's Motion To Strike Or Dismiss and Petitioners' Response To Motion To Stay All Discovery. Appearing in 2018-MR-500173 were Petitioners, Mr. Douglas Hulme and Mr. Robert Dorman who were represented by Attorney G. Edward Moorman. Petitioner Mr. Kurt Prenzler did not appear. Appearing in

2018-MR-500233 was Mr. Stephen Adler who was represented by Attorney Amy Sholar. The Respondent, Madison County State's Attorney Thomas G. Gibbons appeared with Madison County Assistant State's Attorney Jeffrey Ezra.

By agreement of the parties the Court heard combined arguments as to the Respondent's aforementioned Motion To Strike Or Dismiss filed in each of the above captioned cases.

The Court, after reviewing the aforementioned documents filed herein, and after considering the pertinent statutory law and case law together with the learned arguments of counsel, rules as follows:

A. The Court DENIES the State's Attorney's Motion To Strike Or Dismiss filed in each of the above captioned cases; and

B. The Court GRANTS in part and DENIES in part the Motion For Order Finding A Conflict Of Interest And For Appointment Of Counsel filed by the Petitioners in each of the above captioned cases in that the Court finds that an actual conflict of interest exists between the legal duties of the State's Attorney and the Petitioners in their capacity as current or former county officials. The Court, therefore, REMOVES the Madison County State's Attorney's Office from any investigation and/or prosecution of the Petitioners and appoints the Illinois Attorney General

to carry out that task with all deliberate speed. However, the Court DENIES Petitioners' request to appoint private counsel for them at county expense because the sitting State's Attorney is still charged with that duty, the conflict having been removed.

C. The Court DENIES the State's Attorney's Motion To Stay All Discovery due to its now being moot.

The Court makes the above rulings for the following reasons, to wit:

1. The pertinent statute controlling this matter is 55 ILCS 5/3-9008(a-10), which states:

"The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause or proceeding. The court shall consider the petition, any documents filed in response, and if necessary, grant a hearing to determine whether the State's Attorney has an actual conflict of interest in the cause or proceeding. If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause or proceeding."

2. The Illinois Rules of Professional Conduct, promulgated by the Illinois Supreme Court to guide Illinois attorneys, also apply to public officers and employees who are attorneys (Rule 1.11(d)) with regard to conflicts of interest involving *current* clients (Rule 1.7) and *former*

clients (Rule 1.9). This, of course, applies to State's Attorneys and Assistant State's Attorneys. (Emphasis added)

3. The State's Attorney represents the people of the State of Illinois and the county officers of his or her county which is clearly set out in 55 ILCS 3-9005(a) which, among other things, states that it is the State's Attorney's duty "to commence and prosecute all actions, suits, indictments, and prosecutions, civil and criminal, in the circuit court for his or her county, in which the people of the State or county may be concerned and all actions and proceedings brought by any county officer in his or her official capacity" (55 ILCS 5/3-9005(a)(1), (a)(3); and "to give his or her opinion , without fee or reward, to any county officer in the county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned" (55 ILCS 5/3-9005(a)(7). (Emphasis added)

4. The prosecutorial duties of the State's Attorney are not limited, as State's Attorney Gibbons argued, to the carrying forward of complaints filed by the police, informations under his or her signature and supported by a court's finding of probable cause or indictments handed down by a grand jury. A prosecutor may also perform "the investigative functions normally performed by a detective or police .

officer” by searching for the clues and corroboration that might furnish probable cause to recommend that a suspect be arrested. Generally, Illinois case law recognizes that a State’s Attorney has an affirmative duty to investigate the facts and determine whether an offense has been committed. *People v. Ringland*, 2017 IL 119484, citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *Bianchi v. McQueen*, 2016 IL App (2d) 150646; *White v. City of Chicago*, 369 Ill. App. 3d 765, 769-71 (2006); *McCall v. Devine*, 334 Ill. App. 3d 192, 204 (2002); *People v. Nohren*, 283 Ill. App. 3d 753, 758 (1996); *People v. Pohl*, 47 Ill. App. 2d 232, 242 (1964). (Emphasis added)

5. Article 112-4 of the Illinois Code of Criminal Procedure of 1963 sets out the duties of the grand jury as they relate to the State’s Attorney, which are significant. Of particular pertinence is the language of the statute at Section 112-4(a), which states:

“The Grand Jury shall hear all evidence presented by the State’s Attorney.”

It goes on to state at Section 112-4(b) that:

“The Grand Jury has the right to subpoena and question any person *against whom the State’s Attorney is seeking a Bill of Indictment*, or any other person, and to obtain and examine any documents or transcripts relevant to *the matter being prosecuted by the State’s Attorney*. Prior to the commencement of its duties and, again, before the

consideration of each matter or charge before the Grand Jury, *the State's Attorney shall inform the Grand Jury of these rights.*" (Emphasis added)

6. The Illinois Supreme Court through its administrative arm, The Administrative Office of the Illinois Courts, has produced an item called Grand Juror Handbook, prepared by the Illinois Judicial Conference and revised by AOIC. It is available on line at www.illinoiscourts.gov/CircuitCourt/Jury/GrandJuror.asp and exists ubiquitously in pamphlet form, which contains valuable information (and is also illuminating in this case) for those serving or about to serve on a grand jury. The following statement is included therein:

"Most of the cases that you will consider as a grand juror will be brought to your attention and come before you *as a result of investigation and preparation of the Prosecutor.* However, the grand jury possesses broad powers of its own to inquire into crime and corruption in its jurisdiction. It has a right under the law to make its own investigation unaided by the Court *and assisted by any prosecuting attorney.*" (Emphasis added)

7. In his oral argument presented on May 10, 2018, in support of his aforementioned Motion To Strike Or Dismiss, State's Attorney Gibbons acknowledged that the State's Attorney is a party to a grand jury proceeding and was so as it relates to these matters. See the transcript of said hearing at page 8.

8. It is abundantly clear that an Illinois grand jury is not a truly independent body. It can hear only evidence presented by the State's Attorney or the Attorney General. While it has the right to subpoena and question any person, it can only do so under the guidance and direction of the Prosecutor who is the only official allowed to meet with it in its secret proceedings. It is a valuable tool in the Prosecutor's tool kit, which gives a seed of truth to the old adage that a good prosecutor could get a grand jury to indict a ham sandwich.

9. State's Attorney Gibbons further acknowledged that he currently represents Petitioner Dorman as the IT director, Petitioner Hulme as the county administrator and Petitioner Prenzler as county board chairman. See the transcript of said hearing at page 15.

10. There is a factual dispute as to whether or not Petitioner Adler was a county official at the time of service of the subject search warrants and/or subpoena *duces tecum*. However, it is clear that the obtaining of records from him through the subject investigation is based on his employment with Madison County in 2017 or earlier, which, in the Court's opinion gives him standing in this matter by virtue of Rule 1.9, *supra*, not to mention judicial economy.

11. It would seem that State's Attorney Gibbons believed that a conflict of interest could arise if he gave legal advice on the subject investigation to Mr. Andrew Esping, as is evidenced by his e-mail response to Mr. Esping. However, it is not the serving of two opposing legal interests that creates a conflict of interest; such action would have violated the prohibition. The actual conflict had already been created.

12. State's Attorney Gibbons further acknowledged that in December of 2017, after having been provided with information that appeared to be evidence of criminal activity on the part of members of the Madison County administration, *he* made contact with the Illinois State Police and various Madison County law enforcement agencies and *he* asked them to create a multi-jurisdictional independent task force, the Madison County Public Corruption Task Force. (Emphasis added)

13. The aforesaid task force then proceeded to carry out an investigation, which has resulted in the issuance of search warrants and a subpoena *duces tecum*, which then resulted in the seizure of items relating to the Petitioners herein in their capacity as Madison County officials.

14. While it is quite right that State's Attorneys are not to be the primary investigators of criminal offenses, State's Attorneys can and

often do oversee and/or conduct investigations through a grand jury, their own investigators or police authorities. See *Ringland, supra*.

15. It is also quite true that a State's Attorney does not have the power or authority to actually issue a search warrant under his or her signature. That is, of course, the Court's bailiwick. However, the State's Attorney can and usually does set the parts in motion as happened here with the creation of the Task Force at the State's Attorney's urging and with his providing the initial alleged evidence to the police. And, even if the State's Attorney did not assist in the preparation or obtaining of the subject search warrants, as Mr. Gibbons argues, the law tosses the ball to the State's Attorney to defend any search and seizure challenged by anyone having legal standing, so it is in the State's Attorney's interest to see to it that the paperwork will stand up under judicial scrutiny should charges go forward relying on evidence obtained as a result of the search. The Court, however, takes Mr. Gibbons at his word as an officer of the Court.

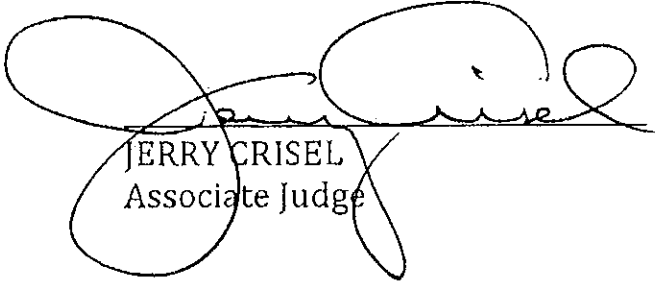
16. It is quite correct, as Ms Sholar and Mr. Moorman argue, that there are several facts disputed by the parties in this matter, but the Court agrees with Mr. Gibbons that there are enough uncontested facts before the Court for it to make a ruling; and it has done so.

17. For the State's Attorney to remain in a holding pattern while the Task Force completes its work, would not be appropriate in view of Rule 1.7 and Rule 1.9, *supra*; and it could damage not only the reality of justice, but its perception as well.

THEREFORE, the Court rules as set out above. The Clerk is directed to send a copy of this Order to counsel and to the Attorney General of Illinois.

ENTERED

June 8, 2018



JERRY CRISEL
Associate Judge