MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1822-CR01377
	)	
ERIC GREITENS,	)	Div. 16
	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO MOTION TO DISQUALIFY

The defendant has filed a motion to disqualify the office of the St. Louis Circuit Attorney in No. 1822-CR01377, but not in No. 1822-CR00642. Notably, the defendant is also attacking the Attorney General of Missouri in regard to the allegations of felony computer tampering which form the gravamen of the charges in No. 1822-CR01377. See Greitens v. Attorney General, No. 18AC-CC00143 (Cole County).

Defendant alleges that the Circuit Attorney's entire office should be disqualified on the ground of "interest" under §56.110, RSMo. It appears that the defendant's argument is that the Circuit Attorney is "interested" in the prosecution in No. 1822-CR01377, because the defendant has accused her of suborning perjury by a retained investigator in No. 1822-CR00642, and this perjury accusation has made the Circuit Attorney vindictive in pursuing No. 1822-CR01377. Thus, defendant's argument conflates two principles and essentially contends that the Circuit Attorney is interested because she is vindictive. For good measure, the defendant asserts an "appearance of impropriety."

Defendant's allegations are not self-proving. The Circuit Attorney categorically rejects the claim that she is "interested" or vindictive, and the Circuit Attorney likewise disputes the reckless and unwarranted accusation of subornation of perjury.[1]

Defendant's motion boils down to this: a defendant's attack on a prosecutor in one case precludes the prosecution of any other case against him, as it raises an "appearance" that the prosecutor is interested or vindictive, or both, in pursuing the additional case. The Court must approach this novel argument with skepticism, particularly where a party may be seeking an advantage by disqualifying the elected prosecutor. 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).

1. The allegations of "perjury" in connection with discovery disputes in a case alleging felony invasion of privacy do not establish an "interest" of the Circuit Attorney in prosecuting a wholly unrelated charge of felony computer data tampering.

As the Court is all too well aware, the defendant is charged in No. 1822-CR00642 with felony invasion of privacy, §565.252, RSMo 2000 & Supp., arising out of an encounter in his home in March 2015. The

[1] The defendant's allusion to a discovery sanction in another, closed case in this circuit, involving two of the State's counsel in this case, is surely an impertinent and unworthy aside.

defendant is charged in No. 1822-CR01377 with alternative counts of computer data tampering or computer tampering, by disclosure of data having a value in excess of $500. §569.095, RSMo 2000 & Supp. The cases have only the defendant in common. The circumstances of each case are wholly different.

Section 56.110, RSMo, provides in pertinent part that if the prosecuting attorney is interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his or her office, the court having jurisdiction may appoint a special prosecutor. None of the cases construing that statute to date have applied it in the way in which the defendant seeks here. On the contrary, the cases have uniformly rejected disqualification of the elected prosecutor on the basis of assertions that the prosecutor does not like the defendant, has had prior confrontations with the defendant, made public statements regarding the defendant's case, or that the defendant voted for a political opponent of the prosecutor. See *State v. Wacaser,* 794 S.W.2d 190 (Mo.banc 1990); *State v. Stewart,* 869 S.W.2d 86 (Mo.App.W.D. 1994); *State v. Heistand,* 714 S.W.2d 842 (Mo.App.S.D. 1986); *State v. Holt,* 603 S.W.2d 698 (Mo.App.S.D. 1980).

While the Court has the authority under §56.110 as well as inherent power to disqualify a prosecutor, *State v. Copeland,* 928 S.W.2d 828 (Mo.banc 1996), that authority must be exercised cautiously. The allegations of defendant's motion in this case fall far short of the sort of proof that would warrant disqualification of the Circuit Attorney in No. 1822-CR01377 for "interest." Cf. *State v. Nicholson,* 7 S.W.2d 375 (Mo.App.Spr. 1928)(holding that prosecutor who

participated in search underlying criminal case, testified as a witness at trial, and misbehaved during trial, was disqualified for "interest").

2. The allegations of "perjury" or other misconduct in the invasion of privacy prosecution do not establish any disqualifying vindictiveness on the part the Circuit Attorney in charging defendant with computer data tampering, in that all actions of the Circuit Attorney have occurred pretrial, the investigation of the computer data tampering case has been supported by the recommendation of the Attorney General of Missouri, and the preferment of the computer data tampering charge cannot be shown to be in retaliation for the exercise of any procedural or constitutional right.

Defendant asserts that the allegations of "perjury" and the supposed weakness of the invasion of privacy case combine to establish not only "interest" but also vindictiveness in filing the computer data tampering charge. Defendant's motion is alike insufficient to show either a presumption of or actual vindictiveness.

The principles governing the issue of prosecutorial vindictiveness in the pretrial context have been summarized by the United States Supreme Court in *United States v. Goodwin,* 457 U.S. 368, 381ff. (1982), as follows (footnotes omitted):

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely

> that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.
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> In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.
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> . . . A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. . . . the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

The Missouri cases applying the constitutional precepts in regard to prosecutorial vindictiveness likewise reflect the heavy burden that a defendant must carry in the absence of a presumption of vindictiveness. See *State v. Gardner,* 8 S.W.3d 66 (Mo.banc 1999); *Chrisman v. State,* 297 S.W.3d 145 (Mo.App.S.D. 2009). In No. 1822-CR01377, there simply is no realistic likelihood of vindictiveness and no viable allegation of actual vindictiveness. The filing of the computer data tampering charge cannot be characterized as a retaliation for the defendant's invocation of any constitutional or procedural right. There simply is no realistic likelihood of vindictiveness when the prosecutor files an unrelated charge based on her own investigation and an investigation by the Attorney General of the State. Indeed, the insufficiency of defendant's allegations is

cast in sharp relief by the defendant's parallel accusations against the Attorney General. The defendant's motivation is transparent: he wishes to disable both the Circuit Attorney and the Attorney General—the responsible elected officers charged with enforcement of the criminal laws—from proceeding on a criminal charge, in an obvious effort to delay the cause so as to deflect the General Assembly from pursuing its own agenda. The Court should not aid or abet this gambit.

3. There is no "appearance of impropriety" created by the Circuit Attorney's conduct in filing a new, unrelated charge against defendant while another case is pending.

The Circuit Attorney does not dispute that, as a "quasi-judicial officer," she must avoid the "appearance of impropriety" in prosecuting criminal cases. *State ex rel. Burns v. Richards,* 248 S.W.3d 603 (Mo.banc 2008)(disqualifying prosecutor from prosecuting a former client, due to interrelationship of prior representation and the criminal case). However, an appearance of impropriety does not exist unless there is an objective basis upon which a reasonable person could have a doubt about the fairness of the proceeding. *State v. Lemasters,* 456 S.W.3d 416 (Mo.banc 2015). Here, the defendant presents no objective basis upon which a reasonable person could doubt the fairness of the proceedings in No. 1822-CR01377.

A paramount duty of a prosecutor under the Rules of Professional Responsibility is to make sure probable cause exists for a criminal prosecution. The obligation is set out succinctly in Mo.R.Ct. 4-3.8(a): "The prosecutor in a criminal case shall . . .

refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." The Comment to that Rule adds: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." A prosecutor's obligation is to do justice and to prosecute only those cases supported by probable cause.

The Missouri Supreme Court has described the prosecutor's role and the court's role in relation to the prosecutor as follows:

> In Missouri it is recognized that a prosecuting attorney is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, and in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly guilty and the doubtfully guilty. . . .
> When the law, in terms or impliedly, commits and entrusts to a public officer the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, [i.e. not merely ministerially] but acting as the result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any other person, such function is clearly quasi judicial. This court has written much upon the broad discretion vested in a public prosecutor. [Citations omitted.] . . . With every other attorney at law a prosecuting attorney is, of course, an officer of the court in a larger sense; *but he is not a mere lackey of the court nor are his conclusions in the discharge of his official duties and responsibilities, in anywise subservient to the views of the judge as to the handling of the State's cases.* A public prosecutor is a responsible officer chosen for his office by the suffrage of the people. He is accountable to the law, and to the people. He is "vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney. He is disqualified from becoming in any way entangled with private interests or grievances in any way connected with charges of crime. He is expected to be impartial in abstaining from prosecuting as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned." . . . [*State ex rel. Griffin v. Smith,* 258 S.W.2d 590, 593 (Mo. 1953), emphasis added.]

Defendant's argument, if accepted, presents the very real prospect that courts will be called upon to appoint a special prosecutor in every case where the defendant has aggressively attacked the methods and conduct of the prosecutor in one case, to preclude the prosecution of other meritorious cases against that defendant.

Tellingly, defendant can point to no appellate authority supporting his extraordinary motion. On the contrary, the weight of authority is that a trial court should not disqualify the elected prosecutor except in clear cases of direct personal interest in a prosecution—e.g., where the prosecutor himself was the crime victim, see *State v. Jones,* 268 S.W. 83 (Mo. 1924)—or where the prosecutor had formerly represented the defendant in a related matter, *State ex rel. Burns v. Richards,* supra--or where attorneys representing the defendant in a related civil matter were also part-time prosecutors in office that had charged their client criminally. *State v. Ross,* 829 S.W.2d 948 (Mo.banc 1992).

An "appearance of impropriety" is not some general warrant for courts to scrutinize the behavior of prosecutors (or other counsel, for that matter) in cases before them, and to disqualify them when the court disagrees with the manner in which the prosecutor exercises her statutory discretion. As noted above, circumstances creating an "appearance of impropriety" must be circumstances amounting to an objective basis upon which a reasonable person could base a doubt about the fairness of a trial or criminal proceeding. *State v. Lemasters,* 456 S.W.3d 416 (Mo.banc 2015). Defendant presents no objective basis to believe that the accusations leveled against the

Circuit Attorney in the invasion of privacy case have had any effect whatever in the pursuing the computer data tampering case. Probable cause for the computer data tampering charge is manifest. Defendant relies on his own characterization of a discovery dispute as "perjury" as the basis for the alleged "appearance of impropriety." That does not suffice to authorize this Court to disqualify the Circuit Attorney.[2]

Conclusion

For the foregoing reasons, the Circuit Attorney respectfully submits that the motion to disqualify the Circuit Attorney and her office must be denied.

Respectfully submitted,

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Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 23 day of April 2018.

[2] Because the motion is wholly without merit, the Circuit Attorney sees no reason to address the argument that her whole office must be disqualified because of defendant's personal attacks on her. Suffice it to say, the accusation of "interest" and vindictiveness does not require disqualification of the whole office.

/s/Robert H. Dierker 23671