

STATE OF NORTH CAROLINA
CABARRUS COUNTY

FILED

09 R 209

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2009 APR 22 P 1:11

CABARRUS COUNTY, C.O.C.

In re Vernon A. Russell, Esquire

BY LT

ORDER

This cause coming on before the Honorable W. David Lee, Judge Presiding at the April 13, 2009 session of Cabarrus County Superior Court upon the motion of the District Attorney that Vernon A. Russell, Esq. (hereinafter "the attorney") be admonished and sanctioned for the filing of that certain motion, filed March 9, 2009, seeking to disqualify the District Attorney, Roxann Vaneekhoven, with respect to the prosecution of the attorney's client, Alfred E. Johnson, for an alleged assault on a female (Cabarrus File#06 CRS 54380); and

The attorney having waived further notice and requested that the Court hear the matter on April 16, 2009, and this Court having the inherent authority, recognized in G.S. 84-36 and cases construing same, to discipline lawyers, which authority is well recognized and is not superseded by the State Bar's disciplinary powers; and the Court having conducted a hearing, at which both the attorney and the District Attorney were given a full and fair opportunity to be heard, as appears of record, and after which both the District Attorney and the attorney were allowed to file supplemental written arguments; and the Court having considered all of the evidence, arguments and contentions presented at the hearing and subsequent thereto; and

The attorney having acknowledged his familiarity with our Supreme Court's decision in State v. Camacho, 329 NC 589 (1991), the attorney acknowledging his participation in the filing and presentation of an earlier motion to disqualify the District Attorney in the Cabarrus County trial of State v. David Devine in which Camacho was cited and argued; and it appearing that the attorney participated in similar conduct in the Devine case referred to above, as is more particularly set forth in the December 8, 2005 Order of Senior Resident Judge W. Erwin Spainhour, a copy of which is appended to this Order for further reference;

And it appearing that district attorneys are independent constitutional officers, and that Article IV, sec. 18 of the North Carolina Constitution provides that the district attorney shall "be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district..." and that district attorneys have the exclusive discretion to determine what cases will be prosecuted in their respective districts; and it appearing at this hearing that there is no actual conflict, as contemplated in Camacho, justifying the disqualification of District Attorney Roxann Vaneekhoven in the prosecution of Alfred E. Johnson, all of the statements and arguments presented leading to no more than mere conjecture or speculation with respect to any possible conflict, the motion being frivolous and wholly without merit; and

4-28-09

The District Attorney having determined, in her discretion, for reasons in no way related to those advanced by the attorney in his motion, but because the matters and things alleged in the motion, as stated by the District Attorney in her response, make it "foreseeable that anyone prosecuting this case (i.e., the Alfred E. Johnson case) may wish to call the District Attorney as a witness to impeach the defendant's credibility," that another prosecutor should be brought in to handle the prosecution of Mr. Johnson.

The Court concludes that the motion was interposed for the improper purposes of causing unnecessary delay and needless waste of time and effort, the same being harassing and vexatious in nature, and being an impropriety substantially interfering with the administration of justice; and the Court further concluding that the motion was intended to reduce public trust and confidence in the District Attorney as a constitutional officer;

And the Court having considered other possible sanctions, including censure or reprimand, but the Court having determined, in its discretion, that this admonishment, coupled with informing the North Carolina State Bar of this misconduct are the most appropriate sanctions in this instance;

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Vernon A. Russell is admonished by this Court for his misconduct in the filing and prosecution of the motion; and further, that Vernon A. Russell is cautioned that further efforts to disqualify the District Attorney without substantial evidence of an actual conflict in any pending or future prosecution may subject him to further, more severe sanctions.

IT IS FURTHER ORDERED that a copy of this Order be sent by the Clerk to the Secretary of the North Carolina State Bar, as well as to Vernon A. Russell, Esquire, and to the District Attorney, Roxann Vaneekoven.

With the consent of counsel this Order is signed out of session *nunc pro tunc* this 21st day of April, 2009.


W. David Lee, Judge Presiding

NORTH CAROLINA
CABARRUS COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. 01 CRS 22984-86
01 CRS 23308-70; 02 CRS 6973-4

STATE OF NORTH CAROLINA

v.

DAVID KEITH DEVINE, Jr.
Defendant.

FILED IN COURTROOM 3
CABARRUS COUNTY
Date 12-8-05 3:45 PM
MC
Ass't./Deputy Clerk
ORDER

These matters are before the court upon defendant's Motion to Disqualify the Cabarrus County District Attorney's Office from prosecution of the above-captioned criminal cases now pending in the Superior Court for Cabarrus County. A hearing was conducted in this court before the undersigned judge presiding on 6 December 2005. District Attorney Roxann Vaneekhoven, and Assistant District Attorneys Ashlie P. Shanley and Paul Holcomb appeared on behalf of the State. The defendant was present in court and was represented by his attorneys of record, Luke Largess and Vernon A. Russell.

A BRIEF PROCEDURAL HISTORY OF THE CASES

The defendant is an employee of the Cabarrus County Board of Education. He was indicted by the grand jury of Cabarrus County in nine indictments of taking an indecent liberty with nine different students. At the time of his indictment he was a teacher at J.N. Fries Middle School in Cabarrus County, and had been a teacher for twenty-three years.

As a result of the indictments the defendant was suspended from his duties as a teacher and the Cabarrus County Board of Education moved to dismiss him as a tenured teacher in the Cabarrus County Public Schools. The defendant requested a hearing, and a hearing was duly conducted before a case manager assigned by the North Carolina State Board of Education. At the hearing before the case manager the testimony of the alleged victims in case number 01 CRS 22986 (Jordan Smith), case number 01 CRS 23370 (Kristen Black) and case number 02 CRS 6973 (Jordan Hiltz) was heard. The case manager found that the testimony of these three alleged victims was not credible, and he recommended to the Superintendent of the Cabarrus County Schools that the defendant not be dismissed. Thus, the defendant remains an employee of the Cabarrus County Schools, but not in the classroom. Instead, the defendant is employed in the school bus garage.

In June of 2003 case number 02 CRS 6972, wherein Nikki Waller was the alleged victim, was tried before Judge Mark Klass and a jury. At the close of all the evidence Judge Klass dismissed the case and did not submit the case to the jury. The remaining eight cases are pending in this court.

THE CONTENTIONS OF THE DEFENDANT AND THE STATE

The defendant contends that the elected District Attorney in this district, and her staff, should be disqualified from prosecuting the defendant on the pending charges for the following reasons:

- (a) The defendant contends that a witness, referred to herein as "V.A.", then age 14, committed perjury during a *voir dire* examination in the absence of the jury at the trial of case number 02 CRS 6972 in June of 2003. The witness V.A. was not allowed to testify in the presence of the jury at the conclusion of the *voir dire*. The defendant contends that the District Attorney should investigate or prosecute V.A. for perjury or subornation of perjury, but that defendant's counsel has been "rebuffed every time the topic has been raised." (Defendant's Motion filed 26 October 2005, p. 7.) The defendant contends that "the failure of the State to address criminal deception by its witnesses creates a conflict of interest in pursuing these criminal convictions against the defendant." *Ibid.*, p. 9.
- (b) The defendant contends that the district attorney's refusal to investigate criminal conduct of its witnesses "might be tied" to the fact that the District Attorney and her staff are too close personally and politically to the alleged victims and their families; that one of the alleged victims, Kristen Black, is the daughter of David Black, who served for several years as the chairman of the Cabarrus County Republican Party; and that the elected District Attorney ran on the Republican ticket and as part of her campaign she promised to "rid the County of sex offenders." *Id.*, p. 11. Further, the defendant contends that Assistant District Attorney Ashlie Shanley, who was the lead prosecutor at the trial in June, 2003, was at that time the vice-chair of the Cabarrus County Republican Party, and that Chairman Black and his wife sat through the trial in open court during the entire trial in 2003, "even though their own child did not testify and was not the complaining witness." *Id.*, p. 11. Because of this the defendant has concluded that the District Attorney has the "urge to 'get' the man who allegedly took indecent liberties with... (Mr. Black's) daughter (and that this) has impacted the District Attorney's ability to view these cases objectively and to prevent her and her staff from addressing criminal conduct by those trying to (convict the defendant)", *Id.*, p. 11, and that, therefore, a conflict of interest exists. In short, the defendant accuses the District Attorney of refusal to exercise her constitutional duties and prosecute crimes because of personal and political relationships. *Id.*, p. 12. For this, the defendant alleges that the District Attorney and her staff should be removed from further involvement in the pending cases.

District Attorney Vaneekhoven and her staff vigorously dispute each allegation of the defendant, and contend in the State's Response to Defense Motion to Disqualify, and in oral argument, as follows:

- (a) In fact, the District Attorney has investigated the alleged perjury of the witness, V.A., and other witnesses for the State and concluded that the crime of perjury could not be proven. The defense called witnesses that contradicted each other in the June, 2003, trial, and it is common that there be inconsistencies in the testimony of the witnesses any trial.
- (b) No conflict of interest exists. The decision to prosecute the defendant for taking indecent liberties with nine school children stems solely from the discharge of the constitutional duties of the district attorney—not from politics. The defendant's attorneys have demanded special consideration for the defendant, but the District Attorney's office treats all defendants the same, and prosecutes cases based on the evidence available. The defendant was charged, arrested and indicted under the authority of then District Attorney Mark Speas. District Attorney Vaneekhoven was not in office when the decision to prosecute these cases was made. The fact that Ms. Vaneekhoven campaigned to aggressively prosecute child molesters is no evidence of a conflict of interest in the Devine cases. Her office has always rigorously prosecuted such persons, and this case is no different from the numerous cases that have been prosecuted by her and her staff. The District Attorney and the members of her staff belong to numerous civic clubs, churches, and the Chamber of Commerce. The fact that family members of the alleged victims belong to some of the same organizations, including the Republican Party, does not create a conflict of interest.
- (c) Numerous witnesses have come forward to the investigating officers alleging inappropriate touching on the part of the defendant. Some of those persons are adults in their thirties who know none of the alleged victims in the pending cases. In addition, other former students were contacted who were in the defendant's classes a few years before the alleged victims in these cases, and they also confirmed inappropriate touching of students by the defendant. Law enforcement officers have identified more than twenty victims and could have charged the defendant with crimes involving each of these persons. Further investigation revealed that youth group members of the defendant's church, who had never been in his school classes and did not know the complaining students in the present cases, stated that he had inappropriately touched them at church.

After reviewing and considering the arguments of counsel, the applicable law, and reviewing the materials submitted and the files in these matters, the court makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In open court the parties stipulated to the following facts: (a) David Black was the chairman of the Cabarrus County Republican Party for a significant period of time; (b) Roxann Vaneekhoven ran as a Republican candidate in the 2002 election and was elected District Attorney; (c) Kristin Black is the daughter of David and Deborah Black; and (d) Assistant District Attorney Ashlie Shanley at the time of the 2003 trial was the vice-chair of the Cabarrus County Republican Party. The court accepts these stipulations as true and correct.
2. District Attorney Vaneekhoven, and others working at her direction, have investigated the allegations of perjury of the witness V.A., and others, and the District Attorney has exercised her professional judgment and authority in deciding not to prosecute charges of perjury. There is no evidence that the decision not to prosecute V.A. was made inappropriately or in any way contrary to the constitutional duties of the District Attorney. On the contrary, the duty of the District Attorney is to obtain justice, not merely to convict. North Carolina Rules of Professional Conduct, Rule 3.8. (See also, Defendant's Supplemental Brief, filed 5 December 2005, p. 2.) In the present case, the District Attorney was entirely justified in not prosecuting V.A. for perjury. The inconsistencies in V.A. testimony were discovered during *voir dire* while the jury was not present in defendant's first trial, and V.A. was not permitted to testify before the jury. There is no evidence that the District Attorney or her staff knew of these inconsistencies before V.A. was offered as a witness by the State. The court takes judicial notice of the fact that it is not unusual for a witness to testify in open court differently from what the witness has told an attorney prior to trial. This is a fact of life that any trial lawyer is accustomed to endure. As a part of her constitutional duty to obtain justice, it was proper for the District Attorney not to prosecute a person for a crime whom she did not reasonably believe she could convict.
3. The fact that the chairman of the Cabarrus County Republican Party chose to attend court throughout the trial of the defendant in 2003 does not indicate that the district attorney was prosecuting the defendant for political or personal reasons. The Constitution of North Carolina, art. I, §18, provides that we have open courts in this State, and any person, including Mr. Black, could have attended the trial. He had a constitutional right to be in court, and neither he, nor anyone else, should be criticized for exercising that right. Furthermore, both Mr. Black and District Attorney Vaneekhoven had an absolute right to belong to the Republican Party, and that fact, coupled with the fact that Mr. Black's daughter is one of the alleged victims in this matter, has no bearing whatsoever on the manner in which the District Attorney exercises her duty in that office.
4. The fact that Mr. Black's daughter is one of the alleged victims in this matter, and that Ms. Vaneekhoven and Mr. Black are both members of the Republican

Party does not mean that the district attorney is prosecuting the defendant for political or personal reasons. There is simply no evidence presented that such is the case here. The alleged crimes have been duly investigated and prosecuted properly according to the evidence that has been presented that has been made available to this court.

5. The leading case in North Carolina applicable to this motion is State v. Comacho, 329 N.C. 589, 406 S.E.2d 868 (1991). In that case the Supreme Court of North Carolina ruled that a trial judge had exceeded his authority by ordering a District Attorney to request that the North Carolina Attorney General assume prosecution of a criminal case and that the District Attorney was disqualified from prosecuting the case further. The defendant in Comacho attempted to have the Mecklenburg County District Attorney and his entire staff prohibited from participating in the prosecution of the defendant on the grounds that one of the assistant district attorneys previously had been on the staff of the public defender during the defendant's first trial. The trial court allowed the defendant's motion, and the Supreme Court of North Carolina reversed that decision.

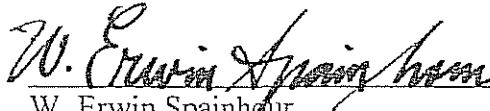
In the Comacho case the Supreme Court noted that District Attorneys are independent constitutional officers elected in their districts, and that Article IV, § 18 of the North Carolina Constitution provides that the district attorney shall...be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district..." (emphasis added by the Supreme Court). 329 N.C., 593. The Attorney General of North Carolina may prosecute a case in the Superior Court, but only upon the request of the District Attorney. N.C. Gen. Stat. § 114-2(4). Addressing the question of whether the trial court exceeded its authority by ordering that "in order to avoid even the possibility or impression of any conflict of interest, the District Attorney and his entire staff must withdraw from the case, the Supreme Court, after a detailed review of cases from North Carolina and other jurisdictions, ruled that "a prosecutor may not be disqualified from prosecuting a criminal action in this State unless and until the trial court determines that an actual conflict of interests exists." 329 N.C., 601.

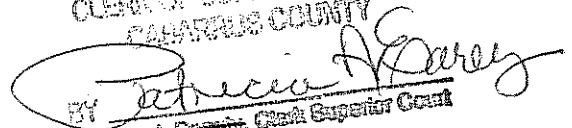
6. The defendant cited to the court several cases in support of his motion. Each of these cases is distinguishable from the present controversy on the basis of the facts presented. In no case cited by the defendant, nor found by the court, has a District Attorney been prohibited from prosecuting a defendant under facts similar to, or that can be reconciled with, the case before the court.
7. In the cases before this court, no conflict of interest exists, and there is no basis in law or in fact for the disqualification of the District Attorney and her staff. Accordingly, the defendant's motion should be denied.

IT IS, THEREFORE, ORDERED that defendant's Motion To Disqualify District Attorney shall be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED, in the discretion of the court, that the State's request that the defendant's attorneys be sanctioned for filing the motion be denied.

This Order was prepared by the undersigned, and is entered on this the 8th day of December, 2005.


W. Erwin Spainhour
Judge Presiding

A TRUE COPY
CLERK OF SUPERIOR COURT
CANADIAN COUNTY
BY 
Assistant, Deputy, Clerk Superior Court