IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

STATE OF OHIO,	**:**	**CASE NO. 07-CR-13898**
Plaintiff	**:**	
vs.	**:**	**Jonathan P. Hein, Judge**
LOUIS RODRIGUEZ	**:**	
Defendant.	**:**	**JUDGMENT ENTRY - State's Motion for Reconsideration**

This matter came before the Court upon the State's motion for reconsideration filed on June 1, 2007. The State of Ohio is now represented by Richard M. Howell the Prosecuting Attorney. The Defendant continues to be represented by Matthew Chapel, Esq.

On May 23, 2007, the Court issued a written decision dismissing the charges filed herein. The reasons for the dismissal were set forth in the prior decision. The State has now filed a request for reconsideration. The Defendant has filed a response. Various points are raised by the State in its motion. These are answered, as best possible, in the same order as raised.

I.

First, the State claims that the Prosecuting Attorney possesses the authority to determine what charges are worthy of filing, provided the decision is supported by facts which constitute probable cause to believe that the Defendant committed a criminal act. Various cases

are cited in support of this proposition, including *Sayte v. United States* (1985), 470 U.S. 598 and *State v.Lamar* (2002), 95 Ohio St.3d 181. The Court accepts the prosecutor's argument and citations of law on this point.

However, the possession of authority and discretion regarding the charging of a person with criminal conduct does not vest with the Prosecuting Attorney the unfettered right to control the case throughout the judicial process. When the Prosecutor chooses to invoke the process of the Court by filing a charge, the Court then possesses inherent and express authorities and duties to ensure procedural and substantive due process. This much is conceded by the State in its motion for reconsideration. See *State v. Lamar, supra*.; *State v. Busch* (1996), 76 Ohio St.3d 613.

Further, the Court during the pre-trial colloquy on May 8, 2007 acknowledged the Prosecutor's rights and privileges with regard to charging decisions. Indeed, in the past eight year, this is the first time the Court has not found it necessary to invoke the provisions of Criminal Rule 48(B).

However, case authority is clear that the Court does possess an affirmative duty to regulate the conduct of attorneys and parties before the Court. This duty includes the enforcement of the various Rules of practice implemented by the Supreme Court. As stated in *Royal Indemnity Co. v. J. C. Penney Co.* (1986), 27 Ohio St.3d 31:

> "[The Ohio Supreme Court} exercises exclusive original jurisdiction of '[a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law." Section 2(B)(1)(g), Article IV, Ohio Constitution. However, a trial court retains the 'authority and duty to see to the ethical conduct of attorneys in proceedings before it * * * [and] [u]pon proper grounds it can disqualify an attorney.' Hahn v. Boeing Co. (1980), 95 Wash. 2d 28, 34, 621 P. 2d 1263, 1266. An attorney may be subject to disciplinary proceedings by a state supreme court for the same conduct that led to a contempt citation or the revocation of his pro hac vice admission by the trial judge. In re Bailey (1971), 57 N.J. 451, 273 A. 2d 563. In fact, an attorney may be disciplined in both his home state and the state in which he appeared pro hac vice. Kentucky Bar Assn. v. Shane (1977), 553 S.W. 2d 467; In re Neff (1980), 83 Ill. 2d 20,

46 Ill. Dec. 169, 413 N.E. 2d 1282.
See also *Mentor Lagoons, Inc. v. Rubin* (1987), 31 Ohio St.3d 256; *Maple Heights v. Redi Car Wash* (1988), 51 Ohio App.3d 341.

When violations of Rules and Codes of Conduct are called to a Courts attention, or are apparent to attorneys licensed to practice before the Courts of this state, a blind eye cannot be turned to the alleged violation. To do so would result in diminution of the integrity of the legal profession, and encourage further disobedience to the Rules and Codes of Conduct. See Canon III (D)(2) of the Code of Judicial Conduct; see DR 1-103 of the Code of Professional Conduct. The apparent violations were articulated in the Court's decision filed May 23, 2007.[1]

This Court was confronted by what appeared to be an obvious violation of the NDAA and Ohio ethical standards. The violation obviously infringed upon the constitutional rights of the Defendant to be free from a tainted prosecution; this Court's dismissal resulted in a remedy directed toward the offended party. The only other alternative would have been referral

---

[1] **National District Attorneys Association Standards:**

1.1 The primary responsibility of the prosecution is to see that justice is done.

1.3 The prosecutor should at all times be zealous in the need to protect the rights of individuals, but must place the rights of society in a paramount position in exercising prosecutorial discretion in individual cases and in the approach to the larger issues of improving the law and making the law conform to the needs of society.

1.4 At a minimum, the prosecutor should abide by all applicable provisions of the Rules of Professional Conduct or Code of Professional Responsibility as adopted by the state of his jurisdiction.

Ohio Ethical Considerations:

7-13: The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefor should use restraint in the discretional exercise of governmental powers, such as the selection of cases to prosecute; (2) [intentionally omitted]; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts....

7-14: A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation what is obviously unfair...

to another agency whose remedy could only be directed toward the offending party – only a *Phyrric* remedy from the Defendant's perspective.

II.

Next, the State claims that the Court has no authority to dismiss a case based upon the failure of a witness to testify against a defendant. Various cases were capably cited by the State. Also, citation was made to recent changes in various sections fo the Revised Code which portend to bar courts from dismissing charges over the objection of the prosecutor. While the Court is of the belief that the Legislature cannot viscerate a Rule promulgated by the Supreme Court [citations omitted], any analysis would be merely theoretical since the Court's decision to dismiss the case was not based merely upon the wishes of the victim to not testify. The decision of May 8, 2007 cites many reasons for the dismissal.

III.

The State claims that it was not provided with notice of the Court's intentions to dismiss the case. However, both parties were given 10 days after the pre-trial to file any pleadings or to supplement the record. The Court clearly articulated its intentions at the hearing and provided an opportunity for further proceedings.

Regarding the presentation of evidence upon which the Court based its decision, during the pre-trial conference, the Court heard argument by counsel and unsworn input from the victim (arguably the State's witness who opposed criminal prosecution) and others about the efficacy of prosecuting this case. The Court finds it curious – and unfortunate – that the Assistant Prosecutor could not articulate reasons that supported his charging decision as mandated by ethical standards promulgated by the National District Attorney's Association and the Ohio Rules of Professional Conduct. The Court is of the opinion that this analysis should be

undertaken in advance of filing all criminal charges, and that such analysis should have been readily and clearly articulated during the pre-trial. Yet the conclusion which was left with the Court following the pre-trial colloquy was that the victim had not been consulted about prosecution and that the consequences of prosecution – to both society at large, and to the defendant and victim and their family in particular – had never been considered or discussed.

IV.

The State next claims that the Court took on the function of the defense attorney. Quite frankly, this assertion is without any merit since clearly the Defendant was present and represented by his own attorney during all proceedings. Both sides participated at all stages of the case; all parties and attorneys were permitted to speak. Both sides were granted time to file pleadings and to supplement the record. The only fact that might support the State's conclusion is that the State did not prevail on the merits – hardly a sufficient basis to claim that the Court took on the Defendant's role.

Also, it is a disingenious argument from the State that the defense attorney should have provided this information; it is no more the duty of the Defendant's attorney to prepare the State's case than it is for the State to prepare the Defendant's case. All of the information which the Court obtained on May 8 2007, such as the marriage records, Defendant's nationality, his immigration status, the family's circumstances, and victim's desires were fully available to the Assistant Prosecutor had he been adequately prepared to prosecute this case. And why does the State now claim that the Defendant did not provide an affidavit from the victim since the State took the pre-trial position that it would accept nothing less than a plea to the indictment as charged?

V.

It is unfortunate that the Prosecuting Attorney's understanding of the case is not factually accurate. He has apparently been provided with false or misleading statements about the case which have now found their way into the Prosecutor's motion. First, discovery was requested by defense counsel and it was provided at the April 5 status conference. At that time, the defense explained the family, marriage, employment and immigration status of the Defendant. The Defendant also offered to plea to a misdemeanor offense. Clearly, for about five weeks in advance of the May 8th pre-trial, the Assistant Prosecutor had time to consider the propriety of his intransigent plea offer and to contact the victim, law enforcement officials and other witnesses. The Prosecutor's reliance on the Assistant Prosecutor's version of this case appears be ill-advised.

Nonetheless, as previously stated, it is clear that the Assistant Prosecutor refused to offer any lesser charges, and rejected a defense offer to plea to a misdemeanor. The State's apparent desire for additional time to once again institute pretrial discussions with the hope of negotiating a plea merely makes a mockery of the pretrial process – and further hinders the pretrial scheduling processes instituted by the Court to resolve cases. If the State wants to negotiate to resolve cases, do so in good faith; intransigent puffing and posturing during pre-trial proceedings is a waste of everyone's time.

One last point should be discussed. The Prosecutor has suggested that he should personally be contacted by defense counsel any time an Assistant Prosecutor appears to be unreasonable. This Court always welcomes the thoughtful, experienced and well-prepared attendance by the Prosecutor when handling cases in this Court. Quite frankly, this demeanor

and temperament is juxtaposed to that of the Assistant who handled this case (as has been previously discussed with the Prosecutor on other cases). The Prosecutor's offer will likely result in an insistent barrage by defense counsel contacting the Prosecutor to intervene on cases where defense counsel perceive – maybe unbeknownst to the Prosecutor -- inadequate case preparation and inexperienced legal acumen to exist on a regular basis.

Conclusion

In some cases, the outcomes are not easily chosen and are less than ideal. Such was the case herein when this Court confronted the facts and circumstances in the pre-trial process. The dismissal of the indictment, in the Court's discretion, was fair to the victim, the defendant and the public. The Prosecuting Attorney understandably disagrees. The resulting difference of opinion is understandable.

However, as articulated previously, and pursuant to Criminal Rule 48(B), the Court again finds that insufficient reasons exist for the prosecution of the Defendant. While deference is usually given to the charging decisions of the prosecutor, such deference is not unlimited.

IT IS THEREFORE ORDERED AND DECREED that the motion for reconsideration is over-ruled, with costs taxed to the State. FINAL APPEALABLE ORDER.

_____

JONATHAN P. HEIN, Judge

cc: Prosecuting Attorney's Office
Matthew Chapel, Attorney for Defendant (via fax)
DCSO, Detective Section (via fax)

jph/research/criminal/dismiss reconsidered