

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CP-41-CR-1715-2020**
 v. :
 :
 ANTWAN MCCLAIN, : **OMNIBUS MOTION**
 Defendant :

OPINION AND ORDER

Antwan McClain (Defendant) was charged with Homicide¹, two (2) counts of Aggravated Assault², Firearms not to be Carried without a License³, Persons not to Possess a Firearm⁴, Discharge of Firearm into Occupied Structure⁵, Flight to Avoid Apprehension⁶, Recklessly Endangering Another Person⁷, and Possession of Weapon⁸. The charges arise from the shooting and subsequent death of Jimia Alston on October 15, 2020. Defendant filed an Omnibus Pretrial Motion on April 26, 2021 and an Amended Omnibus Pretrial Motion on July 29, 2021. Following the issuance of this Court’s Opinion and Order on February 28, 2022, only two (2) issues remain for this Court to address in relation to these motions and their corresponding hearings. First, Defendant requests the recusal of the Lycoming County District Attorney’s Office. Secondly, Defendant wishes for the DA’s Office to provide him with the name of an anonymous cooperative individual. This Court held a hearing on the recusal issue on December 12, 2021. The issue of the anonymous person was brought to this Court’s attention at a court conference held on February 16, 2022.

Discussion

¹ 18 Pa.C.S. § 2501(a).

² 18 Pa.C.S. § 2702(a)(1), (a)(4).

³ 18 Pa.C.S. § 6106(a)(1).

⁴ 18 Pa.C.S. § 6105(a)(1).

⁵ 18 Pa.C.S. § 2707.1(a).

⁶ 18 Pa.C.S. § 5126(a).

⁷ 18 Pa.C.S. § 2705.

⁸ 18 Pa.C.S. § 907(b).

Anonymous Informant

On February 16, 2022, defense counsel notified this Court that an individual called the DA's Office to provide information related to the above-captioned case in exchange for reward money. Defendant requests the name of this person as part of discovery. However, the Commonwealth is reluctant to provide this information. Specifically, the Commonwealth asserts a policy perspective objection to providing this information and believes that complying with Defendant's request will act as a disincentive for the public to come forward and cooperate with their office. The Superior Court of Pennsylvania has held that "where the informant was an eyewitness to the [crimes] in question, the role of the trial judge's discretion is established by rule of court." Commonwealth v. Washington, 63 A.3d 797, 801 (Pa. Super. 2013); *See* Pa.R.Crim.P. 573(B)(2)(a)(i). "Where the informant was not an eyewitness, the extent of the court's discretion is specified more broadly by case law." Id. The issue of revealing an anonymous source's identity "calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crimes charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Commonwealth v. Withrow, 932 A.2d 138, 140-41 (Pa. Super. 2007).

However, "the Commonwealth retains a qualified privilege not to disclose an informant's identity" regardless of whether the informant was an eyewitness or not. Id. "To overcome that privilege, the defendant must show that his request for disclosure is reasonable and that the information sought to be obtained through disclosure is material to the defense." Id. A defendant is not required to predict "exactly what the informant will say" but must

“demonstrate at least a reasonable possibility the informant’s testimony would exonerate him.”

Id.

This Court agrees that requiring the Commonwealth to provide this information to Defendant will actively deter people from coming forward with information that may aid in the prosecution or investigation of criminal cases. Additionally, Defendant has not overcome the Commonwealth’s privilege of keeping this information confidential because Defendant, aside from making this request for the identity of the caller, has not provided the Court with an explanation how this disclosure is material to his defense. Unless and until Defendant can allege how the information provided by this anonymous person would exonerate him, Defendant’s request for the identification of the caller is denied. Therefore, the Commonwealth is not required to disclose the identity of the anonymous caller to Defendant.

Recusal of the DA’s Office

Defendant raises the issue of recusing the DA’s office after his prior counsel, Matthew Welickovitch (Welickovitch), Esquire, started employment with their office. “[P]rosecution is barred when an actual conflict of interest affecting the prosecutor exists in the case; under such circumstances a defendant need not prove actual prejudice in order to require that the conflict be removed.” Commonwealth v. Eskridge, 604 A.2d 700, 702 (Pa. 1992). In Commonwealth v. Sims, 799 A.2d 853 (Pa. Super. 2002), the Superior Court stated that the “mere fact that an attorney or employee of the PD’s Office has moved to the DA’s Office does not necessarily compel disqualification of the entire DA’s Office.” Id. at 857. The courts are directed to “look closely at the specific facts of the case and any remedial measures to determine whether any actual conflict of interest exists.” Id. The Pennsylvania Supreme Court has recognized the “enormous burden upon the already strained resources of the District Attorney’s staff” resulting

in disqualification of their office based on a mere assertion of impropriety. Commonwealth v. Harris, 460 A.2d 747, 750 (Pa. 1983).

In a case before the Supreme Court of Pennsylvania, the defendant was represented by an attorney in a civil matter. Commonwealth v. Wright, 961 A.2d 119, 135 (Pa. 2008). Later that same year, that attorney became an attorney for the local district attorney's office. Id. The defendant was arrested for murder, and the attorney immediately notified the district attorney that she could not be involved in the case. Id. "The trial court found Attorney Miller did not disclose any information to the district attorney's office of any knowledge she had of appellant, and her only involvement with appellant's case was purely ministerial, having recused herself from representing the Commonwealth in this matter." Id. The Supreme Court ultimately upheld the trial court's determination that no prejudice had occurred. Id. at 136. Additionally, in Commonwealth v. Sims, the Superior Court affirmed the trial court's decision to screen an attorney who moved from the PD's Office to the DA's Office rather than recuse the DA's Office entirely. Sims, 799 A.2d at 858.

Defendant argues that, since Welickovitch was his attorney for the above-captioned case, Welickovitch was privy to privileged conversations and observed discovery. Now that he has switched from the Public Defender's Office to the District Attorney's Office, Defendant believes that the conflict of interest is inherently present. Defendant is fearful that Welickovitch may inadvertently discuss the case with other DA's Office employees. The Commonwealth argues that the DA's Office has many cases that facially appear conflicted because several attorneys have moved from the PD's Office to the DA's Office. However, the Commonwealth asserted that Welickovitch is precluded from discussing this case at all with other employees and is not included in any discussions of trial strategy. The Commonwealth informed the Court

that their record management system is able to keep specific people out of certain cases. This prevents Welickovitch from having electronic access to Defendant's case. Additionally, the physical case files are kept in the DA's locked office or with his assistant in her office, making them inaccessible to Welickovitch.

This Court finds that recusal of the DA's Office is not necessary in this particular instance. "A mere allegation or appearance of impropriety is insufficient to establish an actual conflict of interest." Commonwealth v. Karenbauer, 715 A.2d 1086, 1094 (Pa. 1998). It is clear that Welickovitch has been absolutely prohibited from speaking about Defendant's case or participating in any discussions, is not given access to the physical case file, and is prevented from accessing the electronic filings. Although this Court recognizes that Defendant is concerned Welickovitch may talk about his case, the Commonwealth has shown that they do not allow Welickovitch to partake in such conversations and Welickovitch has never requested to do so. Therefore, the DA's Office shall not be recused from this matter.

Conclusion

The Court finds that the DA's Office shall not be required to provide Defendant with the identifying information of the anonymous individual. This Court also finds that the DA's Office shall not be recused in this matter.

ORDER

AND NOW, this 4th day of March, 2022, based upon the foregoing Opinion discussing the remaining issues raised in Defendant's Omnibus Motions, it is **ORDERED AND DIRECTED** that Defendant's request for the identity of the anonymous caller is **DENIED**. Defendant's request for the Lycoming County District Attorney's Office to be recused from the above-captioned case is hereby **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA
Jeana Longo, Esq.
Law Clerk (JMH)