

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CR-1224-2023
	:	
vs.	:	
	:	MOTION TO RECUSE
KENNETH MICHAELS,	:	
Defendant	:	

OPINION

Before the Court is a Motion to Disqualify and Recuse the Lycoming County District Attorney’s Office, contained in an Omnibus Pre-Trial Motion filed by the Defendant on March 29, 2024. A hearing was held with regard only to the Motion to Disqualify and Recuse the Lycoming County District Attorney’s Office on May 28, 2024, and a hearing on the remaining motions shall be held at a later date. The Defendant was present and represented by Edward J. Rymysza, Esquire. Matthew B. Welickovitch, Esquire, appeared on behalf of the Commonwealth. At the time of the hearing, counsel stipulated that the Defendant’s Motion to Disqualify within the Defendant’s Omnibus Pre-trial Motion and the Commonwealth’s Answer thereto would be admitted into evidence as Exhibits D1 and D2, respectively. The approximately fifteen (15) minute audio interview of Erin Turner, Cable Services employee, by Lycoming County Detective Steve Sorage and then-candidate for District Attorney Marino, was admitted as Exhibit D3. Finally, counsel stipulated that District Attorney Marino had recused himself as Attorney Rymysza indicated he received an email from ADA Wade on May 16, 2016, to that effect. At the hearing, ADA Welickovitch confirmed District Attorney Marino’s recusal without admission that a conflict of interest

exists.

Factual and Procedural Background

On August 31, 2023, the Defendant was charged with an open count of Criminal Homicide¹ and one count of Possessing Instruments of Crime². The charges stem from an incident on August 17, 2023, in which the Defendant fired a single shot in the lobby of his business after opening a locked door to allow entry to his irate former business partner and brother-in-law, John Roskowski, fatally wounding him. The Defendant was arrested in New Jersey on September 1, 2023. He waived extradition and was returned to Pennsylvania on or about September 14, 2023.

A preliminary arraignment was held on September 14, 2023, before Magisterial District Justice William Solomon who declined to set bail. A preliminary hearing was held on September 22, 2023, before Magisterial District Justice Solomon and both charges were held for court. Bail was again denied, due to the nature of the open count of homicide and its possibility of a life sentence if convicted. The Defendant's Motion to Set Reasonable Bail was filed on October 23, 2023. An evidentiary hearing was held on November 8, 2023, and November 14, 2023, after which the Court, by Opinion and Order docketed February 13, 2024, denied Defendant's Motion to Set Reasonable Bail.

After several unopposed Motions for Extensions of Time to File, Defendant filed an Omnibus Pre-trial Motion on March 29, 2024. Within the Omnibus Pre-Trial Motion is a Motion to Disqualify and Recuse the Lycoming County District Attorney's Office. Much of Defendant's motion is centered around the Lycoming County District Attorney, Thomas A.

¹ 18 Pa.C.S. §2501(a).

² 18 Pa.C.S. §907(b).

Marino, Esquire, (“Marino”) and his personal relationship with the decedent, John Roskowski, (“Decedent”) and his family. Not only does the motion allege that Marino assisted the Decedent in entering a drug rehabilitation facility, was a guest on the Decedent’s corporate plane, and contacted the Decedent on his personal cell phone to solicit financial support for his campaign, but also alleges that this close personal relationship with the Decedent was not disclosed to the defense by Marino or anyone in the District Attorney’s office. Furthermore, the motion contains allegations of the Marino’s involvement with the case, and actions taken by him, in this matter when he was still a candidate prior to his election or assumption of his official duties. This includes being seated at counsel table with First Assistant District Attorney Martin L. Wade, Esquire, (“Wade”) for the Defendant’s preliminary hearing and the first day of the hearing on Defendant’s Motion to Set Reasonable Bail. Additionally, the motion alleges that in early September of 2023, then-candidate Marino and a Lycoming County detective engaged in a joint interview of a Cable Services employee at her residence. During the interview, which was only partially recorded, the employee was asked questions about the shooting incident and related details. According to the Defendant’s motion, this interview was not disclosed by the prosecution.

The motion alleges that the above-described actions by then-candidate, and current District Attorney Marino demonstrate that he was, and is, personally invested in the outcome of this case. As a result, Defendant argues, there exists at a minimum an appearance of a conflict, if not an actual conflict. The Defendant further argues that not only must District Attorney Marino be disqualified from the case, but the entire Lycoming County District Attorney’s Office must be disqualified as the assistant district attorneys’ power to prosecute

a case is derived from the constitutional authority of the district attorney, who would no longer have the authority to proceed.

Hearing Testimony

At the hearing, the defense called Erin Turner, an employee who had worked at Cable Services for approximately 2.5 months at the time of the incident. Ms. Turner testified that she has several family members who also work at Cable Services, that she knew the Decedent, and that she also knows the District Attorney through her father-in-law, a former county detective. (Transcript of Proceedings, 5/28/24, pgs. 7, 11-12). On or around September 8, 2023, Ms. Turner's father-in-law informed her that the then-candidate for District Attorney Marino wanted to meet with her at her residence to "get ahead of the case and help Ken out." *Id.* at 8. She further testified that the meeting occurred at her house and Detective Sorage asked permission to record the interview, which she granted. *Id.* at 9. Detective Sorage primarily asked the questions during the interview, which lasted approximately 15-20 minutes, and when he was finished he turned off the recorder and asked then-candidate for District Attorney Marino if he had any questions. *Id.* Ms. Turner testified that after the interview Marino stated "Again, let's keep this between us. I wasn't here." *Id.* at 10. Ms. Turner testified that neither Detective Sorage nor Marino ever stated they were there to help the Defendant and she was confused as to why they wanted to interview her as she did not see anything the day of the incident due to her location in the building. *Id.* at 14.

The defense next called Yvonne DiRocco, the Decedent's ex-wife. Ms. DiRocco testified that she has known "Marino and his family since I was a little girl." *Id.* at 17. She

further testified that Cable Services had a corporate plane and she flew on it one time with Marino, prior to her divorce from the Decedent, and they were flying to meet with another lawyer but Marino was never formally retained. *Id.* at 17-18, 27. Ms. DiRocco testified that her interactions with Marino after that flight were minimal and she characterized him as a “professional acquaintance” and “not a friend that she would go to dinner with or go on vacation with.” *Id.* at 23.

The defense’s final witness was First Assistant District Attorney, Martin L. Wade, Esquire. ADA Wade testified that he serves at the will of the elected district attorney. *Id.* at 26. He testified that Ryan Gardner was the elected district attorney at the time of the incident on August 7, 2023, and Thomas L. Marino was not employed in any capacity in the district attorney’s office and had no legal authority in the district attorney’s office between August 2023 and the end of December 2023. *Id.* at 27. ADA Wade testified that he was made aware of Marino’s relationship with the Decedent around the time of the preliminary hearing in September 2023. *Id.* at 28. ADA Wade indicated Marino was invited in to the District Attorney’s Office by District Attorney Gardner to learn how the office functioned in anticipation of the transition, and that Marino was there “regularly” in the fall of 2023. *Id.* at 30.

With regard to the interview of Ms. Turner, ADA Wade testified that he could not remember if he learned of it - and Marino’s involvement – before or after it happened. *Id.* at 31. Marino did not ask ADA Wade’s permission, and Wade did not authorize it, Marino “just did it.” *Id.* at 31, 56. ADA Wade further testified that he may have first learned that the interview was recorded when he received the Defendant’s Omnibus Pretrial Motion and

therefore it was unlikely that it was disclosed pursuant to a discovery request as the Commonwealth was not in possession of it at that time. *Id.* at 35.

Concerning Marino's presence at counsel table with ADA Wade, first at the preliminary hearing on September 22, 2023, ADA Wade testified that Marino asked if he was allowed to come to the hearing and Wade said yes, but he thought Marino meant as a "spectator." *Id.* at 37. ADA Wade stated Marino did not ask to sit at counsel table with him, "he pulled the chair out and sat down." *Id.* When asked if he had any reservations about Marino sitting with him at counsel table, ADA Wade responded "probably." *Id.* ADA Wade indicated he was "pretty focused on what he was about to do" so he did not tell Marino that he could not sit there. *Id.* Additionally, when asked if he had any concerns about telling Marino he could not sit at counsel table because he was his future boss, ADA Wade replied "for sure." *Id.* With regard to Marino joining him at counsel table on the first day of a two-day bail hearing, ADA Wade testified he did not tell him it wasn't appropriate or that he should be sitting with him because "he had nothing to do with it and he wasn't taking part in it or interfering with what I was doing so I just proceeded." *Id.* at 38.

ADA Wade testified that he has been involved with this case "since day one" and that prior to the incident he has no personal relationship with the Decedent or his family. *Id.* at 46. At no point, directly or indirectly, did Marino influence any decisions ADA Wade has made on this case, including with regard to the charging. *Id.* When asked, from the time District Attorney Marino took office in January 2024 until the time of the hearing on the Motion to Recuse, how he would characterize his involvement in this case, ADA Wade responded, "He hasn't done anything on the case. I've done all the work on the case." *Id.* at

59.

ADA Wade testified that there are policies in place in the District Attorney's Office which deal with conflicts of interest with staff or prosecuting attorneys, but they are not written. *Id.* at 38. ADA Wade further testified that he is the one who makes the policies for the office and "it is the same for each conflict that arises. The attorney that is conflicted is blocked from accessing the electronic file system for that particular case." *Id.* at 39-40. ADA Wade indicated that the screening policies are in place for assistant prosecuting attorneys and staff, but he had never previously done it for "the boss." *Id.* at 42. However, ADA Wade testified that in April of 2024, "I blocked him (Marino) from the file just preemptively, unilaterally." *Id.* at 58. This was prior to District Attorney Marino texting ADA Wade to notify him that he was formally recusing himself from the case. *Id.* When asked on cross-examination why he blocked District Attorney Marino if he was not doing anything on the case, ADA Wade testified, "[b]ecause he's – he's in the office and I felt it was important to take that step because I knew we would be arguing or – yeah, I knew we would be arguing that he could be recused and the office could continue." *Id.* at 59.

In addition to electronic files, ADA Wade testified that the District Attorney's office maintains physical files in a cabinet in his office, and these cabinets are not under lock and key. *Id.* at 40. According to ADA Wade, District Attorney Marino has never asked to see or read the paper file in the cabinet in his office. *Id.* at 49. However, ADA Wade agreed on cross-examination that the protective steps he has taken thus far would not prevent the District Attorney from having communications with others, such as county detectives, about the case if he so desired, and that those communications may be done without his

knowledge. *Id.* at 58.

Legal Analysis

The Defendant argues that implicit in the District Attorney's self-imposed recusal was the recognition of, at a minimum, an appearance of a conflict of interest, if not an actual conflict of interest resulting from his conduct in this case before he was elected as District Attorney. The Defendant further argues that, despite District Attorney Marino's recusal via text message and ADA Wade preemptively blocking his ability to electronically access the file, the entire District Attorney's Office must be disqualified from prosecuting this case. The Defendant's argument is twofold. First, he argues that in Pennsylvania, where a conflict of interest lies with the elected district attorney of the county, as opposed to an assistant district attorney, the entire district attorney's office is disqualified from handling the case. Next, he argues that the screening policies and procedures implemented by ADA Wade were utilized too late and are woefully insufficient to ensure the District Attorney is prevented from exerting any influence in this case. The Commonwealth contends that District Attorney Marino's recusal from further participation in the case cures any actual conflict of interest or appearance of impropriety and disqualification of the entire Lycoming County District Attorney's Office is not required.

Although the Defendant's focus is primarily on Marino's conduct between the filing of the criminal complaint and his official assumption of duties as the elected District Attorney, the Court finds it critical to inquire into and analyze what, if any, influence Marino had in the decision to charge the Defendant and the crimes with which the Defendant was ultimately charged. The incident occurred on August 17, 2023. Defendant

was charged on August 31, 2023, with an open count of Criminal Homicide and one count of Possessing Instruments of Crime. ADA Wade is the attorney who signed the Criminal Complaint on behalf of the Commonwealth. At the time of the incident and when the charges were filed, Ryan C. Gardner, Esquire, was the Lycoming County District Attorney. Tom Marino was a guest in the District Attorney's Office, not to work on cases but to learn how the office functioned in anticipation of his eventual election. ADA Wade did not discuss this case with Marino prior to bringing the charges against the Defendant. Rather, in making the decision to charge the Defendant with Criminal Homicide and Possessing Instruments of Crime, ADA Wade evaluated the evidence available to him independent of Marino's influence and without any knowledge of Marino's relationship with the Decedent. ADA Wade testified, and there was no evidence presented to the contrary, that the decision to charge the Defendant with Criminal Homicide was his and his alone. While the Defendant greatly emphasizes the relationship between the Decedent and Marino, there was no evidence presented that ADA Wade had any prior relationship with either the Decedent or the Defendant, which would have influenced his decision making or impacted his ability to abide by the Rules of Professional Conduct when prosecuting the case. ADA Wade further testified that Marino, once he took office as the District Attorney, informed ADA Wade that if he disagreed with Marino's decisions or strategies on a case, he should bring it to Marino's attention and that ADA Wade has done so without fear of any negative consequences in terms of his employment status.

The defense does not appear to dispute that Marino's actions in the early stages of the prosecution were done without the permission, or even the knowledge of, those in the

District Attorney's Office who were responsible for making substantive and procedural decisions about the case, including ADA Wade. As the District Attorney has seemingly voluntarily recused himself from this matter by virtue of the text message sent to ADA Wade, the Court will formalize and memorialize this by granting the Defendant's request that Thomas L. Marino, Esquire, the Lycoming County District Attorney, be recused from the prosecution of this case in its entirety. Having determined that the District Attorney shall be recused, the Court must now focus on the Defendant's request that the entire Lycoming County District Attorney's Office be disqualified from prosecuting the case and the matter be referred to the Office of the Attorney General. Where an actual conflict of interest exists, the defendant is entitled to have the conflict removed without any further showing of prejudice. *Commonwealth v. Sims*, 799 A.2d 853, 856-57 (Pa. Super. 2002). On the other hand, a mere allegation or appearance of impropriety is insufficient to establish an actual conflict of interest. *Id.* (internal citations omitted).

This is not a case where the District Attorney has a direct financial interest in the outcome of the case, wherein the Pennsylvania Supreme Court held that when the DA's private firm represented the victim in a civil suit and was poised to receive a direct financial benefit if the defendant was convicted, an actual conflict of interest existed which could not be cured by delegating the matter to an ADA and required referral to the Attorney General's Office because an ADA would still be under the direction of, and subject to, the influence of the District Attorney. *See Commonwealth v. Eskridge*, 604 A.2d 700 (Pa. 1992). Nor is this a case where the District Attorney formerly represented the Defendant in a criminal matter and an actual conflict of interest exists due to danger of the District Attorney using

confidential information obtained during his prior representation against the Defendant in the current prosecution. *See Commonwealth v. Miller*, 422 A.2d 525 (Pa. Super. 1980) (Court conducted review of other jurisdictions in absence of factually similar Pennsylvania cases and found “the only cases which have required disqualification of the entire prosecutorial staff have involved situations where a prosecutor, and usually one with administrative control over all cases, has formerly represented the particular defendant seeking recusal due to the appearance of the potential for a breach of confidence.”). This is a case where one attorney, who at the time was not employed in any capacity in the District Attorney’s Office and had no legal authority in the District Attorney’s Office, inserted himself into certain aspects of the prosecution of the Defendant. Whether this was done in anticipation of and preparation for his eventual election to the position of District Attorney or because he had a prior relationship with the Decedent is not particularly relevant to this Court. While the Court is cognizant of the fact that the District Attorney’s actions may have caused an appearance of impropriety, the Court finds that they did occur prior to ADA Wade making his determination on the changes and thus did not cause actual conflict of interest.

The Court is satisfied that Marino’s conduct in no way influenced the decisions of the District Attorney in office or his staff, particularly ADA Wade, at the time the charges were filed. Additionally, the Court is satisfied that ADA Wade has been responsible for all substantive and procedural decisions in this matter, even after Marino took office as the District Attorney. As the Superior Court in *Miller* held when rejecting the defendant’s argument that the entire district attorney’s office should be disqualified upon a self-imposed recusal of the District Attorney, “[i]nstead of opting for such an extravagantly indulgent

application of the ‘appearance of impropriety’ standard, we prefer to rely upon the integrity of the district attorneys of this Commonwealth not to participate in the prosecution of cases when such participation would generate an appearance of impropriety.” 422 A.2d at 529. Here, the District Attorney voluntarily recused himself, an action that is being ratified and formalized by Order of Court. By the same token, this Court is satisfied that ADA Wade, will uphold the integrity of his profession and the Order of Court over any potential influence that would perpetuate an appearance of impropriety as the District Attorney will have no role whatsoever in the prosecution of this case.

ADA Wade testified that he preemptively blocked District Attorney Marino’s access to the electronic file. In order to ensure that the District Attorney is fully screened and precluded from exerting any possible influence on the decision making processes, the Court finds the imposition of additional requirements are necessary. These additional requirements shall be listed in the attached Order and shall be adhered to by the District Attorney and all members of the Lycoming County District Attorney’s Office. With the implementation of these additional measures, the Court finds it unnecessary to disqualify the entire Lycoming County District Attorney’s Office in light of the recusal of the District Attorney Thomas L. Marino, Esquire.

Accordingly, the Court will enter the following Order:

ORDER

AND NOW this ___ day of _____, 2024, after careful consideration of the arguments of counsel and the supplemental briefs filed by each counsel in support of his

position, and for the reasons set forth above, the Defendant's Motion to Recuse is **GRANTED IN PART and DENIED IN PART.**

The request that District Attorney Thomas L. Marino, Esquire, be recused from the prosecution of this case is **GRANTED.** The District Attorney shall have absolutely no involvement in, or influence over, any substantive or procedural aspect of this case. The request that the entire Lycoming County District Attorney's Office be disqualified and the matter be referred to the Attorney General's Office for prosecution is **DENIED,** subject to the following requirements in addition to blocking the District Attorney's access to the electronic file, which was previously done:

1. The paper file and all copies of documents related to this matter that ADA Wade testified is kept in his office shall be kept separate from other paper files and shall be maintained under lock and key;
2. The District Attorney shall not discuss the case, either verbally or through written communication, with any member of the Lycoming County District Attorney's Office, including but not limited to, Assistant District Attorneys, paralegals, clerical staff, and county detectives;
3. The District Attorney shall not attend any court proceedings in this matter, either in his official capacity or as an observer; and
4. The District Attorney shall refrain from speaking about the case with Defendant's counsel, potential witnesses, the media, the press, or the general public.

These requirements shall be implemented immediately. Within five (5) days of the date of this Order, First Assistant District Attorney Martin L. Wade, Esquire, shall file with the Court an affidavit indicating that the District Attorney and all members of the Lycoming County District Attorney's Office have been made aware of the screening requirements.

By the Court,

Ryan M. Tira, Judge

RMT/jel

CC: DA – Martin L. Wade, Esq.
Edward J. Rymysza, Esq.
Gary Weber, Esq.