

Filed in Supreme Court

JAN 15 2015

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT


Middle

IN RE: : SUPREME COURT OF PENNSYLVANIA
THE THIRTY-FIFTH STATEWIDE : NO. 7 MM 2015
INVESTIGATING GRAND JURY : MONTGOMERY COUNTY COMMON PLEAS
: M.D. 2644-2012
:

SEALING ORDER

AND NOW, this 15th day of January, 2015, it is hereby ORDERED, that the attached Opinion of January 15, 2015 be filed under seal with the Supreme Court of Pennsylvania until further Order of this Court.

BY THE COURT:


WILLIAM R. CARPENTER,
Supervising Judge

Received in Supreme Court

JAN 15 2015

Middle

FILED UNDER SEAL

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

IN RE:	:	
	:	
THE THIRTY-FIFTH STATEWIDE	:	SUPREME COURT DOCKET
INVESTIGATING GRAND JURY	:	NO. 7 MM 2015
	:	
	:	MONTGOMERY COUNTY
	:	COMMON PLEAS
	:	NO. 2644-2012

OPINION

CARPENTER J.

JANUARY 15, 2015

FACTUAL AND PROCEDURAL HISTORY

Attorney General Kathleen G. Kane has filed an Emergency Application for Stay of Presentment ("Application for Stay"), and seeking to stay the District Attorney of Montgomery County from prosecuting Attorney General Kane. This Application for Stay should be denied because the Montgomery County District Attorney has the right and the duty to investigate criminal activity that occurred in Montgomery County and the appointment of Special Prosecutor Thomas E. Carluccio, Esquire by me, as the Supervising Judge of the Thirty-Fifth Statewide Investigating Grand Jury, was proper.

On May 29, 2014, I issued an Order appointing Thomas E. Carluccio, Esquire as a special prosecutor to conduct an investigation into alleged violations of and rules of Grand Jury secrecy as to a previous Statewide Investigating Grand Jury.

On December 18, 2014, the Thirty-Fifth Statewide Investigating Grand Jury issued Presentment No. #60, finding that there were reasonable grounds that

Attorney General Kane was involved in violations of criminal law of our Commonwealth; specifically, Perjury, 18 Pa.C.S.A. §4902, False Swearing, 18 Pa.C.S.A. §4903, Official Oppression, 18 Pa.C.S.A. §5301 and Obstruction Administration of Law or Other Governmental Function, 18 Pa.C.S.A. §5101. See, Exhibit "A", Presentment No. #60, dated December 18, 2014. Also on this date, Attorney General Kane filed a *quo warranto* action in the Pennsylvania Supreme Court to quash the appointment of Special Prosecutor Carluccio. To date, the *quo warranto* action has not been decided.

On December 19, 2014, I entered an Order Accepting Presentment No. #60. See, Exhibit "B", Order Accepting Presentment No. #60, dated December 19, 2014. ~~The matter has been referred to the District Attorney of Montgomery County for~~ prosecution.

ISSUES

- I. Whether the Montgomery County District Attorney's investigation into alleged criminal activity should go forward.
- II. Whether the appointment of the Special Prosecutor was proper.

DISCUSSION

- I. The Montgomery County District Attorney's investigation into alleged criminal activity should go forward.

First, Attorney General Kane requests that the Presentment be stayed until the resolution of her previously filed *quo warranto* action, asserting that the Thirty-Fifth Statewide Investigating Grand Jury had no authority to issue the Presentment based upon her underlying challenge to the authority and appointment of the Special Prosecutor in her *quo warranto* action. However, Attorney General Kane's request to have the Montgomery County District Attorney's investigation and possible prosecution

stayed is outrageous and unsupported by the law. In fact, she cites no legal authority for this request. For this reason and the additional reasons that follow, the request for a stay should be denied.

Among the most important of the district attorney's responsibilities are the responsibilities to investigate complaints brought to his or her attention, determine whether there is substance to them and determine whether a prosecution should be initiated. This is true regardless of the source of the information supplied that led to the investigation, i.e., the source of that information is irrelevant. The information could come from a convicted criminal on death row, a private citizen, some other source, or as ~~here, the Thirty-Fifth Statewide investigating Grand Jury. Therefore, the District Attorney~~ of Montgomery County has the absolute right and duty to investigate criminal activity that has occurred in Montgomery County irrespective of the source, and the absolute right and duty to file criminal charges based upon probable cause if probable cause is found. Additionally upon accepting Presentment No. 60 I made a judicial determination of probable cause that Attorney General Kane committed perjury and other crimes in Montgomery County and elsewhere.

Additionally, Attorney General Kane as a private citizen should receive no more protection than the average citizen from possible prosecution simply because she is also *Attorney General Kane*. The investigation of citizen Kane should not be stayed. Preventing a district attorney from investigating criminal activity is wrong no matter what the title the citizen being investigated has.

II. The appointment of the Special Prosecutor was proper.

Next, Attorney General Kane reargues the substance of her *quo warranto* action. In that regard, she first contends in her current Application for Stay that my

reliance on In re Dauphin County Fourth Investigating Grand Jury, 610 Pa. 296, 19 A.3d 491 (Pa. 2014,) in the December 30, 2014 Opinion addressing Attorney General Kane's *quo warranto* action was erroneous because the appointment of the special prosecutor by the judiciary was not directly at issue. Additionally, Attorney General Kane asserts that I had no legal authority, based in any statute, to appoint a special prosecutor and that the position of special prosecutor itself has no basis in statutory law of this Commonwealth. Further, Attorney General Kane contends that the appointment of Special Prosecutor Carluccio by me, as the judiciary, was a constitutional separation of powers violation and that it infringed on the exclusive power of the Attorney General and the executive branch to investigate and prosecute alleged Grand Jury violations.

Further, Attorney General complains that I failed to address her citation to Smith v. Gallagher, 185 A.2d 135 (Pa. 1962) (overruled on other grounds) in my December 30, 2014 Opinion.

- a. *The appointment of Special Prosecutor Carluccio was within my judicial authority.*

For those reasons previously set forth in my December 30, 2014, Opinion, written in response to Attorney General Kane *quo warranto* action, there was no error in my appointment of Special Prosecutor Carluccio. A Supervising Judge of a Statewide Investigating Grand Jury must have the inherent authority to appoint a special prosecutor. As stated in McGinley v. Scott, 401 Pa. 310, 316, 164 A.2d 424, 428 (Pa. 1960), in discussing the jurisdiction of the courts of common pleas "[t]his jurisdiction unquestionably embraces the power of every court of common pleas of the Commonwealth to prevent or restrain 'the commission or continuance of acts contrary to law, and prejudicial to the interest of the community or the rights of individuals.'" Id., 164

A.2d 428; see also, Savitt, *Pennsylvania Grand Jury Practice* §33.04, p. 186 (1983) (stating that "nothing in the existing law abrogates the court's traditional authority to appoint a special prosecutor."). Without the authority to appoint a special prosecutor we would be faced with the distinct possibility that the serious Grand Jury leak here would not have been investigated at all, since the Office of the Attorney General and Attorney General Kane herself have been accused of leaking secret Grand Jury information.

Additionally, my appointment of Special Prosecutor Carluccio did not violate the constitutional separation of powers. To that end, Attorney General Kane argues that the "appointment infringed on the exclusive power of the Attorney General and the executive branch to investigate and prosecute alleged Grand Jury violations."

See, Attorney General Kane's Emergency Application for Stay of Presentment, p. 4. In this case, the executive branch was not in a position to investigate this matter. First, before the investigation occurred it was not clear which District Attorney would have jurisdiction over the matter and the fact that the leak was alleged to have come from the Office of the Attorney General or Attorney General Kane herself posed special circumstances in which the appointment of a special prosecutor by the judiciary has gone forth. See, Castellani v. The Scranton Times, 956 A.2d 937 (Pa. 2008).

Further, my appointment of Special Prosecutor Carluccio was made known to then Chief Justice Ronald D. Castille at the time of the appointment, and I explicitly requested to know if the appointment of a special prosecutor exceeded my authority. I have never been informed that it had. See, Exhibit "C", Letter dated May 29, 2014 to Chief Justice Castille.

b. *The position of the Special Prosecutor is a recognized role, despite the fact that the position is not statutorily created.*

The position of a special prosecutor in this Commonwealth is not a statutorily created position, to that end Attorney General Kane is correct; however, that does not mean that it does not exist. There is a plethora of Pennsylvania cases that recognize the de facto existence of a special prosecutor. See, e.g., Commonwealth v. Boyle, 447 A.2d 250 (Pa. 1982), Shapp v. Sloan, 391 A.2d 595 (Pa. 1978); Pirillo v. Takiff, 341 A.2d 898 (Pa. 1975), Commonwealth v. Burdell, 110 A.2d 193 (Pa. 1955).

c. *Smith v. Gallagher*, 185 A.2d 135 (Pa. 1962).

Furthermore, the only case cited by Attorney General Kane in her

Application for Stay in support of her *quo warranto* argument is Smith v. Gallagher, 185 A.2d 135 (Pa. 1962). However, this case has unconvincing validity for the proposition asserted, as it sets forth that, "there is no public office in Pennsylvania known as Special Prosecutor." Id. at 149. However, more modern case law, while admittedly has not directly dealt directly with the role of a special prosecutor has implicitly recognized such a role. See, e.g., In Re Dauphin County Fourth Investigating Grand Jury, 19 A.3d 491 (Pa. 2011); Castellani, *supra*; In Re Dauphin County Fourth Investigating Grand Jury, 957 A.2d 712 (Pa. 2008). In fact, in Pirillo v. Takiff, 341 A.2d 896 (Pa. 1975), the Attorney General of Pennsylvania appointed a special prosecutor to investigate police corruption in the Philadelphia Police Department. This position of the special prosecutor does exist in Pennsylvania despite that it is not a position designated by a statute. Additionally, case law demonstrates that Supervising Judges of the Statewide Grand Jury in Pennsylvania have appointed special prosecutors when the circumstances indicate that it is appropriate, as it is here. Therefore, Attorney General Kane's reliance

on a sole case, with dubious validity, in support of her *quo warranto* argument should be rejected.


CONCLUSION

The mechanism of criminal justice in Pennsylvania is finely tuned to deliver appropriate results in an orderly manner. The Attorney General seeks to disable the mechanism of criminal justice in Pennsylvania for her personal benefit by seeking to prevent the District Attorney of Montgomery County from doing her job. The Attorney General cites no authority for her request to stay District Attorney of Montgomery County from doing her job.

The Attorney General cites no authority for the stay of Presentment No. 60 which has been accepted by me as the Supervising Judge and referred to the District Attorney of Montgomery County.

I respectfully submit that this Emergency Application for Stay of Presentment should be denied.

BY THE COURT:



WILLIAM R. CARPENTER
SUPERVISING JUDGE OF THE
THIRTY-FIFTH STATEWIDE
INVESTIGATING GRAND JURY

J.

EXHIBIT "A"

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE:

THE THIRTY-FIFTH STATEWIDE

INVESTIGATING GRAND JURY

: SUPREME COURT OF PENNSYLVANIA
: NO. 171 M.D.D MISC. KT 2012

: MONTGOMERY COUNTY COMMON PLEAS
: M.D. 2644-2012

: NOTICE No # 123
:

TO THE HONORABLE WILLIAM R. CARPENTER, SUPERVISING JUDGE:

PRESENTMENT No. # 60

We, the Thirty-Fifth Statewide Investigating Grand Jury, duly charged to inquire into offenses against the criminal laws of the Commonwealth, have obtained knowledge of such matters from witnesses sworn by the Court and testifying before us. We find reasonable grounds to believe that various violations of the criminal laws have occurred. So finding with no fewer than twelve concurring, we do hereby make this Presentment to the Court.



Foreperson – The Thirty-Fifth Statewide
Investigating Grand Jury

DATED: The 18 day of December, 2014

EXHIBIT "B"

IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE: : SUPREME COURT OF PENNSYLVANIA
: NO. 171 M.D. MISC DKT. 2012
THE THIRTY-FIVE STATEWIDE :
: MONTGOMERY COUNTY COMMON PLEAS
INVESTIGATING GRAND JURY : M.D. 2644-2012
:
: NOTICE NO. 123

ORDER ACCEPTING PRESENTMENT NO #60

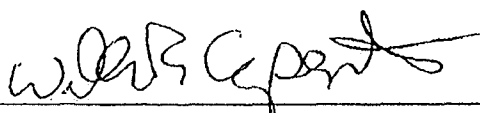
A. The Court finds Presentment No #60 of the Thirty-Fifth Statewide Investigating Grand Jury is within the authority of said Grand Jury and is in accordance with the provisions of this Investigating Grand Jury Act, 42 Pa.C.S. §4541, *et seq.* Further I find that the determination of the Thirty-Fifth Statewide Investigating Grand Jury is supported by Probable Cause and establishes a Prima Facie case against Attorney General Kathleen Kane. Accordingly, this Presentment is accepted by the Court.

B. The County conducting the trial of all charges pursuant to this Presentment shall be Montgomery County.

C. The District Attorney for Montgomery County, or her designee, is hereby authorized to prosecute as recommended in the Presentment by instituting appropriate criminal proceedings in the aforesaid County.

SO ORDERED this 19th day of December, 2014.

BY THE COURT:



WILLIAM R. CARPENTER, J.
Supervising Judge

EXHIBIT "C"

COURT OF COMMON PLEAS



MONTGOMERY COUNTY
THIRTY-EIGHTH JUDICIAL DISTRICT
NORRISTOWN, PENNSYLVANIA
19404

SENIOR JUDGES
WILLIAM T. NICHOLAS
S. GERALD CORSO
CALVIN S. DRAVER, JR.
KENT H. ALBRIGHT
ARTHUR R. TILSON

PRESIDENT JUDGE
WILLIAM J. FURBER, JR.
ASSOCIATE JUDGES
JOSEPH A. SMYTH
STANLEY R. OTT
BERNARD A. MOORE
WILLIAM R. CARPENTER
RHONDA LEE DANIELE
EMANUEL A. BERTIN
THOMAS M. DELRICCI
R. STEPHEN BARRETT
THOMAS C. BRANCA
STEVEN T. O'NEILL
THOMAS P. ROGERS
GARRETT D. PAGE
KELLY C. WALL
CAROLYN TORNETTA CARLUCCIO
WENDY DEMCHICK-ALLOY
PATRICIA E. COONAHAN
LOIS EISNER MURPHY
GARY S. SILOW
RICHARD P. HAAZ
CHERYL L. AUSTIN
GAIL A. WEILHEIMER
STEVEN C. TOLLIVER, SR.

May 29, 2014

The Honorable Ronald D. Castille
Chief Justice of Pennsylvania
Supreme Court of Pennsylvania
1818 Market Street, Suite 3730
Philadelphia, PA 19103

Re: Statewide Investigating Grand Juries

Dear Chief Justice:

Enclosed you will find an Order appointing a Special Prosecutor to investigate an allegation that secret Grand Jury information from a prior Grand Jury was released by someone in the Attorney General's Office.

As the current supervising Grand Jury Judge, this matter was brought to my attention. My preliminary review included in camera sealed testimony from two individuals with knowledge.

I have decided that the matter is important enough to appoint a Special Prosecutor, Thomas E. Carluccio, Esquire. He is a former prosecutor, served in the Department of the Attorney General in Delaware for fourteen years and a Special Assistant United States Attorney. In addition Tom has done Grand Jury work, and is honest, capable and reliable.

Please call me if you would like to discuss this matter further.

Please advise if you feel that I am in error or have exceeded my authority as the Supervising Grand Jury Judge.

Sincerely,

William R. Carpenter, J.
Supervising Judge

WRC/cns
Cc. Thomas E. Carluccio, Esquire

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

IN RE: : **SUPREME COURT OF PENNSYLVANIA**
: **NO. 7 MM 2015**
THE THIRTY-FIFTH STATEWIDE :
: **MONTGOMERY COUNTY COMMON PLEAS**
INVESTIGATING GRAND JURY : **M.D. 2644-2012**
:

CERTIFICATE OF SERVICE

I, William R. Carpenter, Supervising Judge of the 35th Statewide Investigating Grand Jury, certify that a true and correct copy of the attached Opinion of January 15, 2015 was forwarded to the persons set forth below via First Class Mail on January 15, 2015.



WILLIAM R. CARPENTER, J.
Supervising Judge
Montgomery County Court of Common Pleas
P.O. Box 311
Norristown, PA 19404

Prothonotary Irene Bizzoso
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue
Suite 4500
P.O. Box 62575
Harrisburg, PA 17106

Attorney General Kathleen G. Kane
Pennsylvania Office of the Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Amil M. Minora, Esquire
Attorney for Attorney General Kathleen G. Kane
700 Vine Street
Scranton, PA 18510

Gerald L. Shargel, Esquire
Attorney Pro Hac Vice for
Attorney General Kathleen G. Kane
200 Park Avenue
New York, NY 10166

Thomas E. Carluccio, Esquire
Special Prosecutor
1000 Germantown Pike
Suite D3
Plymouth Meeting, PA 19462