

FILED
12-06-2022
CIRCUIT COURT
DANE COUNTY, WI
2022CF002481

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

CASE NO. 22-CF-2481

MARK WAGNER,

Defendant.

MOTION TO RECUSE THE DANE COUNTY DISTRICT ATTORNEY

NOW COMES the Defendant, Mark Wagner, by and through his attorneys, Michael J. Steinle and Daniel H. Sanders, upon all the records, files and proceedings heretofore had herein, respectfully moves this Honorable Court pursuant to Wis. Stats. Sec. 971.31(2) for entry of an order for the recusal of the Dane County District Attorney and/or its assistants as the prosecuting agency in this matter.

AS GROUNDS THEREFORE, Counsel would show to this Court that the Dane County District Attorney's office has a conflict of interest and the District Attorneys are material witnesses in the investigation and arrest of QLW in this matter. Counsel submits the attached Memorandum in Support of said motion and requests a hearing be set in this matter.

Dated at Milwaukee, Wisconsin, this 6th day of December, 2022.

Respectfully submitted,

TERSCHAN, STEINLE, HODAN &
GANZER, LTD.

Electronically Signed By:

MICHAEL J. STEINLE
Attorney for Mark Wagner
State Bar No. 1018859

P.O. ADDRESS:

309 North Water Street, Suite 215
Milwaukee, Wisconsin 53202
Telephone: 414-258-6200

HART & POWELL SC

Electronically Signed By:

DANIEL H. SANDERS
Attorney for Mark Wagner
State Bar No. 1092309

P.O. ADDRESS:

735 North Water Street, Suite 1212
Milwaukee, Wisconsin 53202
Telephone: 414-271-9595

FILED
12-06-2022
CIRCUIT COURT
DANE COUNTY, WI
2022CF002481

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

CASE NO. 22-CF-2481

MARK WAGNER,

Defendant.

**MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO RECUSE THE DANE COUNTY DISTRICT ATTORNEY**

In early 2020, Special Agent (SA) of the Wisconsin Department of Justice, Division of Criminal Investigation (DCI), participated in a federal drug trafficking investigation concerning persons selling illegal narcotics in Dane County, WI, and elsewhere. During that investigation, SA learned that XXX was a large-scale cocaine trafficker in Dane County. SA initiated an investigation of XXX, his suspected customers, and his suspected source of narcotics.¹ The investigation led to state court-authorized wiretaps of telephones used by XXX to conduct drug transactions. SA worked with the Dane County District Attorney's Office (DCDAO) in the investigation and to obtain the court-authorized wiretaps.² Throughout this investigation DCDAO provided oversight,³

¹ DCI Case No. 20-4215.

² The first wiretap on XXX's number began in late August 2020 and lasted for approximately 30 days. The wiretap was extended for another 30 days but was ended shortly after the extension because XXX stopped using the number. Once investigators determined XXX's new number, a new wiretap was authorized, and it began in early October 2020 and lasted for approximately 30 days.

³ Wis. Stat. § 968.28, Application for court order to intercept communications.

review,⁴ charging decisions, and coordination with federal prosecutors and federal, state, and local law enforcement officers.

In early January 2021, SA, in coordination with and under the supervision of DCDAO, concluded the investigation of XXX, his drug sources, and his drug customers. The investigation revealed that XXX was a large-scale drug trafficker in the Dane County area who utilized firearms during his drug trafficking activities, had multiple drug sources, and sold large quantities of drugs to multiple individuals in the Dane County area.

During the investigation, QLW was identified as one of XXX's regular customers who bought large quantities of cocaine and was routinely in possession of firearms in drug transactions and while travelling in vehicles. At the time of the XXX investigation, QLW had an adult criminal record dating back to 2002 with several felony and misdemeanor convictions for resisting arrest/obstruction of justice, theft, disorderly conduct, operating a vehicle while revoked, escape, battery, criminal trespassing of a dwelling, intimidation of a victim, and fleeing/eluding an officer.⁵ Many of the convicted

⁴ Wis. Stat. § 968.30, Procedure for interception of wire, electronic or oral communications.

⁵ Wisconsin Circuit Court Access (WCCA) page, <https://wcca.wicourts.gov/case.html>, last accessed on December 2, 2022. On August 14, 2017, DCDAO filed a criminal complaint charging QLW with Possession of a Firearm by a Convicted Felon, 2nd Degree Reckless Endangering Safety, and 1st Degree Reckless Endangering Safety-Use of a Dangerous Weapon for offenses occurring on August 4, 2017. On November 1, 2017, QLW posted \$20,000 cash bail and was released with several conditions, including no contact orders, no possession of any dangerous weapon, no possession of controlled substances, and to remain in Dane County. While out on bond in 2017CF1956, QLW was charged by DCDAO in two additional cases: 2018CF276, felony Bail Jumping/repeater and misdemeanor Disorderly Conduct/DV/repeater for an offense on February 13, 2018; and 2018CF386, three counts of felony Bail Jumping and three counts of misdemeanor Contact After a DV Arrest for offenses that occurred on February 9, 10, and 11, 2018. Cash bail was posted by QLW on the two new cases and he was placed in the Dane County Monitoring Program (GPS). On July 25, 2018, QLW pled guilty to Possession of a Firearm by a Felon and 2nd Deg. RES in 2017CF1958. The 1st Deg. RES was dismissed and read in. In addition, all of the counts charged in

offenses were charged with repeater, domestic abuse, or habitual criminal modifiers.⁶ During the XXX investigation, QLW was on extended supervision with the Wisconsin Department of Corrections (WDOC) for a felony conviction in Dane Co. Case No. 2017CF1958 for Possession of a Firearm by a Felon and 2nd Degree Reckless Endangering Safety.⁷

In coordination between DCDAO and the United States Attorney's Office for the Western District of Wisconsin, six individuals identified in the XXX investigation, including one of XXX's source of drugs, were indicted in United States District Court for the Western District of Wisconsin under Case Nos. 21-CR-00020, 21-CR-34, and 21-CR-120. DCDAO agreed to charge XXX, QLW, and two others who were customers of XXX and XXX's source. To date, DCDAO has not charged any of these individuals with the drug trafficking and firearm offences committed during the XXX investigation.

Additional Information Leading up to QLW's Arrest on February 3, 2022

On August 11, 2020, 11-year-old Anisa Scott was shot and killed in Madison, WI while travelling as a passenger in a vehicle being driven by CC, the boyfriend of her mother. Madison area law enforcement, including SA, know that CC and QLW are close associates and have been suspected of committing numerous armed robberies of rival drug traffickers within the City of Madison. The investigation of AS's murder revealed that QLW and CC were being targeted by rival drug traffickers because of a previous

2018CF276 and 2018CF386 were dismissed and read in. On September 10, 2018, QLW was sentenced in 2017CF1958 to a total of 2 years of initial confinement and 4 years of extended supervision. QLW was released from incarceration on February 6, 2020 and placed on extended supervision with the WDOC.

⁶ *Id.*

⁷ *Id.*

armed robbery of narcotics and both had a “hit” put out on them because of the robbery. The investigation also revealed that QLW was believed to be at the scene of the shooting, possibly in a separate vehicle, and may have disposed of firearms that were originally located at the scene. SA was also aware that CC was a drug associate of XXX.⁸

On September 3, 2020, CC was revoked from supervised release in WIWD Case No 12-CR-84 and sentenced to 21 months prison.

In early fall 2020, the Dane County Narcotics Task Force (Task Force) was investigating narcotics and firearm offenses regarding several individuals including JTM,⁹ QLW’s brother, and others. The investigation led to the execution of a court-authorized search warrant at QLW’s family residence on Milwaukee Street in Madison. Numerous firearms were located in and seized from the residence.¹⁰ Subsequent to the search warrant, law enforcement learned that QLW contacted XXX about the firearms recovered by law enforcement from his family’s residence. QLW said his brother was in trouble because he sold drugs to an undercover officer. QLW further stated that one of the guns belonged to his brother, JTM, and one belonged to his father.¹¹ QLW was also concerned because one of the guns was connected to a crime.

⁸ The initial robbery was believed to have been conducted by QLW’s brother, JTM. QLW tried to broker a deal with the rival gang/drug dealers to return some of the stolen marijuana. It is believed that QLW was interviewed about the shooting because he was at the scene of the shooting, then left and possibly came back. It is believed that law enforcement believes QLW left the scene with firearms and or narcotics from CC’s vehicle in order to get rid of them.

⁹ Dane Co Case No. 2020CF2754, WCCA page, <https://wcca.wicourts.gov/case.html>, last accessed on December 2, 2022.

¹⁰ MPD Case No. 20-345509.

¹¹ Believed to be NJM. See Dane County Case No. 2020CF2760, WCCA page, <https://wcca.wicourts.gov/case.html>, last accessed on December 2, 2022.

On April 9, 2021, an individual, SPB, died of a drug overdose in Madison. QLW was suspected by law enforcement to be the person who sold narcotics to SPB's friend, SLB. SPB died shortly after the sale between QLW and SLB. This matter was not charged by DCDAO until February 18, 2022.¹² According the criminal complaint, QLW was charged with Delivery of Schedule I or II Narcotics, Repeater, a Class E Felony. Law enforcement identified QLW as the drug dealer through the telephone number given to SLB, listening to jail calls between JTM and QLW, and a photo array identification by SLB as the drug dealer who sold SLB the narcotics on April 9, 2021. QLW was on extended supervision at the time of the overdose death on April 9, 2021.

On May 22, 2021, an anonymous citizen made a complaint to WDOC Probation/Parole that QLW was observed driving a vehicle, reaching under his seat to grab a black handgun and then pointing the handgun at an individual driving a bus. The complaint stated the victim in the offense did not wish to make a report because the victim feared retaliation. QLW was on extended supervision at the time of this incident.

On June 4, 2021, a criminal complaint was filed by DCDAO charging QLW with Disorderly Conduct/Domestic Violence and two days later, on June 4, 2021, DCDAO filed another criminal complaint charging QLW with Phone Threats/Domestic Violence.¹³ QLW was on extended supervision at the time of these incidents.

¹² WCCA page, <https://wcca.wicourts.gov/case.html>, last accessed on December 2, 2022.

¹³ WCCA page, <https://wcca.wicourts.gov/case.html>, last accessed on December 2, 2022.

On June 8, 2021, members of the Dane County Narcotics Task Force (Task Force)¹⁴ attempted to take QLW in custody for the crimes described above and numerous extended supervision violations. The Task Force works with DCDAO on ongoing drug trafficking investigations and charging decisions. The Task Force, along with FBI and state DCI agents, attempted to take QLW into custody with help from aerial surveillance from the FBI. When a marked Madison Police Department squad attempted to stop QLW in his vehicle, QLW fled at a high rate of speed. During the pursuit, QLW avoided tire deflation devices and recklessly drove throughout Madison. QLW eventually stopped his vehicle in the parking lot of a window tint business, where an unknown associate of QLW's picked him up in a separate vehicle and fled the scene avoiding detection and arrest of law enforcement.¹⁵ QLW was on extended supervision at the time of this incident.

In late January 2022, SA met with DCDAO to plan for the arrest of QLW. DCDAO indicated state criminal charges would be filed against QLW regarding his involvement in the XXX investigation within a couple weeks of QLW's arrest.

Leading up to the anticipated arrest of QLW on February 3, 2022, DCI agents conducted extensive surveillance on QLW to determine possible arrest locations to ensure the safety of the community, the arresting officers, and QLW himself.

During the briefing of the anticipated arrest of QLW in the mid-morning hours of February 3, 2022, SA told the law enforcement participants, including DCI Special Agent

¹⁴ Members of the Dane County Narcotics Task Force include members of the Madison Police Department and Dane County Sheriff's Office.

¹⁵ MPD Case No. 21-091412.

Mark Wagner, the details of QLW's arrest record, criminal history, involvement in the XXX investigation, routine possession of firearms, drug trafficking activities, involvement in the AS shooting, involvement in several uncharged shootings in Madison, and fleeing and eluding arrest from officers, including the fleeing incident on June 8, 2021.

On February 3, 2022, at approximately 7:14 am, the WDOC agent supervising QLW, in coordination with DCI and DCDAO, issued a warrant for QLW's arrest for numerous extended supervision violations and anticipated criminal charges to be filed by DCDAO.¹⁶

On February 4, 2022, SA Wagner was made aware he was formally being investigated for an officer involved shooting from the arrest of QLW on February 3, 2022.

During a court-authorized search of the vehicle driven by QLW on February 3, 2022, officers recovered forty-eight (48) grams of cocaine base (crack), twenty-three (23) grams of Fentanyl, a digital scale, \$1,856 cash, and a cellular telephone.¹⁷

On February 18, 2022, DCDAO filed a criminal complaint under Dane County Case No. 2022CF476 charging QLW with one count of Delivery of Schedule I or II Narcotics, Repeater, a Class E Felony for his role in an overdose death of SPB that occurred in Madison on April 9, 2021.¹⁸

On April 29, 2022, DCDAO filed a criminal complaint under Dane County Case No. 2022CM000831 charging QLW with one count of possession of cocaine/coca, an

¹⁶ Complaint for Search Warrant, page 11, Dane County Case No. 2022GF023047, Document 1.

¹⁷ Complaint for Search Warrant, page 11, Dane County Case No. 2022GF023047, Document 1.

¹⁸ WCCA page, <https://wcca.wicourts.gov/case.html>, last accessed on December 2, 2022.

unclassified misdemeanor, for the forty-eight (48) grams of crack and twenty-three (23) grams of Fentanyl found in the vehicle he was driving on February 3, 2022.¹⁹

On May 9, 2022, QLW pled guilty, pursuant to a plea agreement with DCDAO, to Delivery of Schedule I or II Narcotics without the repeater modifier in 2022CF476 and possession of cocaine/coca in 2022CM831. QLW was sentenced on the same day. DCDAO and QLW made a joint recommendation to the court for a sentence of three (3) years of initial confinement and three (3) years of extended supervision in 2022CF476 and thirty (30) days jail in 2022CM831, concurrent to each other. DCDAO also agreed to not charge QLW for any of his conduct arising out of the XXX wiretap investigation.²⁰ The court adopted the recommendation in full. The court did not address whether the sentence imposed would be concurrent or consecutive to 2017CF1958. In the absence of statute or judicial declaration to the contrary, the second sentence is presumed concurrent.²¹

Also on May 9, 2022, DCDAO moved to dismiss the domestic violence charges alleged to have occurred on June 4 and 6, 2021. The court granted the motion.²²

Lastly, to tie up all the loose ends, on May 10, 2022, QLW was finally revoked in 2017CF1958 and sent to prison for three years.

¹⁹ WCCA page, <https://wcca.wicourts.gov/case.html>, last accessed on December 2, 2022.

²⁰ WCCA page, <https://wcca.wicourts.gov/case.html>, last accessed on December 2, 2022. *See also* plea/sentencing transcript from May 9, 2022.

²¹ *State v. Oglesby*, 2006 WI App 95, 292 W2d 746. The WDOC Inmate Locator page, <https://appsdoc.wi.gov/lop/utility.do>, last accessed on December 2, 2022, shows QLW's mandatory release date as February 2, 2025.

²² WCCA page, <https://wcca.wicourts.gov/case.html>, last accessed on December 2, 2022.

The defense in this case alleges that the Dane County District Attorney and his staff have been intimately involved in these events leading up to QWL's arrest on February 3, 2022 and the decisions regarding the same and are therefore material witnesses to be called in pretrial proceedings as well as the trial of this matter. The District Attorney and his staff have provided oversight review and all charging decisions leading up to February 3, 2022 and continues to do so to date.

Dated at Milwaukee, Wisconsin, this 6th day of December, 2022.

Respectfully submitted,
TERSCHAN, STEINLE, HODAN &
GANZER, LTD.

Electronically Signed By:

MICHAEL J. STEINLE
Attorney for Mark Wagner
State Bar No. 1018859

P.O. ADDRESS:

309 North Water Street, Suite 215
Milwaukee, Wisconsin 53202
Telephone: 414-258-6200

HART & POWELL SC

Electronically Signed By:

DANIEL H. SANDERS
Attorney for Mark Wagner
State Bar No. 1092309

P.O. ADDRESS:

735 North Water Street, Suite 1212
Milwaukee, Wisconsin 53202

Telephone: 414-271-9595