FILED
12-14-2022
CIRCUIT COURT
DANE COUNTY, WI
2022CF002481

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 12** **DANE COUNTY**

STATE OF WISCONSIN, Court Case No.: 2022CF002481

Plaintiff,

vs.

MARK WAGNER,

Defendant.

For Official Use

THE STATE OF WISCONSIN'S MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANT'S MOTION TO RECUSE THE DANE COUNTY DISTRICT ATTORNEY

The State of Wisconsin respectfully requests that this Court deny Defendant Mark Wagner's motion to force the recusal of Dane County District Attorney Ismael Ozanne and his office. Wagner's motion fails to identify the existence of any conflict of interest. Wagner's motion also fails to articulate a compelling or legitimate need for Ozanne or a member of his office to testify at trial. Nor does Wagner's motion demonstrate a reasonable probability that the testimony of Ozanne or any member of his office will lead to competent, relevant, and material evidence in any pre-trial hearings.

ARGUMENT

1. This Court should dismiss Wagner's Motion for failing to cite any supporting legal authority.

Other than citing to one subsection of the motions before trial statute in Wis. Stat. § 971.31(2), Wagner cites no legal authority in support of his motion. This ignores the requirements contained in Wis. Stat. § 971.30(2)(c) (motion should "state with particularity the grounds for the motion and the order or relief sought"), and the requirements of Dane County Circuit Court Rule 108 which also require motions to state with specificity "the grounds and

factual basis therefore." This Court should deny Wagner's motion based on his failure to identify any legal authority that supports his requested relief.

2. Wagner fails to identify any conflict of interest.

In his motion, Wagner asserts the existence of an unidentified conflict of interest and that "the District Attorneys are material witnesses." Motion, Docket No. 21, p. 1. In his memorandum in support of his motion, Docket No. 22, Wagner never identifies the conflict of interest. This Court should deny Wagner's motion to the extent Wagner relies upon an alleged and unknown conflict of interest as grounds for recusal.

3. Wagner has not demonstrated any need for testimony from the Dane County District Attorney or his staff.

Wagner claims that the Dane County District Attorney and staff have been "intimately involved" in the events that led to the shooting of and arrest of QLW 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." Memorandum, Docket No. 22, p. 9. Wagner further claims that "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." Wagner never explains how any of this results in a need for Ozanne or a member of his office to testify.

Wagner asserts that Ozanne and his office played a role during a wiretap investigation related to QLW's arrest and Wagner refers to other claims that the District Attorney's Office generally coordinated with other law enforcement agencies and other prosecutors. Wagner also claims the District Attorney's Office provided some amount of supervision of the wiretap case and prosecuted matters in which QLW was either a defendant or related party. Significantly, Wagner does not claim the District Attorney's Office was involved in briefing Wagner—or other law enforcement officers—in connection with the planned arrest of QLW,

see Docket No. 22, pp. 6-7, or providing any information about QLW to Wagner or to other law enforcement officers. As indicated in the Criminal Complaint:

> Wagner stated he had no prior interactions or knowledge of QLW before February 3, 2022. Wagner stated he knew from the operation plan and in person briefing that QLW had an extensive criminal history and was wanted on a WI Department of Corrections Warrant.

Complaint, p. 5.

The reality is that the prosecutor working on the wiretap investigation—Assistant District Attorney Valerian Powell—assisted with legal issues connected to the wiretap investigation worked with the involved law enforcement officers collaboratively just as he would on any case during an ongoing investigation. *See* Affidavit of Valerian Powell ("Powell Aff."), ¶¶ 5-8.[1] Powell does not recall any direct contact with Wagner or any particular involvement by Wagner during the wiretap investigation. *See id.*, ¶ 9. Powell's knowledge of QLW or other activity described in Wagner's memorandum is derived from information provided by law enforcement or from other cases referred to the District Attorney's Office. *See id.*, ¶ 10. Powell was not involved in directly planning the February 3 arrest operation and did not provide information for any briefing planning the tactics used. *See id.*, ¶ 11. Powell is not aware of any uncharged pending referrals related to the wiretap investigation and is aware that there are two pending cases related to the wiretap. *See id.*, ¶¶ 12-13.

In *State v. Wallis*, 149 Wis.2d 534, 439 N.W.2d 590 (Ct. App. 1989), the Wisconsin Court of Appeals considered a defendant's attempt to compel a district attorney to testify at a pre-trial suppression hearing. *See id.* at 535. The district attorney and a detective had met with the defendant after he was apparently arrested. During that recorded interview, the defendant made incriminating statements. *See id.* at 536. The defendant requested a hearing to challenge the voluntariness of his statements, subpoenaed the district attorney, and moved to

[1] Powell has reviewed and approved the affidavit filed with this response. The State will file a signed and notarized affidavit on December 15, 2022.

disqualify the district attorney from prosecuting him. *See id.* The district attorney moved to quash the subpoena and the trial court, without comment or explanation, quashed the subpoena and denied the disqualification motion. *See id.*

The Court of Appeals reversed. The court first considered the showing a defendant had to make to call a prosecutor as a witness. The court rejected the state's efforts to argue for the "compelling need" standard based on *United States v. Schwartzbaum*, 527 F.2d 249 (2d Cir. 1975), *cert denied*, 424 U.S. 942, because that case, and most of the other cases cited by the state, involved a defendant seeking a prosecutor's testimony at trial, which raised the dangers of confusing the distinctions between advocate and witness and between argument and testimony. The court also noted that none of the cases cited by the state involved the prosecutors' conduct or relationship with the defendant and none involved proposed testimony implicating a defendant's constitutional rights. *See State v. Wallis*, 149 Wis.2d at 538-39.

The Court of Appeals instead applied a test developed in *Green Bay Newspaper v. Circuit Court*, 113 Wis.2d 411, 421, 335 N.W.2d 367 (1983). Under that standard, the defendant was only required to show a reasonable probability that the district attorney's testimony would lead to competent, relevant, and material evidence. *See State v. Wallis*, 149 Wis.2d at 540. The Court of Appeals also held that there was no reason to disqualify the district attorney from prosecuting the case based only on his possible testimony at a pre-trial hearing.

"Whether a witness is a 'material witness' is determined by the nature of the testimony that the witness is able to provide relative to the consequential facts that are in dispute." *In re Disciplinary Proceeding Against Prosser*, 2012 WI 43, ¶ 14, 340 Wis.2d 292, 813 N.W.2d 208 (Roggensack, J.). "Material facts are those that are of consequence to the merits of the litigation." *In the Interest of Michael R.B.*, 175 Wis.2d 713, 724, 499 N.W.2d 641 (1993). Relevant evidence, under Wis. Stat. § 904.01, "means evidence having any tendency to make

the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *State v. Denny*, 120 Wis.2d 614, 623 357 N.W.2d 12 (Ct. App. 1984).

Applying the lower standard described in *Wallis*, let alone the compelling need standard from *Schwartzbaum*, this Court should deny Wagner's motion. Wagner fails to identify on what consequential facts he believes Ozanne or a member of the District Attorney's Office could testify or why that testimony would make the existence of those facts more probable or less probable than it would be without such testimony. Wagner also does not identify how this testimony would be competent, which in this context means admissible. Wagner does not assert Ozanne or anyone from the District Attorney's Office supplied him with information about QLW or was present at the time of the shooting on February 3. Wagner does not suggest questions or lines of inquiry directed to Ozanne or his staff that would be relevant to any defense or even that might lead to such information. *Wallis* also involved a direct interaction between the defendant and the district attorney; no such interaction occurred in this matter. Finally, there is no basis upon which to disqualify Ozanne or his office from prosecuting this matter. Even the *Wallis* court rejected the claim that the possible testimony of a district attorney should result in recusal.

CONCLUSION

For the reasons stated above, the State respectfully requests that the Court deny Wagner's motion. Should Wagner attempt to allege new factual reasons or any legal reasons in support of his motion, the State requests the opportunity to respond.

STATE OF WISCONSIN - VS - Mark Wagner

Date Signed: 12/14/22

Electronically Signed By:

Matthew Moeser

Assistant District Attorney

State Bar #: 1034198