

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION FOURTEEN**

**STATE OF KANSAS,**     )  
                  **Plaintiff,**    )  
                                  )  
**vs.**                            )  
                                  )  
**JASON M. JUDD,**        )  
                  **Defendant.**    )  
\_\_\_\_\_                    )

**Case No. 08CR 1035**

**MEMORANDUM DECISION AND ORDER**  
**Motion to Dismiss**

The above captioned case came before the court on July 2, 2009, for an evidentiary hearing on the State’s motion to dismiss charges against the defendant, Jason Judd.

The State appeared by Cindi Carle, assigned special prosecutor from the Johnson County District Attorney’s office; the defendant appeared in person and with his counsel, Tom Lemon; and Pedro Irigonegaray appeared as associate counsel on behalf of victims, Daniel and Devin Llamas.

The court set an evidentiary hearing after reviewing the State’s Motion to Dismiss and the victims’ counsel’s objections to the motion. The reason provided by the State in the Motion to Dismiss was that probable cause did not exist to believe that a crime had been committed or that defendant Judd had committed that crime. The State further argued that

it was unethical to prosecute a charge that is not supported by probable cause. The State's belief that there was no probable cause conflicted with Judge Tom Conklin's earlier finding that there was probable cause to issue the arrest warrant and also this court's earlier finding that there was sufficient evidence in the charging affidavit to support probable cause.

Associate Counsel Irigonegaray, representing victims Devin and Daniel Llamas, objected to the State's Motion to Dismiss. As the State has argued, in any other case filed by the State, the prosecutor has absolute authority and discretion to dismiss charges, and the court has no authority to deny the dismissal. The difference in this case is that the victims hired an attorney who entered his appearance as associate counsel pursuant to K.S.A. 19-717. In this rare situation, Kansas law provides that the associate counsel can file a written objection to the dismissal of charges. The court then, after hearing arguments of counsel, fully considers the reasons presented.

The statute doesn't specifically require an evidentiary hearing. However, the arguments presented by the State were in conflict with earlier judicial findings of probable cause, so the court afforded all counsel the opportunity to present evidence to support their positions. The parties earlier had submitted briefs arguing facts that were not in evidence before the court, and in order to fully consider these arguments, the court set the evidentiary hearing.

Immediately prior to the evidentiary hearing, the State filed a Supplemental Motion to Dismiss alleging that there is a lack of sufficient, credible evidence necessary to obtain a

conviction and alleging that there is reasonable doubt about the guilt of defendant Judd. The State repeated its argument from their original Motion to Dismiss that the facts show that defendant Judd was acting in lawful self-defense. The State cites the American Bar Association ethical standard 3-3.9 which provides that “a prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.” Thus, the prosecutor argues that it is not ethical for her to proceed with the prosecution of defendant Judd.

Further, in this supplemental motion, the State reiterates its argument that K.S.A. 19-717 does not usurp the State’s prosecutorial authority to decline to prosecute a case or its decision to dismiss charges. Kansas appellate court cases support the State’s position. In *State ex rel, Rome v. Fountain*, 234 Kan. 943, 678 P.2d 146 (1984), the Supreme Court reviewed the history of some cases which set out the power of a prosecutor to determine the charges to be filed against a defendant and whether those charges should be reduced or dismissed and the ultimate power to control the prosecution. The *Rome* case cites *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973) where the Kansas Supreme Court stated that a trial judge has no right to substitute his or her judgment for that of the prosecutor unless there is some compelling reason to protect the rights of the defendant. *Rome* at 947.

A county attorney or district attorney is the representative of the State in criminal prosecutions. As such, he or she controls criminal prosecutions. It is the county or district attorney who has the authority to dismiss any charge or to reduce any charge. *State v. Turner*, 223 Kan. 707, 709, 576 P.2d 644 (1978). The prosecuting attorney has broad discretion in discharging his or her duty. The scope of this discretion extends to the power to investigate and to

determine who shall be prosecuted and what crimes shall be charged. *State v. Dedman*, 230 Kan. 793, 798, 640 P.2d 1266 (1982); *State v. Blount*, 13 Kan. App. 2d 347, 351, 770 P.2d 852, *rev. denied* 245 Kan. 786 (1989). *The prosecuting attorney has discretion to dismiss charges, and the court cannot refuse to allow a dismissal.* (Emphasis added.) *Foley v. Ham*, 102 Kan. 66, 67-72, 169 Pac. 183 (1917). Similarly, the court cannot restrain a prosecutor from prosecuting an action. *State, ex rel., v. Rohleder*, 208 Kan. 193, 195, 490 P. 2d 374 (1971).

*State v. Williamson*, 253 Kan. 163, 165-66, 853 P.2d 56 (1993).

In a more recent case, the Kansas Supreme Court pointed out the difference between the attorney occupying the public office of prosecutor and an attorney hired by the prosecuting witness to assist the public prosecutor. “The public prosecutor is expected to be conflict-free, whereas we have acknowledged that the victim-retained ‘assistant’ comes to the table with built-in divided loyalties.” *State v. Pabst*, 287 Kan. 1, 12, 192 P.3d 630 (2008). Apparently, because of the potential for conflict, the victim-retained associate counsel’s role is one of assisting the State prosecutor and the control of the criminal case at all times remains with the State prosecutor.

“a private individual has no right to prosecute another for crime and no right to control any criminal prosecution when one is instituted. . . . [T]he philosophy of this state has always been that a criminal prosecution is a state affair and the control of it is in the public prosecutor.” 234 Kan. At 945. As was noted in the opinion, there is an abundance of authority in Kansas for the rule that the public prosecutor is to control criminal cases. *State ex. rel. Miller v. Richardson*, 229 Kan. 234, 623 P.2d 1317 (1981); *State v. Turner*, 223 Kan. 707, 709, 576 P.2d 644 (1978); *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973); *State v. Kilpatrick*, 201 Kan. 6, 17, 439 P.2d 99 (1968); *State, ex rel., v. Court of Coffeyville*, 123 Kan. 774, 256 Pac. 804 (1927); *Foley v. Ham*, 102 Kan. 66, 169 Pac. 183 (1917); *In re Broadhead*, 74 Kan. 401, 86 Pac. 458 (1906); *State v. Brown*, 63 Kan. 262, 65 Pac. 213 (1901); *State v. Wells*, 54 Kan. 161, 165, 37 Pac. 1005 (1894); *State v. Wilson*, 24 Kan. 189 (1880); *Jackson v. State*, 4 Kan. 150 (1867).

While the trial court is required pursuant to K.S.A. 19-717 to fully consider the reason for the Motion to Dismiss and the objections to that motion, there is no statutory guidance nor any case law as to how the case would proceed if the Motion to Dismiss is denied. The public prosecutor clearly retains the power to control the criminal prosecution. Although Associate Counsel Irigonegaray has requested that the court disqualify Ms. Carle as the prosecutor, the court has no authority under Kansas statutory or case law to replace Ms. Carle and appoint a new special counsel. In fact, the only authority the court has to replace a prosecutor is if the prosecutor is absent, sick or disabled. In this case, the prosecutor assigned to this case is neither absent, sick nor disabled. The Supreme Court specifically held in a similar situation that once a special prosecutor has been designated (as Ms. Carle has been in this case) the court can not remove the special prosecutor.

“After a special county attorney has been appointed and has acted upon the matter for which he was specifically appointed, and he has exercised the discretion which necessarily rests in a public officer, a second special county attorney cannot be appointed merely because the elected county attorney or the court is dissatisfied with the action taken by the first appointed special county attorney. A special county attorney becomes a public officer and as such his discretionary acts and decisions cannot be controlled by the court.”

*State ex rel., v. Kerns*, 210 Kan. 579, 586, 502 P.2d 639 (1972).

As Associate Counsel, Mr. Irigonegaray, would be in a “Catch 22” situation if the court denied the Motion to Dismiss. The control of the case still would remain with the official public prosecutor Ms. Carle, who believes it is unethical to proceed on the current charges.

The standards on which this court reviews the reasons and objections to the Motion to Dismiss are not set out in either statutory or case law. It appears to this court that its role is to review the reason for dismissal and as long as that reason is made in good faith, the court must grant the Motion to Dismiss. To do otherwise would wrench the control of the case from the prosecution which would be contrary to longstanding statutory and case law which clearly place control of a criminal prosecution in the hands of a public prosecutor. While the original Motion to Dismiss was based on the prosecutor's belief there was not probable cause to support the charges against Judd, the State's Supplemental Motion to Dismiss cites the absence of sufficient admissible evidence to support a conviction which requires more evidence than probable cause.

In support of her Supplemental Motion to Dismiss, the prosecutor does raise some significant facts which were substantiated by the evidence presented on July 2, 2009. One of those facts was that while other officers may have been asked to leave the Llamas residence, there was no evidence that Judd was asked to leave the Llamas residence. The State argues that they cannot prove one of the elements for trespass, *i.e.* that the defendant was told to leave the property by an owner or other authorized person.

Another significant fact that the State raises in the Supplemental Motion to Dismiss was that there is no evidence that Judd exhibited any aggressive behavior toward the Llamas's or their guests prior to being attacked by five or more persons. In fact, Detective Mummey, the lead detective on the case, testified in the evidentiary hearing that there was

no evidence to believe that Judd instigated any physical fighting. The State correctly points out that actions by the other officers are not actions of defendant Judd and cannot be imputed to him.

According to Detective Mummey's testimony, Daniel Llamas testified at the inquisition that he did not see a weapon prior to retrieving a gun from inside his house. Detective Mummey testified at the evidentiary hearing that Jason Judd said that he drew his firearm because he was "in fear for his life because of the attack by the five to six males" and that he did not shoot his weapon until "he was staring down the muzzle of a firearm." No evidence was presented that conflicted with the statement attributed to defendant Judd.

In addition, Detective Mummey testified that Judd had stated that Devin Llamas was pointing a firearm at off-duty police officer Travis Jepson. Mr. Jepson confirmed in his testimony at the evidentiary hearing that Devin Llamas swung a gun toward Jepson and aimed the gun at him. No testimony was presented at the evidentiary hearing that refuted the statements of Jepson nor those attributed to Judd.

Pattern Instruction for Kansas 3d 54.17 sets out the instruction to be given to a jury when a defendant claims self-defense or defense of another person.

Defendant is permitted to use deadly force against another person only when and to the extent that it appears to him and he reasonably believes deadly force is necessary to prevent death or great bodily harm to himself or someone else from the other person's imminent use of unlawful force. Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.

In a prior conference call hearing, Johnson County District Attorney Stephen Howe appeared with Ms. Carle and stated to this court that he had convened a group of seasoned

assistant district attorneys with over 70 years of combined prosecution experience to review the facts of this case. It was their united position that the case should not proceed.

It is certainly possible that the Llamas brothers would present testimony that would conflict with Judd and Jepson's statements. However, Detective Mummey testified that Devin and Daniel Llamas each said in prior statements that they could not remember what happened after they stepped off the porch. According to Detective Mummey they attributed their lack of memory to intoxication. On the day of the evidentiary hearing Mr. Irigonegaray stated that Daniel Llamas was in the hospital and wouldn't be available to testify. However, Devin Llamas was present but neither Associate Counsel Irigonegaray nor either of the other counsel called him to testify.

Mr. Irigonegaray said that the testimony presented on July 2, 2009 raises issues of police officers drinking while carrying firearms and of an open container in defendant Judd's truck. He is absolutely correct. However, Judd is not charged with an open container violation in this case. Also, the issue of an officer drinking while carrying a firearm is not before this court. The court is limited to considering only the motion to dismiss the charges filed against Judd. This behavior by off-duty police officers more than likely will be dealt with through administrative channels in the Topeka Police Department.

Mr. Irigonegaray also raises the issue of the need of the public to know. At the evidentiary hearing on July 2, 2009, the court did provide each party, including the associate counsel, a full opportunity to present all the evidence that could have been presented in a

preliminary hearing. While the court understands that there is great public interest in this case, the court's duty is to apply the law to the evidence as presented.

During the evidentiary hearing, Mr. Irigonegaray moved to admit the entire investigative record of the case under seal out of public view. The State objected to admitting the record. Defendant Judd's counsel did not object to the admission of the record but objected to it being filed under seal. Later Judd's counsel pointed out that the record was not complete as it did not contain the statements made by the victims, Daniel and Devin Llamas. The court finds that the record is inadmissible as it contains hearsay and it does not fall under any exception to the hearsay rule.

### **Conclusion**

Certainly there were reprehensible actions and inexcusably bad judgment displayed by the off-duty police officers. A life-threatening, tragic incident occurred, and lives have drastically been changed. But the question here is not whether there were wrongs committed by the off-duty police officers (obviously there appear to be), but whether the State can dismiss the criminal charges against the defendant Jason Judd.

Arguments and evidence presented to this court indicate that the Motion to Dismiss was offered in good faith within the discretionary authority the law grants to the prosecutor. Given the longstanding and clear statutory authority that places criminal prosecution under the control of the prosecutor, the court grants the State's Motion to Dismiss.

The above is this court's ruling on the Motion to Dismiss and no further journal entry is required.

IT IS SO ORDERED.

Dated this 24<sup>th</sup> day of July, 2009.

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Nancy Parrish  
District Judge, Third Judicial District

**CERTIFICATE OF MAILING**

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION** was mailed, hand delivered, or placed in pick-up bin this **24<sup>th</sup>** day of **July**, **2009**, to the following:

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