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2017 IL App (3d) 160561-U

Order filed November 30, 2017

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

CLEVE HEIDELBERG, JR.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Petitioner-Appellee,	)	Peoria County, Illinois.
	)	
v.	)	Appeal No. 3-16-0561
	)	Circuit No. 16-MR-326
THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	The Honorable
Respondent-Appellant.	)	Albert L. Purham, Jr.
	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices O'Brien and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Trial court did not abuse its discretion in granting petitioner's motion to appoint special prosecutor to investigate criminal case where court found close, personal relationship between State's Attorney and prosecutor accused by petitioner of wrongdoing. Trial court lacked jurisdiction to enter order dismissing case where notice of appeal had been filed and appeal was pending in this court.

¶ 2 Petitioner, Cleve Heidelberg, Jr., was convicted of murder and attempted armed robbery in Peoria in 1970. In 2016, he filed a petition seeking the appointment of a special prosecutor to investigate his criminal case. The trial court granted Heidelberg's petition and entered an order

appointing the Illinois Attorney General as special prosecutor. After the State filed its notice of appeal, the Illinois Attorney General filed a motion to dismiss the trial court's order. The trial court granted the motion, dismissing the case in its entirety. Heidelberg filed a motion to strike in this court. We affirm the trial court's order appointing a special prosecutor, grant Heidelberg's motion to strike, and remand for further proceedings.

¶ 3

## FACTS

¶ 4

### I. Special Prosecutor Appointment (Case No. 16-MR-326)

¶ 5

Following a jury trial, petitioner Cleve Heidelberg, Jr. was convicted of murdering Peoria Police Department Sergeant Raymond Espinoza and committing attempted armed robbery of the Bellevue Drive-In Theatre on May 26, 1970. He was sentenced to consecutive terms of imprisonment of 99 to 175 years for murder and 10 to 14 years for attempted armed robbery. He appealed his conviction and sentences, and we affirmed in 1975. In 2001, defendant filed a motion for fingerprint testing and a petition for a writ of *habeas corpus*, which the trial court denied, and we affirmed.

¶ 6

In October 2015, Heidelberg's attorney met with Peoria County State's Attorney Jerry Brady to discuss evidence of defendant's actual innocence. After that meeting, Heidelberg sent a 27-page letter to Brady, accompanied by 30 exhibits, alleging that fingerprint evidence was not provided to Heidelberg or his attorney prior to his trial, that an officer from the Peoria County sheriff's office spied on conversations between Heidelberg and his counsel, that witnesses were intimidated, and that evidence was manufactured and destroyed by Ronald Hamm and John Riddle, prosecutors for the Peoria County State's Attorney's office. Brady found insufficient evidence to support reopening Heidelberg's case.

¶ 7 In 2016, Heidelberg filed an amended 118-page petition seeking appointment of a special prosecutor. Heidelberg alleged that he presented new evidence requiring further investigation, including (1) a fingerprint report that was destroyed by police, (2) an FBI index card indicating that fingerprints on the weapon found in Heidelberg’s car were “negative”, (3) the affidavit of Matthew Clark, stating that his brother, James, was in Heidelberg’s car on May 26, 1970, and that James confessed to the murder and attempted armed robbery of which Heidelberg was convicted, (4) James Clark’s confession, (5) Lester Mason’s affidavit stating that he borrowed Heidelberg’s car and gave it to James Clark on May 26, 1970, and (6) a report showing that an officer spied on conversations between Heidelberg and his counsel.

¶ 8 Heidelberg’s amended petition alleged that a special prosecutor was necessary because Peoria County State’s Attorney Brady refused to thoroughly investigate any of his claims. Heidelberg alleged that Brady did not interview anyone except Hamm, who Brady “has a longstanding close and personal relationship with.” Heidelberg alleged that “Brady has an actual conflict of interest based on his personal relationship with former prosecutor Hamm.” Heidelberg claimed that Brady’s “personal relationship” with Hamm “compromised his ability to objectively investigate Heidelberg’s claims” and “did, indeed, *influence* the discharge of his duties to fully and fairly investigate Heidelberg’s claims.” (Emphasis in original.) Heidelberg further alleged that appointing a special prosecutor was necessary “to maintain the public’s confidence in the impartiality and integrity of the judicial system.”

¶ 9 The State filed a response to Heidelberg’s petition, asserting that (1) it was an improper collateral attack on a closed criminal case, (2) Heidelberg failed to adequately allege a conflict of interest, (3) Heidelberg failed to present new, credible or material evidence because the evidence

defendant claimed was new, including the affidavits of Lester Mason and Matthew Clark, had previously been provided to and rejected by the trial court.

¶ 10 On July 28, 2016, the trial court entered an order granting defendant's petition for appointment of a special prosecutor and appointed the Illinois Attorney General to investigate Heidelberg's claims. The court stated that it "was not satisfied with the investigation" performed by Brady, which consisted of him talking only to Hamm, a mentor and friend who Heidelberg accused of misconduct.

¶ 11 The State filed a motion to reconsider, which the trial court denied. The trial court stated that this was "an unusual case" because the Peoria County State's Attorney's Office was being asked to examine or investigate "previous State's Attorneys who used to be former members of their office" and "a mentor of the State's Attorney." The court found that "there is a conflict of interest" because the subject of the investigation was the State's Attorney's office and "someone close to the State's Attorney." On September 14, 2016, the State filed its notice of appeal of the trial court's July 28, 2016 order.

¶ 12 II. Postconviction proceedings (Case No. 70-CF-1976)

¶ 13 In August 2016, Heidelberg filed an amended postconviction petition, arguing that his convictions should be reversed. The State filed a motion for appointment of a special prosecutor for Heidelberg's postconviction petition. Attached to the motion was an affidavit from Brady, stating that the prosecution of Heidelberg by the Peoria County State's Attorney's Office "could be a conflict of interest" or "create the appearance of impropriety."

¶ 14 The trial court granted the State's motion for appointment of a special prosecutor for Heidelberg's postconviction petition. Following an evidentiary hearing, the trial court granted Heidelberg's postconviction petition, vacated his convictions and granted him a new trial. The

State filed a notice of appeal, appealing the trial court's order granting Heidelberg's postconviction petition. That appeal is pending in this court as Appeal No. 3-17-0282.

¶ 15 III. Trial court proceedings following postconviction proceedings

¶ 16 After the trial court granted Heidelberg's postconviction petition in Case No. 16-MR-236, the Illinois Attorney General made an oral motion to vacate the trial court's July 28, 2016 order appointing it as special prosecutor. Petitioner opposed the motion. On July 21, 2017, the trial court entered an order granting the Attorney General's motion and dismissed the case in its entirety.

¶ 17 In this court, Heidelberg filed a motion to strike the trial court's July 21, 2017 order for want of jurisdiction. We ordered the motion taken with the case.

¶ 18 ANALYSIS

¶ 19 I. Motion Taken with the Case

¶ 20 We first address the motion taken with the case – petitioner's motion to strike the trial court's July 21, 2017 order dismissing Case No. 16-MR-236.

¶ 21 “The filing of a notice of appeal transfers jurisdiction to the appellate court *instanter* and simultaneously divests the trial court of jurisdiction to enter additional orders of substance in a case.” *People v. Kolzow*, 332 Ill. App. 3d 457, 459 (2002) (citing *People v. Bounds*, 182 Ill. 2d 1, 3 (1998)). After a notice of appeal has been filed, the trial court may not enter an order that would modify the order or judgment being appealed or interfere with the appellate court's review of it. *Id.* An order or judgment entered by a trial court without jurisdiction is void. *Id.* (citing *People v. Davis*, 156 Ill. 2d 149, 155 (1993)).

¶ 22 Here, the State filed a notice of appeal in the underlying case, 16-MR-326, in September 2016. The effect of the State's filing of its notice of appeal was to transfer jurisdiction to this

court and divest the trial court of jurisdiction to enter any additional orders of substance. See *Kolzow*, 332 Ill. App. 3d at 459-60. Nevertheless, 10 months after the State filed its notice of appeal and while the appeal was still pending before this court, the trial court entered an order dismissing the case in its entirety. Because the trial court’s dismissal order modified its prior order, which was under appeal, the dismissal order was entered without jurisdiction and is void. See *id.* at 460. We grant petitioner’s motion to strike and vacate the trial court’s July 21, 2017 dismissal order. See *id.*

¶ 23

## II. Appointment of Special Prosecutor

¶ 24

Section 3-9008 of the Counties Code authorizes the appointment of a special prosecutor in certain situations:

“The court on its own motion, or an interested person in a cause or proceeding, civil or criminal may file a petition alleging that the State’s Attorney has an actual conflict of interest in the cause or proceeding. The court shall consider the petition, any documents filed in response, and if necessary, grant a hearing to determine whether the State’s Attorney has an actual conflict of interest in the cause or proceeding. If the court finds that the petitioner has proven by sufficient facts and evidence that the State’s Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.” 55 ILCS 5/3-9008(a-10) (West 2014).

¶ 25

Appointment of a special prosecutor requires more than speculative and conclusory allegations of a conflict of interest. See *Baxter v. Peterlin*, 156 Ill. App. 3d 564, 567 (1987). A petitioner must plead and prove specific facts showing that the State’s Attorney would not

zealously represent the People of the State of Illinois in a particular case. *In re Appointment of Special Prosecutor*, 388 Ill. App. 3d 220, 233 (2009). The petitioner must present evidence that the personal conflict is so great that it will influence the State's Attorney's discharge of his duties. *Id.* To require any less "would open the door to requiring a special prosecutor be appointed any time a public official of whatever rank is suspected of wrongdoing." *Baxter*, 156 Ill. App. 3d at 566.

¶ 26 A special prosecutor may be appointed where a petitioner alleges the existence of a relationship between the State's Attorney and a party to be investigated that would make it improbable that the State's Attorney would conduct an unbiased investigation in the case. See *McCall v. Devine*, 334 Ill. App. 3d 192, 200-01 (2002). A petitioner can demonstrate that a State's Attorney has abandoned his duties to the People of the State of Illinois by alleging an impropriety or insufficiency in the State's Attorney's investigation. *Id.* at 204.

¶ 27 In appointing a special prosecutor, the trial court must exercise its discretion in determining whether a statutory condition exists that requires appointment of a special prosecutor. *Baxter*, 156 Ill. App. 3d at 566. The decision of whether to appoint a special prosecutor is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *People v. Weeks*, 2011 IL App (1st) 100395, ¶ 46.

¶ 28 Here, Heidelberg alleged that Brady had a close, personal relationship with Hamm, one of the Peoria County prosecutors who originally prosecuted him. He further alleged that Brady's relationship with Hamm made him unable to zealously investigate his claims, as evidenced by Brady's failure to conduct a thorough investigation into his claims. The trial court agreed, finding that Brady's investigation, which consisted entirely of Brady speaking to Hamm, was insufficient.

¶ 29 Heidelberg presented sufficient evidence to establish that it was improbable that the Peoria County State’s Attorney would conduct an unbiased investigation into his criminal case because State’s Attorney Brady would be required to investigate former employees of the Peoria County State’s Attorney’s Office, including one with whom Brady has a close, personal friendship. Heidelberg further demonstrated that a conflict of interest existed because Brady performed an insufficient investigation into his allegations. See *McCall*, 334 Ill. App. 3d at 204. The trial court did not abuse its discretion in appointing a special prosecutor to investigate Heidelberg’s criminal case.

¶ 30 III. Post-appointment proceedings

¶ 31 Based on facts and circumstances discovered after the trial court’s appointment of the Illinois Attorney General, Heidelberg has asked us to remove the Illinois Attorney General as special prosecutor and name the Cook County State’s Attorney as the new special prosecutor in this case. The Illinois Attorney General, on the other hand, asks to be removed as special prosecutor and contends that no replacement is necessary because Heidelberg’s convictions have been vacated.

¶ 32 We decline to grant either party’s request. Instead, we remand this case to the trial court to determine who, if anyone, should be appointed special prosecutor to investigate Heidelberg’s convictions, bearing in mind that if this court affirms the trial court’s decision on Heidelberg’s postconviction petition in Appeal No. 3-17-0282, there will be no convictions to investigate.

¶ 33 CONCLUSION

¶ 34 The judgment of the circuit court of Peoria County is affirmed; motion taken with the case granted; case remanded to trial court.

¶ 35 Affirmed; motion granted; case remanded.