

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

STATE OF ALABAMA,)	
)	
Plaintiff,)	
)	Case No.: CC-2018-4025
v.)	CC-2018-4026
)	
)	
ONIS GLENN,)	
WILLIE S. PHILLIPS)	
Defendants.)	

ORDER DENYING DEFENDANTS’ MOTIONS TO DISMISS BASED ON VIOLATIONS OF STATUTORY SAFEGUARDS IN THE ALABAMA ETHICS ACT

After considering all filings, affidavits, testimony and allowing the parties to brief and argue the matter, the defendants Phillips and Glenn’s motions to dismiss based on violations of certain statutory safeguards are Denied.

The Court reviewed the filings by both parties and a full hearing was held with testimony taken.

The defendants maintain that that Ethics Commission Staff (hereinafter referred to as the Commission) failed to follow the Ethics Act’s requirements in obtaining indictments in these cases. Specifically, they claim that an active existing investigation is needed by the district attorney’s office before that office can seek assistance from the

Commission or the Commission can offer or lend assistance. The defendants claim that this effort by the Commission violates the procedures outlined in the Ethics Act and the defendants' due process rights. Thus, the indictments should be dismissed.

BACKGROUND

A brief recitation of the facts is necessary to fully discuss and examine these issues.

On August 24, 2018, Attorney David Ludder¹ initiated this effort by emailing the Jefferson County District Attorney's office requesting a meeting with a "prosecuting attorney in the DA's office who concentrates in public corruption...regarding...possible offenses." (Email dated 8/24/18). As a result, Jefferson County Deputy District Attorney Andrew Herring telephoned Ludder to arrange a meeting.

Following that exchange, Ludder sent a subsequent email to Herring confirming the meeting and referencing relevant statutes with attached documents including a chronology of events naming the defendants. (Email dated 8/27/18 w/ attachments). Thereafter, Herring met with Ludder

¹ Ludder is an attorney licensed to practice law in Alabama.

and Attorney Haley Lewis² where information was provided to Herring for possible action. (Herring p. 32-33).

Herring later discussed the matter with then District Attorney Mike Anderton. Per Herring, Anderton recommended that they send the “information...to the Ethics Commission and the Attorney General’s Prosecution Division for...additional investigation for prosecution.” (Herring p. 38-39). The State does not dispute that initially the Jefferson County District Attorney’s office declined to pursue the matter further—based principally on a lack of resources. (Cynthia Raulston Affidavit).

On or about October 9, 2018, a complaint was also made to the Ethics Commission regarding many of these same allegations.³

Thereafter, on or about October 22, 2018, General Counsel for the Ethics Commission, Cynthia Raulston, learned from the original complainants, Ludder and Lewis, that the Jefferson County District Attorney’s office was unable to proceed with a prosecution because they no longer had a white-collar crime unit and lacked the necessary investigators to pursue the matter. (Raulston Affidavit). Raulston then communicated to Herring to ensure that his office knew that the Commission could help

² Lewis is also an attorney licensed to practice in law in Alabama. She works as an attorney for the Greater Birmingham Alliance to Stop Pollution (G.A.S.P.).

³ On or about October 29, 2018, a subsequent complaint was also made to the Ethics Commission.

considering this lack of resources. Specifically, Raulston offered the “services of the Ethics Commission investigators because the information that had been provided to the district attorney’s office involved violations of the Ethics Act” and it was her position that the “Commission was permitted to assist [the District Attorney’s office] per Ala. Code Section 36-25-4(i).” (Raulston Affidavit).

After speaking with Herring, she claims that she also spoke to Anderton and he indicated that the matter should be prosecuted and/or otherwise presented to the grand jury. (Raulston Affidavit). Per Raulston, Anderton, in fact, requested her assistance in presenting the matter to the grand jury and assisting through the trial phase. (Raulston Affidavit). Admittedly, Raulston has no authority to prosecute a case absent a request and appointment by a district attorney or the Attorney General.

Similar in part to Raulston’s version, Anderton claims that he declined to prosecute the matter because of the lack of resources. However, where they differ, Anderton claims that he informed her that the district attorney’s office would not be prosecuting the matter and would not be involved, but Raulston and the commission could instead proceed with presenting it to the grand jury. (Anderton p. 127).

Despite Anderton's present version of events, his office drafted and he signed a letter dated October 30, 2018 stating:

We have received a complaint against Scott Phillips. I understand that your Commission has launched an investigation into this particular issue. I, therefore, as District Attorney for the 10th Judicial Circuit of Alabama, request the assistance of Cynthia Raulston to investigate and prosecute this case as well as any other related cases that may arise through complaint with the Commission or from the investigation of this case. This would include a presentation to the Grand Jury for possible charges to be considered against Mr. Phillips and/or other individuals. I will appoint Ms. Raulston as a Deputy District Attorney for the 10th Judicial Circuit pursuant to Alabama Code Section 12-17-220⁴ for the purposes of investigating and prosecuting this case.

I further request the assistance of Special Agents Chris Clark, Dustin Lansford, and Byron Butler in this matter. I will appoint Special Agents Clark, Lunsford, and Butler as District Attorney Investigators for the 10th Judicial Circuit pursuant to Alabama Code Section 12-17-220 for the purposes of investigating and prosecuting this case.

⁴ Alabama Code Section 12-17-220 states:

(a) The district attorney of each judicial circuit is hereby authorized to employ, in any manner as he or she shall determine necessary, assistant district attorneys, investigators, clerical, secretarial, and other personnel, who shall be paid from funds available for that purpose. Unless otherwise provided by local law for Talladega County, all of these employees shall serve at the pleasure of the district attorney and shall not be considered employees under the State Merit System Act.

(b) The district attorney is authorized to supplement the salaries of personnel employed within his or her office.

(c) The district attorney is authorized to use funds available to him or her from all sources such as grants, appropriations, gifts, and other sources for the purposes stated in this section or for any other law enforcement purpose.

(d) Counties are authorized to supplement state expenditures as they deem necessary and shall provide other financial support as required by laws in effect on September 30, 1977.

Additionally, and consistent with this appointment letter, Deputy District Attorney Herring met with Raulston and other Commission staff to collaborate in presenting the matter to the grand jury. In fact, Herring testified that they met “primarily to go over the case...what all evidence is out there and how it matched up with the charges that were being suggested...as well as making sure basically that our system was set up to accept all the different charges.” (Herring p. 63-67). Raulston supports Herring’s testimony, as she also claims Herring had informed her that they “would be working together.” (Raulston affidavit)

To further elucidate these factual matters, the Court questioned Herring as to whether he was merely serving as clerical support in this meeting. Herring stated that he offered his opinions and that they collectively discussed “the evidence and then decide[d]...does what we found match up with what the code section says, and does the code section match the File Maker System.” (Herring p. 64-65). Herring also testified that at that time he was not directed to limit his involvement only to the grand jury proceedings. He stated initially there was no limiting instruction or explicit conversation as to his degree of involvement. (Herring p. 66-67).

Thereafter, without explanation from Anderton, Herring was instructed to end his involvement. (Herring p. 66-67). There is no evidence that Anderton did or sought to amend his previous letter appointing Raulston or amended their mutual understanding. To the contrary, the indictments include Anderton's signature as the district attorney. This court is satisfied that the indictments were developed and obtained in a collaborative effort and the Commission was not simply acting on its own.

Generally, and as agreed by the parties there exists no independent authority for the Ethics Commission to prosecute any case unless at the express invitation and appointment of a district attorney or the Attorney General.

The defendants make several objections to how these cases were prosecuted and ultimately indicted. Generally, the defendants claim that the Ethics Commission circumvented and failed to abide by certain due process procedures set forth in the Ethics Act. (Glenn and Phillips dismissal motions). Specifically, defendant Glenn claims that the "genesis for Glenn's indictment was a complaint filed with the Ethics Commission," thus triggering certain procedural requirements as set out in Alabama Code 36-25-4(d). (Glenn dismissal-2/11/19 p. 1-7). There is also a disagreement as to whether the district attorney must be actively and

independently investigating a matter before it can request assistance from the Ethics Commission. (Glenn dismissal—2/11/19 p. 8, 15)

DISCUSSION

The Alabama Ethics Commission can take appropriate legal action when so requested by the district attorney. Specifically, the statute states:

After receiving or initiating a complaint, the commission has 180 days to determine whether probable cause exists. At the expiration of 180 days from the date of receipt or commencement of a complaint, if the commission does not find probable cause, the complaint shall be deemed dismissed and cannot be reinstated based on the same facts alleged in the complaint. Upon good cause shown from the general counsel and chief investigator, the director may request from the commission a one-time extension of 180 days. Upon the majority vote of the commission, the staff may be granted a one-time extension of 180 days in which to complete the investigation. If the commission finds probable cause that a person covered by this chapter has violated it or that the person covered by the Fair Campaign Practices Act has violated that act, the case and the commission's findings shall be forwarded to the district attorney for the jurisdiction in which the alleged acts occurred or to the Attorney General. The case, along with the commission's findings, shall be referred for appropriate legal action. **Nothing in this section shall be deemed to limit the commission's ability to take appropriate legal action when so requested by the district attorney for the appropriate jurisdiction or by the Attorney General.**

Ala. Code Section 36-25-4(i) (emphasis added).

Here, defendant Glenn maintains that this section “allows for the possibility that a district attorney or the Attorney General independently investigates or prosecutes a matter and then requests that the Commission

take appropriate legal action to assist those investigatory or prosecutorial efforts.” (Glenn motion-2/9/19 p. 15).

The Court is not persuaded by this argument. The statute is purposefully broad and does not indicate what degree of involvement is required by a district attorney or Attorney General before that elected office holder can refer or otherwise request assistance from the Commission. The statute does not contain any mandated procedural requirements that must be satisfied.

Regardless, the undisputed facts are as follows - the initial complaint was first received by the Jefferson County District Attorney’s office. Anderton’s own correspondence states in its first line, “We have received a complaint against Scott Phillips.” A meeting was first held with the complainants and the Jefferson County District Attorney’s office. Documents were provided to Herring that referenced both defendants.

Even if you ignore Raulston’s affidavit, Anderton by written correspondence requested the assistance of the Commission. Specifically, Anderton stated in writing the he was “request[ing] the assistance of Cynthia Raulston to investigate and prosecute this case as well as any other related cases that may arise through complaint with the Commission or from the investigation of this case...this would include a presentation to

the grand jury for possible charges to be considered against Mr. Phillips and/or other individuals...I will appoint Ms. Raulston as a Deputy District Attorney...for the purpose of investigating and prosecuting this case.”

These actions are certainly permissible under the Ethics Act.

Consistent with that correspondence, the Jefferson County District Attorney’s office met with Commission staff and discussed possible charges and presentment to the grand jury. This effort led to indictments for multiple violations of the Alabama’s Ethics Act signed by the local district attorney, Mike Anderton. There is no indication that the authority conferred by this letter was ever revoked or amended. In fact, on February 28, 2019, the currently elected District Attorney, Danny Carr, appointed Shelby County Assistant District Attorney Daniel McBrayer to prosecute these cases as well and otherwise assist in this case.⁵

The defendants claim that Anderton was in part some unsophisticated actor.⁶ Therefore, his appointment letter written contemporaneously to these events should be disregarded. It is notable that his own office drafted the appointment letter. Surely, this Court as any court must assume that a district attorney reads and understands the

⁵ On November 6, 2018, Anderton was defeated and Danny Carr was elected as the current Jefferson County District Attorney.

⁶ Anderton currently serves as Deputy General Counsel for the Alabama Law Enforcement Agency.

official correspondence that he or she signs. Therefore, based on the unambiguous language in this correspondence coupled with other evidence, this court cannot ignore this document and can only conclude that he intended to appoint Raulston to assist the district attorney's office in prosecuting these cases.

Regardless, if Anderton did not wish to seek the Commission's assistance, he could have simply refused to appoint Raulston or worded the letter with his currently stated understanding of their arrangement. He was certainly under no obligation to have his deputy, Herring, assist the Commission in reviewing evidence and determining appropriate charges for presentation at the grand jury. He was also not obligated to arrange these matters be presented to a Jefferson County grand jury.

Alabama Code Section 36-25-27(c) provides similar discretion to the Commission and referral by the district attorney. It states as follows:

The enforcement of this chapter shall be vested in the commission; provided, however, nothing in this chapter shall be deemed to limit or otherwise prohibit the Attorney General or district attorney for the appropriate jurisdiction from enforcing any provision of this chapter as they deem appropriate. In the event the commission, by majority vote, finds that any provision of this chapter has been violated, the alleged violation and any investigation conducted by the commission shall be referred to the district attorney of the appropriate jurisdiction or the Attorney General. **The commission shall provide any and all appropriate assistance to the such district attorney or Attorney General. Upon request of such district attorney or the Attorney General, the commission may institute, prosecute, or**

take such other appropriate legal action regarding such violations, proceeding therein with all rights, privileges, and powers conferred by law upon assistant attorneys general.

(emphasis added)

Here, the defendants maintain that this provision only applies to a situation where the Commission has by majority vote determined a violation to have occurred and then referred the matter to a district attorney or Attorney General. (Glenn dismissal — 2/11/19 p. 16). The Act certainly sought to discourage the Ethics Commission from refusing to assist a well-intentioned local district attorney or Attorney General in prosecuting these matters.

However, this Court does not read this statute to limit a district attorney or Attorney General from requesting assistance only in instances where the matter first originated with the Ethics Commission. In this statute, full prosecutorial enforcement is given to the district attorney and the Attorney General. If a district attorney's office or Attorney General instead originates the prosecution, the Commission must provide "any and all appropriate assistance."

The last line of the statute even states that upon request by a district attorney, the Commission may even "institute, prosecute, or take such other appropriate legal action regarding such violations." This broad

language confers a great deal of discretion to the Ethics Commission and to the district attorney in deciding how best to proceed. Absent sharing confidential information by the Commission, a plain reading indicates that these statutes were to encourage communication and assistance among these different agencies in enforcing Alabama's Ethics Act.

The Court is satisfied that these two statutes taken together were intended to provide not only the Commission with flexibility, but similarly provide a district attorney or Attorney General with the ability to confer with the Commission and request assistance if they so decide to prosecute cases under this Act.

Finally, even accepting the defendants' legal interpretations—that the Commission and the district attorney's office must remain strictly incommunicado and the district attorney must be in the throes of an active ongoing investigation before assistance by the Commission may be accepted, this court is still not convinced that dismissal is required. The defendants cite to one case *Ex parte E.J.M.*, 829 So.2d 105 (Ala. 2001) – to support their contention that the cases should be dismissed. In *E.J.M.*, without any complaint being filed by anyone outside the Ethics Commission, the Ethics Commission itself initiated a complaint against E.J.M.; and, instead of following the mandate of Section 36-25-4(c), to refer

the complaint to a three-judge panel for hearing, the Ethics Commission simply referred confidential material to the Attorney General. The Attorney General had no independent knowledge of wrongdoing by E.J.M. The Court held that the Ethics Commission “violated the confidentiality commands of Section 36-25-4(b)” in disclosing confidential matter to the Attorney General and therefore “the Attorney General’s investigation and convening of the grand jury were and are illegal as fruit of the poisonous tree.” *Id.* at 110.

The facts in our case are quite distinguishable from *E.J.M.*. Here, the complaint originated with the district attorney’s office. There is no allegation that confidential material was unlawfully disclosed to the district attorney’s office. In *E.J.M.*, the Court’s decision turned on the prohibited disclosure of confidential information by the Ethics Commission to the Attorney General. That is not the situation here.

In summary, this court does not agree that the Commission violated the Ethics Act by contacting the district attorney’s office. There is nothing in the clear language that prevents contact with any law enforcement agency for the purposes of offering assistance or discussing a matter that has been disclosed to both parties. As stated, the Ethics Act was written to provide the district attorney and the Attorney General with some flexibility in

deciding whether assistance is needed and how best to proceed in these complicated matters that often require extensive resources. In contrast, the defendants' legal interpretation would unnecessarily restrict not only the Ethics Commission, but also a district attorney and the Attorney General in communicating and prosecuting these matters with Commission assistance.

The court takes judicial knowledge that many district attorney's offices lack the needed resources to engage in costly and time consuming litigation brought pursuant to the Ethics Act. Their focus as in Jefferson County is generally directed at violent crime. With that understanding, the Ethics Act addresses that concern and ensures prosecutions are not declined simply because a local district attorney lacks the needed resources.

Therefore, the court concludes that the State acted properly and in compliance with the Ethics Act and these cases should not be summarily dismissed.

DONE and ORDERED this the 6th day of August, 2019.

s/ Stephen C. Wallace
Stephen C. Wallace
Circuit Judge