

[\*1]

Decided on March 25, 2008

**Supreme Court, Queens County**

**The People of the State of New York**

**against**

**Joseph Bonelli, Defendant.**

11117/2006

Counsels' appearances are:

For the People: Peter A. Crusco

Exec. Asst. D.A., Queens District Attorney's Office

Richard A. Brown, District Attorney

For the Defense: Virginia Alvarez

The Portella Law Firm

Jeremy S. Weinstein, J.

Defendant moves pursuant to County Law § 701 for the appointment of a Special Prosecutor <sup>[FN1]</sup> to investigate his allegations of misconduct by the Queens County District Attorney's Office and specifically Assistant District Attorney Barbara Wilkanowski. Defendant further requests that the Court vacate defendant's plea <sup>[FN2]</sup> or in the alternative, stay sentencing until a Special Prosecutor is appointed to investigate this matter, and sanction the Queens County District Attorney's Office. [\*2]

On July 6, 2006, defendant was arrested and charged with Criminal Sale of a Controlled Substance in the Second Degree (P.L. § 220.41-1), Criminal Possession of a Controlled Substance in the Third Degree (P.L. § 220.16-1) and Criminal Possession of a Weapon in the Fourth Degree (P.L. § 265.01-2). On September 13, 2006, defendant was arrested and charged with Criminal Possession of a Weapon in the Fourth Degree (P.L. § 265.01-1). In both instances, defendant was represented by Lawrence DiGiansante. On October 31, 2006, defendant met with ADA Wilkanowski outside the courthouse, and in November 2006, defendant fired attorney DiGiansante and hired Robert Kelly to represent him in those matters. On December 8, 2006, defendant and attorney Kelly met with Assistant District Attorney Gerard Brave to negotiate and execute a plea and cooperation agreement. Pursuant to the agreement, defendant was required to perform various duties, including but not limited to: testifying against co-defendants, making controlled buys of controlled substances, engaging in taped telephone conversations, and providing information to support the issuance of search warrants.

Pursuant to the plea agreement, defendant pled guilty on December 27, 2006, to the following charges <sup>[FN3]</sup>: Criminal Sale of a Controlled Substance in the Third Degree (P.L. § 220.39) and Criminal Possession of a Controlled Substance in the Seventh Degree (P.L. § 220.03). He also pled guilty to a violation of probation for a previous offense and received time served. In exchange for his guilty plea, defendant was promised a sentence of no more than seven years imprisonment and two years post-release supervision. The cooperation agreement further provided that, based upon the extent and nature of defendant's cooperation, he may be permitted to withdraw his guilty plea and re-plead to a lesser charge. If that occurred, the Queens County District Attorney's Office may recommend any sentence permissible by law based upon the nature and extent of defendant's cooperation. Conversely, the Queens County District Attorney's Office also had discretion to terminate the cooperation agreement and ask the Court to sentence defendant to seven years imprisonment, the maximum term permissible under the plea agreement.

When defendant appeared in court to accept the plea agreement, Justice Mullings asked him whether any other promises had been made to him, other than those specifically enumerated during the proceeding, to which defendant replied "No, ma'am." He was then advised that if he were to commit a new crime, he could be sentenced to the maximum term of imprisonment under the plea [\*3]agreement, a seven year determinate sentence with two years post-release supervision, to which he agreed.

In December 2007, one year after defendant's plea before Justice Mullings, defendant fired attorney Kelly and hired present counsel, who made the instant motion. On December 28, 2007, defendant was arrested and charged with Attempted Murder in the Second Degree, Assault in the First Degree and other related crimes under Indictment No. 236/2008.

Defendant argues that his plea must be vacated and a Special District Attorney appointed, based upon the misconduct of ADA Wilkanowski on behalf of the Queens County District Attorney's Office. Defendant argues that his plea was not knowing and voluntary, as it was based upon his mistaken belief that he would ultimately receive a misdemeanor conviction and a non-jail sentence. This belief was based upon his conversations with ADA Wilkanowski, who he

alleges arranged for him to retain Robert Kelly as counsel in exchange for a reduced plea and sentence. Defendant argues that had he not received this misinformation from ADA Wilkanowski, he would not have pled guilty to the felony charges and consented to the cooperation agreement with the Queens County District Attorney's Office.

Defendant also seeks appointment of a Special District Attorney to investigate the Queens County District Attorney's Office and represent the prosecution in the case against him. Defendant argues that ADA Wilkanowski's misconduct occurred while she was a representative of the Queens County District Attorney's Office, and therefore he cannot be fairly prosecuted by that office. Defendant contends that he acted in good faith to comply with the terms of the cooperation agreement and that he was misled by ADA Wilkanowski into believing his actions would result in a non-jail sentence. As ADA Wilkanowski's actions were on behalf of the Queens County District Attorney's Office, that office cannot be considered impartial and should not be permitted to pursue the cases against defendant. Further, based upon the above, defendant argues that sanctions should be awarded against the Queens County District Attorney's Office.

The People oppose defendant's motion in its entirety. They argue that defendant's plea was knowingly and voluntarily made in open court and should not be vacated. Defendant was represented by counsel at all times, when he entered into the plea and cooperation agreement and when he accepted guilt before the Court. There is no evidence that he was unclear as to the terms of the agreement or that he was unable to seek advice from counsel during the proceedings. Further, defendant's prior criminal history evidences a knowledge of the criminal justice system that belies his claims of confusion or ambiguity.

The People further oppose defendant's motion to appoint a Special District Attorney. They argue that defendant failed to [\*4]demonstrate actual prejudice to him as a result of the alleged actions of ADA Wilkanowski or the Queens County District Attorney's Office. There is no evidence that ADA Wilkanowski's alleged actions directly resulted in actual prejudice to defendant. ADA Wilkanowski did not negotiate the cooperation agreement or the terms of defendant's guilty plea. Rather, defendant met with ADA Brave, the Bureau Chief for the Organized Crime Bureau, and negotiated the plea and cooperation agreement with him, outside the presence of ADA Wilkanowski. The terms of the agreement were clear and unambiguous and at no time during the negotiation did defendant inform ADA Brave of any other promises made by ADA Wilkanowski. Further, defendant was not prejudiced by the terms of the plea agreement, but instead benefitted from it, as his possible sentence was drastically reduced. Rather than facing a possible seventeen year combined sentence, he was guaranteed a sentence of no more than seven years, and possibly less depending upon his compliance with the terms of the cooperation agreement.

The People further argue that, even assuming ADA Wilkanowski engaged in the conduct alleged by defendant, it does not warrant sanctioning the Queens County District Attorney's Office or disqualifying the office from prosecuting this case. Her alleged actions were beyond the scope of her duties as an Assistant District Attorney and were not reflective of her position in the Queens County District Attorney's Office. ADA Wilkanowski was merely a supervisor of Part APN/N60, a position that did not afford her the authority to unilaterally negotiate plea

agreements on behalf of the Narcotics Investigation Bureau and the Organized Crime Bureau of the Queens County District Attorney's Office. She was never assigned to prosecute defendant's case. Rather, the prosecution of defendant's case was handled by ADA David Chiang and supervised by ADA Wilbert J. LeMille. There is no evidence that ADA Wilkanowski attempted to influence ADA Chiang or ADA LeMille to negotiate a non-jail sentence for defendant. Therefore, any actions by ADA Wilkanowski with regard to defendant's allegations were solely performed by her and without the express or implied authority of the Queens County District Attorney's Office.

Based upon the papers submitted by counsel and oral argument heard before the Court on March 19, 2008, this Court finds that defendant failed to establish sufficient grounds to appoint a Special District Attorney or to award sanctions against the Queens County District Attorney's Office.

Under County Law § 701,

"Whenever the district attorney of any county and such assistants as he or she may have shall not be in attendance at a term of any court of record, which he or she is by law required to attend, or are disqualified from acting in a [\*5] particular case to discharge his or her duties at a term of any court, a superior criminal court in the county wherein the action is triable may, by order:

(a) appoint some attorney having an office in or residing in the county, or any adjoining county to act as special district attorney during the absence, inability or disqualification of the

district attorney and such assistants  
as he or she may have; or  
(b)appoint a district attorney of any  
other county within the judicial  
department or any other county  
adjoining the county wherein the  
action is triable to act as a special  
district attorney...during such absence,  
inability or disqualification of the  
district attorney and such assistants  
as he or she may have."

As a general rule, courts "should remove a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence." (*Matter of Schumer v. Holtzman*, 60 NY2d 46, 55 [1983]; see e.g. *People v. Shinkle*, 51 NY2d 417 [1980]; *People v. Zimmer*, 51 NY2d 390 [1980].) Actual prejudice or substantial risk of abuse of confidence may arise from evidence of personal connections between the District Attorney and the defendant, or an intimate knowledge of the facts of the matter and a personal stake in the outcome of the prosecution. (*See id.*) However, the mere appearance of impropriety, standing alone, is insufficient to warrant disqualification of a constitutional officer from his elected position. (*See Matter of Schumer, supra; People v. Williams*, 37 AD3d 626 [2nd Dept. 1997].) Rather, the evidence must demonstrate that there is actual prejudice or so substantial a risk thereof that it cannot be ignored. (*See People v. Herr*, 86 NY2d 638, 641 [1995], citing *Matter of Schumer*, 60 NY2d at 55).

In the instant matter, defendant failed to present sufficient evidence to demonstrate actual prejudice or a substantial risk of an abuse of confidence. Defendant alleges that the actions of one Assistant District Attorney impugn the integrity of the whole office, but failed to prove his allegations. Rather, defendant's argument seems to rest on the theory that ADA Wilkanowski offered him a better deal than the agreement proffered by the Assistant [\*6]District Attorneys responsible for prosecuting him, and therefore he was prejudiced. However, this argument is without merit.

While defendant argues that he was misled by ADA Wilkanowski, he failed to demonstrate that her alleged actions prejudiced him. (*See People v. McCullough*, 141 AD2d 856

[2nd Dept. 1988], *app'l dismiss.* 73 NY2d 924 [1989].) Defendant and his attorney voluntarily met with ADA Brave and he agreed to comply with various terms of cooperation in exchange for a lesser sentence. Defendant's prior criminal history provided him with knowledge and an understanding of the possible consequences of the charges against him and gave him an incentive to execute the plea and cooperation agreement. Defendant pled guilty before Justice Mullings in open court and agreed to the terms of the plea agreement and cooperation agreement, without hesitation. At no time did he inform ADA Brave or Justice Mullings that other promises were made to him by ADA Wilkanowski. If defendant was confused or unclear as to the terms of his guilty plea, he had ample opportunity to discuss these with his counsel and express his concerns to the court. Rather, he waited almost one year before presenting his allegations regarding ADA Wilkanowski and over one year to move for the appointment of a Special District Attorney.

It is clear that the plea agreement conferred a significant benefit to him, as he was no longer subject to the lengthy prison sentence that could have resulted from the criminal charges he faced. Based upon the numerous charges against him, defendant could have been sentenced to a maximum combined term of seventeen years imprisonment. However, the agreement reduced his maximum sentence by over one-half, and also permitted the Queens County District Attorney's Office to consent to a plea to a lesser charge and sentence, based upon defendant's cooperation. Based upon the above facts, defendant failed to prove that the plea and cooperation agreement resulted in actual prejudice to him.

Defendant also failed to demonstrate that a substantial risk of abuse of confidence would result if a Special District Attorney is not appointed. There is no evidence that the Queens County District Attorney has a clear conflict of interest or a personal stake in the outcome of defendant's prosecution to warrant disqualification. (*See Zimmer*, 51 NY2d 390.) While ADA Wilkanowski may be called to testify in further proceedings, there is no evidence that she was or will be a material witness in the criminal investigations involving defendant or that she would be called to testify at any prosecution of defendant. (*Cf. People v. Gallagher*, 143 AD2d 929 [2nd Dept. 1988][Suffolk County District Attorney's Office was properly disqualified, as its members were material witnesses to and/or targets of the criminal investigation].) Therefore, there is no evidence to find that a substantial risk of abuse of confidence would result by denying defendant's motion.

Further, defendant failed to prove that any misconduct by ADA [\*7]Wilkanowski warrants the disqualification of or sanction against the entire Queens County District Attorney's Office. Defendant seeks to disqualify the office solely based upon the actions of ADA Wilkanowski. However, there is no evidence that her alleged misconduct pervaded the investigation and prosecution of defendant's case. (*See People v. Herr*, 86 NY2d at 642.) Defendant failed to prove that ADA Wilkanowski informed the assigned prosecutors of her alleged relationship with defendant or her alleged promises to him. Defendant presented no evidence that ADA Wilkanowski was present during his plea negotiations with ADA Brave or that her alleged promises were discussed during their two-hour meeting. (*See People v. English*, 88 NY2d 30 [1996].) He also failed to demonstrate that ADA Wilkanowski exerted any influence on the other Assistant District Attorneys or the proceedings to his detriment. There is no evidence that the Queens County District Attorney's Office handled defendant's case in an

atypical or inappropriate manner. While ADA Wilkanowski's action, if proven to be true, may have been improper, they do not suffice to disqualify the Queens County District Attorney's Office from prosecuting defendant.

In conclusion, this Court holds that defendant failed to meet his burden of establishing actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence, such as to justify the removal of the Queens County District Attorney's Office and the appointment of a Special District Attorney.

However, it is noted that the issue of whether defendant should be permitted to withdraw his plea based upon the allegations against ADA Wilkanowski, is a separate matter to be determined by Justice Mullings.

Accordingly, defendant's motion to appoint a Special District Attorney is denied. Defendant's motion to vacate his plea is respectfully referred to Justice Mullings, before whom defendant previously moved for the relief. Defendant's motion to sanction the Queens County District Attorney's Office is denied, as defendant failed to present sufficient evidence of misconduct by the Office to warrant the imposition of sanctions. Defendant's motion to stay sentencing pending the appointment of a Special District Attorney is denied as moot.

This constitutes the decision and order of the Court.

The Clerk is directed to forward copies of this order to the attorney for the defendant and to the District Attorney.

Dated: March 25, 2008

Jeremy S. Weinstein, J.S.C.

#### **Footnotes**

**Footnote 1:** While defendant uses the term "Special Prosecutor", the correct title is "Special District Attorney" (*see* County Law § 701[1].)

**Footnote 2:** Defendant had previously moved to vacate his plea pursuant to C.P.L. § 220.60(3) or, in the alternative, compel specific performance of the plea agreement. That motion is scheduled for a hearing before Justice Mullings on April 3, 2008.

**Footnote 3:** Defendant also pled guilty to Criminal Possession of a Weapon in the Fourth Degree (P.L. § 265.01) in Criminal Court Part AP-2 before Judge Mary O'Donoghue on December 27, 2006.