Michael K. Jeanes, Clerk of Court
*** Filed ***
08/13/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-009867 08/11/2014

HONORABLE MARK H. BRAIN

CLERK OF THE COURT
T. Springston
Deputy

THOMAS C HORNE MICHAEL D KIMERER

v.

MARICOPA COUNTY ATTORNEYS OFFICE VICTORIA L ORZE

UNDER ADVISEMENT RULING

This matter came before the court for a hearing on the Application for Order to Show Cause and for Preliminary and Injunctive Relief (filed July 28, 2014). Without objection from the parties, the court treated the hearing as an argument for a temporary restraining order with notice (which is a portion of the relief sought through the Application). Having considered the papers on file and the parties' arguments, the court now DENIES the request for a temporary restraining order. By way of explanation, the court offers the following.

A temporary restraining order is a form of preliminary injunction; accordingly, the four-part test of *Shoen v. Shoen*, 167 Ariz. 58, 804 P.2d 787 (App. 1990), applies. The court must balance the following factors: (1) whether plaintiff has a strong likelihood of success on the merits; (2) the possibility of irreparable harm to the plaintiff if relief is not granted; (3) the balance of hardships; and (4) advancement of the public interest. Because we are at the temporary restraining order stage, the court will accept as true well-pled factual allegations, and evaluate the allegations for the possibility of "immediate" harm (i.e., harm that will occur before a formal evidentiary hearing on application for a preliminary injunction).

First, as to the likelihood of success on the merits, Plaintiff Horne's basic claim is that Defendant Maricopa County Attorney's Office[1] should not be allowed to investigate him because Bill Montgomery, the duly elected Maricopa County Attorney, is biased against him. This bias is evidenced by the fact that Mr. Montgomery has pursued claims against him in the past,[2] supports Plaintiff Horne's opponent in the upcoming primary election, and has called on Plaintiff Horne to resign. Plaintiff Horne concedes that Mr. Montgomery has screened himself from any participation in the investigation, but argues that "his subordinates know what he wants," "rely on [him] for their livelihood," and thus cannot be trusted. *See* Complaint ¶ 9. Accordingly, the argument goes, no one associated with Mr. Montgomery's office can investigate Plaintiff Horne.

The cases cited by Plaintiff Horne in support of this position all appear easily distinguishable. In the first place, all of them appear to involve actual, ongoing prosecutions, as opposed to mere investigations which may or may not lead to charges. In addition, the following distinguishing factors are apparent:

- The three principal Arizona cases cited by Plaintiff each involved an ongoing prosecution in which a defendant's attorney joined the prosecutor's office. *State v. Latigue*, 101 Ariz. 52, 509 P.2d 1340 (1972) (defendant's former co-counsel became deputy chief county attorney); *Turbin v. Superior Court*, 165 Ariz. 195, 797 P.2d 734 (1990) (defendant's court-appointed attorney withdrew to rejoin prosecutor's office); and *State Ex Rel. Romley v. Superior Court*, 184 Ariz. 223, 908 P.2d 37 (App. 1995) (defendant's former attorney joined county attorney; under the facts of this particular case, disqualification was not required). *United States v. Catalanotto*, 468 F. Supp. 503 (D. Arizona 1978) also fits within this mold.
- *State v. Wilcox*, CV2010-005423 (Maricopa County Superior Court, 2010), is not a reported opinion and thus ought not be cited in the first place.[3] But in fact, that case involved a county attorney who was prosecuting his own client, which is a clear violation of E.R. 1.7.

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[1] Defense counsel indicated at the hearing that the Maricopa County Attorney's Office is not a jural entity, and thus is an improper defendant. Assuming this is true, it is equally true that Plaintiff has the right to amend the complaint to name a proper party (presumably Mr. Montgomery); accordingly, the court will ignore this deficiency for the time being.

[2] Plaintiff claims that the charges proved untrue, as evidenced by an administrative law judge ruling in favor of him (*see* Complaint ¶ 7), but it is common knowledge that Sheila Polk, the Yavapai County Attorney, rejected that ruling, as is her right, so the matter remains open. Of note, Ms. Polk was chosen by Plaintiff's subordinates to pursue the charges.

[3] Rule 111, Rules of the Supreme Court of Arizona prevents unpublished decisions from being cited as precedent except in circumstances that are not applicable here. Likewise, Local Rule 9.11 only allows certain decisions of the superior court to be published (and that rule does not encompass the minute entry cited by Plaintiff). There is no principled reason that a unpublished minute entry from the superior court should be given precedential effect that an unpublished decision from the appellate courts would not have.

- Plaintiff cites *State v. Gonzales*, 119 P.3d 151 (N.M. 2005), for the proposition that an entire office was disqualified "based in part on animosity by the County Attorney…" Application at p. 5. Left unsaid are: (a) the fact that the attorney and defendant apparently had worked together in the same office for a period which included disciplinary action by the attorney against the defendant and threats of civil rights litigation by the defendant against the attorney; (b) the fact that the attorney *did not screen* herself from the matter; and (c) that the attorney had improperly withheld discovery during the current matter.
- Plaintiff cites *State v. Snyder*, 237 So.2d 392 (La. 1970), as a case involving animosity during a campaign. In fact, the court disqualified the district attorney from prosecuting charges that defendant defamed various individuals, *including the district attorney*. Again, when that fact is included, the case becomes easy. Likewise with *State v. King*, 956 So.2d 562 (La. 2007), where the source of personal animosity toward defendant stemmed from the attorney's belief that defendant started or spread a salacious rumor about him and a member of his family, leading him to make prosecutorial decisions.

Plaintiff Horne's notion that Mr. Montgomery's office will do his unspoken bidding is entirely unconvincing as a basis to disqualify the entire office from a mere investigation and grand jury proceeding. In fact, the reported decisions are extraordinarily leery of attempts to disqualify attorneys based solely on a mere appearance of impropriety, uncoupled from additional facts such as those in the cases cited by Plaintiff Horne. *See Villalpando v. Reagan*, 211 Ariz. 305, 121 P.3d 172 (App. 2005). One of the central lessons (perhaps "reminders" would be a better word) from the Thomas/Aubuchon/Alexander disciplinary process is that the Nuremburg Defense ("I was just following orders") is not viable in Arizona.[4] *See Matter of Alexander*, 232 Ariz. 1, 5-6, 300 P.3d 536, 540-41 (2013). The court will not indulge a presumption that the investigators and employees the Maricopa County Attorneys' Office will act unethically based on a mere allegation that they know what Mr. Montgomery wants, nor that a grand jury will ignore its responsibilities in evaluating any potential charges.

The court accepts as a given that prosecuting attorneys typically do not think much of ordinary people who they believe have committed crimes, and think even less of elected officials who they believe have done so. From the facts presented, it is apparent that Mr. Montgomery does not think much of Plaintiff Horne. But one could presumably disqualify a number of investigating agencies if that argument were good enough. Arizona's second-largest county, Pima County, is headed by a Democratic County Attorney (Barbara LaWall); one assumes a

[4] It is worth noting that Mark Stribling, the chief investigator who Plaintiff Horne claims is involved, was found to have refused improper instructions from Mr. Thomas and Ms. Aubuchon during their disciplinary proceedings. A copy of the Opinion and Order Imposing Sanctions, of which the court may take judicial notice, is available online at the following link:
http://www.azcourts.gov/Portals/9/Press%20Releases/2012/041012ThomasAubuchonAlexander_opinion.pdf

similar argument could be constructed against allowing her office to proceed with the investigation. Likewise, it is common knowledge that the Yavapai County Attorney (Sheila Polk) has rejected an administrative law judge's ruling regarding Plaintiff Horne's conduct during an earlier election and continues to pursue him. An approach that so easily disqualifies prosecuting agencies from even investigating someone cannot be right. The court concludes that Plaintiff Horne's chances of success on the merits are modest at best.[5]

Turning to the possibility of irreparable harm if relief is not granted and public policy, Plaintiff Horne's claim (voiced at the oral argument) is that an indictment during the election season might cost him the election.[6] Perhaps so, although the Arizona Republic articles cited by Plaintiff Horne as evidence of Mr. Montgomery's bias actually appear to help him by bolstering his ability to argue that any indictment is just a political stunt. Public policy certainly does not favor shielding candidates from investigations during elections; if a candidate broke the law, he should receive his just reward. Moreover, if there is, in fact, probable cause to indict Plaintiff Horne, then the public has every right to know it so that voters can factor it into their decisions on how to cast their ballots. Having weighed the competing factors set forth in *Shoen*, the court concludes that Plaintiff Horne is not entitled to a temporary restraining order.

IT IS FURTHER ORDERED signing this minute entry as a formal written Order of the court.

/ s / HONORABLE MARK H. BRAIN

HONORABLE MARK H. BRAIN
JUDICIAL OFFICER OF THE SUPERIOR COURT

[5] An additional impediment to Plaintiff Horne's claim is the Anti-Injunction Act. A.R.S. § 12-1802 provides, "An injunction shall not be granted: . . . . (4) to prevent enforcement of a public statute by officers of the law for the public benefit … [or] (6) to prevent the exercise of a public or private office in a lawful manner by the person in possession . . .."

[6] No other harm appears even arguably irreparable; to the extent charges are made and unethically prosecuted, Plaintiff Horne may file a motion to disqualify the Maricopa County Attorneys' Office, which is what happened in the three reported Arizona cases discussed in the first bullet point (above).