IN THE DISTRICT COURT OF NUCKOLLS COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	**Case No. CR 14-10**
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER**
	)	
JERRY L. FOSTER,	)	
	)	
Defendant.	)	

DATE OF HEARING: August 4, 2015
DATE OF DECISION: August 14, 2015

APPEARANCES:
Charles L. Byrd, Jr., Special Deputy Nuckolls County Attorney.
William P. Tangeman, Special Deputy Nuckolls County Attorney.
Benjamin H. Murray, Attorney for Defendant.
Jerry L. Foster, Defendant.
Vicky L. Johnson, District Judge, presided.

NATURE OF HEARING:

This matter came on for hearing on the Defendant's Motion to Disqualify Counsel and Motion to Seal and/or Suppress Evidence. Evidence was offered and received. Argument was had and the matter was submitted to the Court for a decision. The Court took the matter under advisement.

The 414 hearing and jury trial are continued until further order of the Court.

NOW on this 14th day of August, 2015, this matter comes on for decision.

INTRODUCTION

Under consideration is a Motion to Disqualify Counsel and Motion to Seal and/or Suppress Evidence. The State of Nebraska is in possession of a number of pre-recorded phone calls between the Defendant and his court-appointed counsel which are indisputably privileged. The Defendant seeks to have the phone calls sealed, suppressed as evidence, and current counsel for the State and all members of the Attorney General's office disqualified from prosecuting the Defendant further.

CASE HISTORY

This motion under consideration involves an extremely unusual set of circumstances. The Defendant is charged with Sexual Assault of a Child (Third Degree), a Class IIIA Felony, Neb. Rev. Stat. §28-320.01(1&3) in Nuckolls County by Complaint filed in the County Court on December 8, 2014. He was arrested on December 11, 2014. The Nuckolls County Jail is inadequate to hold prisoners, and as a consequence, he was housed in Webster County, Nebraska. The first hearing on his case was held in Webster County on December 15, 2014, and the Defendant appeared without counsel. The Nuckolls County Attorney, Mr. Timothy Schmidt, appeared by phone. The Defendant asked for counsel. The Public Defender, Mr. Benjamin Murray, was appointed that same day.

On December 30, 2014, the day set for the next appearance in the County Court, the Defendant appeared by "Jabber," which this Court knows is an internet-based web camera. Mr. Schmidt and Mr. Murray were in court in Nuckolls County. As a consequence, there was no opportunity for the Defendant and his counsel to talk privately, except perhaps by phone call, as will be discussed later. The Defendant waived his preliminary hearing, and the case was bound over to the District Court.

The Information was filed on January 6, 2015. The arraignment was held the same day. The Defendant appeared personally with Mr. Murray. The State was represented by Mr. Schmidt. A Motion for Discovery was granted.

Mr. Schmidt subsequently became ill, and has not appeared in this case since. Acting County Attorney Daniel Werner appeared on February 3, 2015, with Mr. Murray. The Defendant was excused. An unopposed Motion for a Competency Evaluation filed by the Defendant was granted. In the motion, Mr. Murray represents that the Defendant has been diagnosed, among other things, with bipolar disorder and post traumatic stress disorder, and is on unknown medications.

On February 17, 2015, the Nebraska Attorney General's office was appointed Deputy Nuckolls County Attorneys in this case.

On April 7, 2015, Mr. Byrd, Mr. Tangeman, both from the Attorney General's office, Mr. Murray, and the Defendant appeared. Upon review of the court-ordered evaluation, the Defendant was found to be competent by the Court.

HALL COUNTY PHONE CALL RECORDING SYSTEM

On or about December 16, 2014, the Defendant was transferred to the Hall County Department of Corrections. Upon entering the jail, the Defendant signed a receipt indicating that he was given a copy of the Hall County Inmate Handbook.

The Handbook indicates that phone calls *may* be recorded. (P. 29, emphasis supplied.) It also indicates that prisoners have "the right to unrestricted and confidential access to the courts...and the right to legal counsel of your choice by means of interviews and correspondence." (P. 5). It also indicates that personal video visitations are recorded and may be monitored. (P. 21). (This is in a section regarding in-person visits.)

There is a sign next to the phone banks, indicating that phone calls are subject to monitoring and recording.

Sgt. Rojewski from the Hall County Department of Corrections monitors and records inmate phone calls and video visitation. His affidavit indicates that communications with counsel can be blocked upon "proper request."

Nowhere in the Handbook does it say that it is possible to block the monitoring and recording of attorney client communications by the sheriff's office. Nor is the process to do so discussed. It does say, at P. 22: "[S]upervising staff *will ensure* that professional visits are kept confidential." [Emphasis supplied.] Nowhere on the sign located in the phone banks are there instructions for blocking phone calls to attorneys.

On February 18, 2015, Mr. Byrd contacted the Hall County Department of Corrections to request phone call and visitation recordings for the Defendant. Approximately two weeks later (early March), a CD was received containing video and audio recordings of the Defendant's conversations.

Upon review, Mr. Byrd determined that the Defendant had apparently placed a phone call to the law office of Mr. Murray. This determination was made based upon the request of the Defendant to speak to "Ben." The Defendant was told that "Ben" was not in the office. Mr. Byrd immediately stopped listening and verified that the phone call was to Mr. Murray's office. He did not listen to any more phone calls, nor did Mr. Tangeman, or anyone else in the Attorney General's office, to Mr. Byrd's knowledge, to that phone number. Mr. Tangeman affirms that he never listened to any calls himself.

In mid-April, 2015, or about six weeks after he became aware of the recorded confidential communications, Mr. Byrd notified Hall County Department of Corrections that phone calls to Mr. Murray's office should be blocked from further recording or monitoring.

On June 3, 2015, a Certificate of Compliance with Discovery was filed with this Court, indicating that Mr. Byrd had furnished a copy of the CD of phone calls to Mr. Murray on the previous day. The copy was made by Mr. Byrd's "office." It is unclear precisely who made the copy.

There are approximately 59 phone calls recorded to Mr. Murray's office, during which Mr. Murray and the Defendant engaged in confidential attorney client communications. The conversations span the dates of December 29, 2014, through March 27, 2015.

According to the affidavits in evidence, at the beginning of each recorded conversation is a statement that the call is subject to monitoring and recording. Because Mr. Murray never answered the phone call from the Defendant personally, he was unaware of this notice. His staff did not inform him of the recorded message before passing the Defendant's call through.

The Attorney General's staff made one copy of the CD, which is the one that Mr. Byrd gave to Mr. Murray. The CD that he was sent from the Hall County Department of Corrections is now in the possession of the Court. The Court has not listened to any of the recordings.

The State acknowledges that the CD should be sealed and suppressed from use as evidence.

What remains for decision is whether Mr. Schmidt, Mr. Werner, Mr. Byrd, Mr. Tangeman and the rest of the Attorney General's office should be prohibited from prosecuting this action by virtue of the fact that they were in possession, or constructive possession, of confidential attorney client conversations.

DISCUSSION

The Court has reviewed the cases cited in oral argument, but believes that *State v. Kinkennon*, 275 Neb. 570 (2008) contains the most applicable case law. The *Kinkennon* decision involved an associate attorney leaving private practice to work for the Hall County Attorney's office. While in private practice, her firm was involved in the defense of a person who was being prosecuted by the attorney's new employer. The defendant's counsel asked the Hall County District Court to disqualify the entire prosecutor's office due to the presence of the new deputy prosecutor, who may have been in possession of client attorney confidences. The District Court did not disqualify the other Hall County prosecutors, because it was convinced sufficient shielding was in place to keep the client's secrets separate by secluding the new prosecutor from the case. The Supreme Court was asked to overturn the decision by the District Court. It did not.

This Court will quote at length from this opinion.

> However, the overwhelming majority of courts to have considered this issue have rejected this type of per se rule [disqualification of an entire office if one attorney has privileged information]. Instead, most courts have adopted a less stringent rule, pursuant to which the trial court evaluates the circumstances of a particular case and then determines whether disqualification of the entire office is appropriate. Under this approach, courts consider, among other things, whether the

attorney divulged any confidential information to other prosecutors or participated in some way in the prosecution of the defendant. The prosecuting office need not be disqualified from prosecuting the defendant if the attorney who had a prior relationship with the defendant is effectively isolated from any participation or discussion of matters concerning which the attorney is disqualified. If impropriety is found, however, the court will require recusal of the entire office.

We agree with the majority view and do not adopt a per se rule of disqualification. We believe the ultimate goal of maintaining both public and individual confidence in the integrity of our judicial system can be served without resorting to such a broad and inflexible rule. As declared by the Maryland Court of Appeals, "'[t]he appearance of impropriety alone is "simply too slender a reed on which to rest a disqualification order except in the rarest of cases."'" [citation omitted.]

And we recently endorsed a more flexible rule by adopting the Nebraska Rules of Professional Conduct. Rule 1.11(d), which addresses conflicts of interest for current government officers and employees, provides in relevant part that"[e]xcept as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee: . . . (2) shall not: (I) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment." [14 Neb. Ct. R. of Prof. Cond. 1.11(d) (Rev. 2005.]

The official comment 2 to rule 1.11 explains that "[b]ecause of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers." This rule recognizes the distinction between lawyers engaged in the private practice of law, who have common financial interests, and lawyers in a prosecutor's office, who have a public duty to seek justice, not profits.

The per se rule would result in the unnecessary disqualification of prosecutors where the risk of a breach of confidentiality is slight, thus needlessly interfering with the prosecutor's performance of his or her constitutional and statutory duties. Furthermore, a per se rule would unnecessarily limit mobility in the legal profession and inhibit the

> ability of prosecuting attorney's offices to hire the best possible employees because of the potential for absolute disqualification in certain instances.
>
> We recognize *that complete disqualification of a prosecutor's office may be warranted in cases where the appearance of unfairness or impropriety is so great that the public trust and confidence in our judicial system simply could not be maintained otherwise*. Such an extreme case might exist, even where the State has done all in its power to establish an effective screening procedure precluding the individual lawyer's direct or indirect participation in the prosecution. But when the disqualified attorney is effectively screened from any participation in the prosecution of the defendant, the prosecutor's office may, in general, proceed with the prosecution.
>
> Whether the apparent conflict of interest justifies the disqualification of other members of the office is a matter committed to the discretion of the trial court. In exercising that discretion, the court should consider all of the facts and circumstances and determine whether the prosecutorial function could be carried out impartially and without breaching any of the privileged communications. A flexible, fact-specific analysis will enable a trial court to protect a criminal defendant from the due process concerns at issue, while at the same time avoiding unnecessary disqualifications of government attorneys. Whether the State has established an effective screening procedure will obviously be part of that analysis.
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> [Emphasis supplied.] At 576-578.

The Court believes the statements of Mr. Tangeman and Mr. Byrd that they have not listened to any confidential client communication. It understands that there is an argument that lacking such communications, they have no conflict of interest requiring them to be disqualified. However, that does not fix the appearance of unfairness or impropriety. The notion that a prosecutor has in hand 59 recorded conversations between the Defendant and his lawyer has the blatant appearance of unfairness.

It is also clear that the recorded preface to phone calls is not a complete recitation of the truth. Phone calls from the jail ARE recorded, they are not simply subject to monitoring the recording.

This Court is unaware of the following: the extent to which the issue of the confidential client communication was discussed in office, what efforts were undertaken to safeguard and screen the CD from the hands and view of other employees (we know at a minimum that someone made a copy of it for Mr. Murray). The Court is also extremely bothered by the fact that it took about six weeks

for Mr. Byrd to advise the Hall County Department of Corrections office to "block" the phone calls to Mr. Murray and *three months* to advise Mr. Murray of the problem.

The Inmate Handbook does not reveal that it is even possible to block a phone number or the process for doing the same; it simply iterates that staff will ensure confidentiality between a defendant and his counsel. Further, the Defendant's counsel had sufficient concerns about the Defendant's ability to understand that a competency evaluation was undertaken without objection from the County Attorney. While he may be competent, he is demonstrably less able than many defendants to converse and understand. Further, unlike the other cases cited by the State, this is not a case where the Defendant and his attorney were aware that they were being recorded; to the contrary, it is obvious that this substantial breach of privilege came as a complete surprise to them.

In regard to the issue of unfairness, the Court is concerned that this breach of client confidentiality was not immediately revealed to Mr. Murray so that he could actively block his phone calls with his client from recording and monitoring. In fact, it took approximately three months for this breach of client confidentiality to be revealed to defense counsel. Phone calls were made between the Defendant and his lawyer after the time that the State became aware that the phone calls were being recorded. The Court amends its statements in open court accordingly. It cannot condone a delay in reporting this information to Mr. Murray, particularly given that communications made between Mr. Murray and his client continued for approximately one month after the Attorney General's office became aware of the breach. It also recognizes that there is an argument that Mr. Murray's support staff should have communicated the recorded message to Mr. Murray.

The Court finds that the actions, more specifically, non-actions, of Mr. Byrd and Mr. Tangeman in not immediately revealing to Mr. Murray the presence of the recordings give an appearance of unfairness that is so great that it disqualifies them from further prosecution. It is simply not comprehensible to this Court why the State sat on this as long as it did. The Court does not go so far as to call it improper. Mr. Byrd and Mr. Tangeman of the Nebraska Attorney General's office are disqualified from further handling of this case. Sgt. Rojewski and any members of the Hall County Department of Correction's department are ordered to have no involvement in this case. Mr. Werner and Mr. Schmidt, although not involved in the CD fiasco, are disqualified because they were counsel of record for the State during this period of recordation and non-disclosure. They were in no way culpable. Any investigators involved in the case, and the support staff personnel who made the copy are prohibited from further involvement in this case. These individuals shall be shielded from any further involvement in this case. The balance of the Nebraska Attorney General's office is not disqualified so long as the specific counsel assigned to prosecute were unaware of the non-disclosure of the problematic client communications to Mr. Murray. If no such assignment can be made, the Court shall be advised within ten judicial days of the date of entry of this order so it can appoint appropriate replacement counsel.

The Court is aware that this Defendant is facing a second series of felony charges in the County Court of Clay County, Case No. CR15-51. This case has not yet been bound over to District Court. The Attorney General's office is participating. A copy of this order shall be sent to Mr.

Foster's counsel, Ms. Michele Oldham, by the Clerk, and Mr. Griess, the Clay County Attorney. A certified copy shall be sent to the County Court of Clay County, Nebraska.

IT IS SO ORDERED.

BY THE COURT:

Vicky L. Johnson
District Court Judge

CERTIFICATE OF SERVICE

I, the undersigned, certify that on August 14, 2015 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Benjamin H Murray
ben@gmjlaw.com

Charles L Byrd Jr
charles.byrd@nebraska.gov

SEAL OF THE DISTRICT COURT Seal NUCKOLLS COUNTY, NEBRASKA

Date: August 14, 2015 BY THE COURT:

CLERK