

**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,  
PENNSYLVANIA – CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA

v.

KATHLEEN G. KANE

No. 6239-15

No. 8423-15

2016 APR -6 PM 4:09

MONTGOMERY COUNTY  
PENNSYLVANIA

**COMMONWEALTH’S RESPONSE TO DEFENDANT’S  
OMNIBUS PRETRIAL MOTION**

The District Attorney of Montgomery County, Kevin R. Steele, hereby respectfully submits the Commonwealth’s response to defendant Kathleen G. Kane’s *Supplemental Pretrial Motions*.

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**I. THE COMMONWEALTH DOES NOT OPPOSE A HEARING RELATING TO THE LEAK OF RECORDED TELEPHONE CALLS TO THE PRESS.**

Defendant, in her most recent motion, alleges that the Commonwealth “leaked” recorded telephone calls to a Harrisburg-based journalist, who then published a story related to these recordings on a website for *The Morning Call*. She seeks an evidentiary hearing on the claim. The claim is meritless, but the Commonwealth does not oppose a hearing.

Defendant, however, proposes several remedies, most of which are unsupported by law. Specifically, she seeks a change in venue, the disqualification of this Office, the suppression of the recordings, and/or the “quashal of the charges in their entirety” (*Memorandum of Law* at 8). She cites nothing that would support a remedy of suppression or dismissal. To the contrary, there is no possible suppression remedy. She has not asserted that she was a party to the telephone calls, which precludes a Fourth Amendment claim. *See Alderman v. United States*, 394 U.S. 165, 174 (1969) (“Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”). Nor has she alleged any possible violation of Pennsylvania’s Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701, *et seq.*, that would justify a statutory exclusion remedy. *See* 18 Pa.C.S. § 5721.1(b)(restricting exclusion remedy to enumerated statutory categories not implicated here).

Instead, defendant relies primarily on *Commonwealth v. Pierce*, 303 A.2d 209 (Pa. 1973). At most, that case indicates that a defendant may be entitled to

a change of venue if the prosecution releases admissible and inadmissible incriminating information before trial. *Id.* at 213-215 (granting new trial based on denial of motion for change of venue). Nothing in *Nelson*, or the other handful of cases defendant cites, would permit the undeserved windfall of suppression or dismissal of charges.

It is the Commonwealth's position that a determination regarding a change of venue will not be able to be made until we have attempted to select a jury and determined whether or not we are able to find fair and impartial jurors.

**II. THE COMMONWEALTH TAKES NO POSITION ON WHETHER DEFENDANT SHOULD BE PERMITTED TO FILE AN ADDITIONAL MOTION UNDER SEAL.**

In defendant's omnibus pretrial motion, she asserted a selective and vindictive prosecution claim. She has not yet, however, advanced any allegations or arguments in support of it. Rather, she asks in her supplemental pretrial motions for this Court to permit her to file that claim under seal. The Commonwealth is unaware of any authority that would permit the sealing of a pretrial motion. *See* Pa. R. Crim. P. 576(a)(1) ("All written motions and any written answers ... shall be filed with the clerk of courts."). Regardless, the Commonwealth takes no position on the request and leaves it to this Court's discretion.

A selective and vindictive prosecution claim, however, would be frivolous. "The burden is on the defense to establish [a selective prosecution] claim; it is error to shift the burden to the prosecution to establish or refute the claim."

*Commonwealth v. Murphy*, 795 A.2d 997, 1000 (Pa. Super. 2002).<sup>1</sup> The Pennsylvania Superior Court has explained as follows:

In our criminal justice system, prosecutors have broad discretion as to whom to prosecute. “So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”

Courts have long recognized that the charging function is uniquely within the competence of the prosecutor and is particularly ill-suited for judicial review. The strength of the case, its deterrence value, and its importance in relation to other criminal matters and the Government’s crime-fighting resources are all best judged by the prosecutors whose jobs entail making these decisions. Judicial micro-management of this area would be cumbersome and inevitably lead to delay and inefficiency.

Though the government enjoys wide discretion in making its prosecutorial decisions, that authority is not unfettered. As the Supreme Court has stated: “Selectivity in the enforcement of criminal law is . . . subject to constitutional constraints.”

Under the equal protection clause of the Fourteenth Amendment of the United States Constitution, the government must afford similarly situated persons similar treatment. Thus, the government may not prosecute someone based upon race, religion or another unjustifiable classification. Nor in retaliation for the exercise of protected statutory and constitutional rights. Similarly, it is unconstitutional for the government to prosecute an individual because the prosecutor has a personal animus against the defendant.

Because it is constitutionally repugnant, selective prosecution constitutes a valid defense to a criminal charge. In order to establish a case of prosecutorial vindictiveness, the defendant must prove that: (1) others who are similarly situated to

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<sup>1</sup> The burden on a defendant asserting a selective prosecution claim is exacting; so exacting, in fact, that the Commonwealth was unable to find a single reported decision in which a selective prosecution claim was successful. The absence of any reported precedential case highlights just how demanding Pennsylvania courts have been with these claims and the evidence required for an evidentiary hearing and relief.

the defendant are not generally prosecuted for similar conduct; and (2) the defendant has been intentionally and purposefully singled out for prosecution for an invidious reason.

*Commonwealth v. Butler*, 533 A.2d 105, 108-109 (Pa. Super. 1987) (citations omitted).

Defendant's as-yet completely undeveloped selective prosecution claim would be frivolous because there have been **five** independent determinations of probable cause: first, the grand jury issued a presentment recommending the criminal charges; second, the supervising grand jury judge approved the presentment; third, Montgomery County District Attorney Risa Vetri Ferman, after her office's investigation, concluded that criminal charges were warranted; finally, a neutral and detached magisterial district judge held the charges for court after two individual preliminary hearings. Because there is indisputably probable cause to believe that "the accused committed [offenses] defined by statute," this Office did not abuse its discretion in filing the criminal complaint against her. *Id.* at 108 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

Further, under a selective prosecution claim, the only decision subject to review is the **charging** decision, which was made in this case by former District Attorney Ferman. The Commonwealth believes that the defendant does not intend to challenge that charging decision. Instead, it believes that she intends to attack Frank Fina and Marc Costanzo, in yet another chapter in her long-running feud with those individuals. However, Fina and Costanzo had no role in the charging decision in this case. The history of the case is dispositive

on this issue: there was a grand jury investigation, the grand jury issued a presentment recommending criminal charges, Judge Carpenter approved it and referred the matter to this Office, this Office conducted its own independent investigation, and former District Attorney Ferman ultimately decided to bring criminal charges. Because Fina and Costanzo had no role in the charging decision in this case, the claim would fail as a matter of law. See *Commonwealth v. Murphy*, 795 A.2d at 1002-1003 (holding that selective prosecution claim failed where, *inter alia*, it was based on allegedly improper motives of persons not in control of the charging decision).

Finally, it should be noted that defendant's selective prosecution claim is strictly a pretrial issue. Selective prosecution "is not a defense on the merits and not a matter for presentation to the jury." *Commonwealth v. Stetler*, 95 A.3d 864, 892 (Pa. Super. 2014); see also *United States v. Armstrong*, 517 U.S. 456, 463 (1996) (same); *Commonwealth v. Butler*, 601 A.2d 268, 270 (Pa. 1991) (same).

RESPECTFULLY SUBMITTED:



KEVIN R. STEELE  
DISTRICT ATTORNEY

**VERIFICATION**

Subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities, I declare that the statements of fact in the foregoing Commonwealth's Response to Defendant's Omnibus Pretrial Motion are true and correct to the best of my knowledge, information, and belief.



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Kevin R. Steele  
District Attorney

Date: April 6, 2016

**CERTIFICATE OF SERVICE**

I, Thomas W. McGoldrick, do hereby certify that I have caused a copy of the foregoing Commonwealth's Response to Defendant's Omnibus Pretrial Motion to be served on April 6, 2016, upon the following:

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Thomas W. McGoldrick  
Deputy District Attorney

Date: April 6, 2016