

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

2017 JAN -4 AM 11:45

COMMONWEALTH OF PENNSYLVANIA	:	
Appellee	:	No(s). CP-46-CR-6239-2015
	:	
v.	:	CP-46-CR-8423-2015
	:	
KATHLEEN G. KANE	:	
Appellant	:	

REVISED STATEMENT OF MATTERS COMPLAINED OF ON APPEAL
PURSUANT TO Pa.R.A.P. 1925(b)

TO THE HONORABLE WENDY DEMCHICK-ALLOY, JUDGE OF SAID COURT:

AND NOW, this 4th day of January, 2017, pursuant to Pa.R.A.P. 1925(b), comes the Defendant/Appellant, Kathleen G, Kane, by and through her attorneys, Joshua. D. Lock, Esq. and Goldberg Katzman, PC, and presents the following Revised Statement of Errors Complained of on Appeal:

1. Denial of Motion To Recuse. The motion was part of the Defendant's Omnibus Pre-Trial Motion filed March 4, 2016. The motion requested the recusal of all judges of the Montgomery County Court of Common Pleas, based on the fact that Judges William R. Carpenter, Carolyn T. Carluccio, and Risa Vetri Ferman were all directly or closely connected to the case. The Court denied the motion by Order entered March 28, 2016.

2. Denial of Motion To Suppress Evidence. The motion was part of the Defendant's Omnibus Pre-Trial Motion filed March 4, 2016. The motion requested the suppression of all evidence and testimony gathered by or derived from the Thirty-Fifth Statewide Investigating Grand Jury in connection with Notice No. 123 and Presentment No. 60, since the appointment by

Supervising Judge of the Grand Jury William R. Carpenter of Special Prosecutor Thomas Carluccio with sweeping powers to, *inter alia*, utilize a Statewide Investigating Grand Jury, subpoena witnesses and documents, and issue a Presentment, was unlawful and unconstitutional. The Court denied the motion by Order entered March 28, 2016.

3. Denial of Motion for Bill of Particulars. The motion was part of the Defendant's Omnibus Pre-Trial Motion filed March 4, 2016. The motion requested particulars as communicated to the Commonwealth by letter dated October 20, 2015 and again set forth in the Defendant's Memorandum of Law in Support of Attorney General Kathleen G. Kane's Omnibus Pre-Trial Motion, (p. 46-47), filed simultaneously with the Omnibus Pre-Trial Motion on March 4, 2016. No Bill of Particulars was ever provided by the Commonwealth. The Court denied the Defendant's Omnibus Pre-Trial Motion by Order entered March 28, 2016.

4. Denial of Motion To Dismiss Perjury and False Swearing Counts as Duplicitous. The motion was filed as part of the Defendant's Omnibus Pre-Trial Motion on March 4, 2016; addressed in the Defendant's Memorandum of Law in Support of Attorney General Kathleen G. Kane's Omnibus Pre-Trial Motion, (p. 51-54), filed the same day; and finally addressed in the Defendant's Reply Memorandum of Law filed March 18, 2016, p. 17-19. The motion was based on the fact that the charges of Perjury at Count One and False Swearing at Count Two of the Information filed at No. 6239-20 15 each embraced four separate subjects and 11 separate allegedly false statements by the Defendant, as set forth in the Affidavit of Probable Cause for the Criminal Complaint at No. 6239-2015, p. 18-30. Multiple perjury offenses were thus improperly charged in one count; as multiple False Swearing offenses were likewise improperly charged in one count. The Court denied the Defendant's Omnibus Pre-Trial Motion by Order entered March 28, 2016.

5. Denial of Motion To Dismiss Obstruction Counts as Duplicitous and/or Multiplicitous. The motion was filed as part of the Defendant's Omnibus Pre-Trial Motion on March 4, 2016; addressed in the Defendant's Memorandum of Law in Support of Attorney General Kathleen G. Kane's Omnibus Pre-Trial Motion, (p. 51-54), filed the same day; and finally addressed in the Defendant's Reply Memorandum of Law filed March 18, 2016, p. 17-19. The motion was based on the fact that the two charges of Obstructing Administration of Law or Other Governmental Function at Counts Three and Four of the Information filed at No. 6239-2015 either both embraced the same three alleged episodes or both failed to differentiate which of the three alleged episodes was or were embraced within Count Three and which of the three alleged episodes was or were embraced within Count Four. See Affidavit of Probable Cause for the Criminal Complaint at No. 6239-2015, p. 37-38. The Court denied the Defendant's Omnibus Pre-Trial Motion by Order entered March 28, 2016.

6. Denial of Motion To Dismiss Official Oppression Counts as Multiplicitous. The motion was filed as part of the Defendant's Omnibus Pre-Trial Motion on March 4, 2016; addressed in the Defendant's Memorandum of Law in Support of Attorney General Kathleen G. Kane's Omnibus Pre-Trial Motion, (p. 51-54), filed the same day; and finally addressed in the Defendant's Reply Memorandum of Law filed March 18, 2016, p. 17-19. The motion was based on the fact that the two charges of Official Oppression at Counts Six and Eight of the Information filed at No. 6239-2015 embraced the same alleged episode of mistreatment of J. Wyatt Mondesire infringing upon his personal rights. See Affidavit of Probable Cause for the Criminal Complaint at No. 6239-2015, p. 39-39. A single alleged offense was thus improperly charged in two counts. The Court denied the Defendant's Omnibus Pre-Trial Motion by Order entered March 28, 2016.

7. **Denial of Motion To Dismiss Due to Selective and Vindictive Prosecution.** The motion was filed on May 26, 2016. The motion requested dismissal of all charges based on the facts extensively set forth in the motion. The Court denied the motion by Order entered June 20, 2016.

8. **Denial of Right to Present Defense.** On July 21, 2016 the Commonwealth filed a Motion *In Limine* to Exclude Evidence of Selective and Vindictive Prosecution. That motion requested that the Court exclude both: (1) evidence of selective and vindictive prosecution; and (2) evidence of pornography. See Commonwealth's Motion *In Limine*, p. 13-15. On July 25, 2016 the Defendant filed a Reply in Opposition to Commonwealth's Motion *In Limine* to Exclude Evidence of Selective and Vindictive Prosecution. The Reply stated at paragraphs 4-9 that the defense proposed to introduce evidence of "pornography discovered by the Office of Attorney General in Frank Fina's and/or Marc Constanzo's work email accounts" (paragraph 4) in order to rebut evidence that the Commonwealth proposed to introduce at trial, and repeatedly did introduce at trial, that the Defendant had a motive to publicly release Grand Jury material concerning the Mondesire case as revenge against Mr. Fina for his criticism of the Attorney General concerning the Ali case. See *e.g.*, Trial Transcript, Commonwealth Opening Statement, August 9, 2016, p. 16, 17, 23, 35. To rebut that argument and evidence by the Commonwealth, the Defendant proposed rather to show that if the Defendant had any intent to retaliate against Mr. Fina she "had a far more powerful means of retaliation at her disposal, had she been inclined to use it." Defendant's Reply, paragraph 8. Accordingly, the evidence of pornography would have been presented by the Defendant precisely to disprove the motive presented by the Commonwealth. Defendant's Reply, paragraphs 4-9. On July 28, 2016 the Court granted the Commonwealth's Motion *In Limine* to Exclude Evidence of Selective and Vindictive Prosecution.

During the Opening Statement of the Defense, counsel stated as follows:

She [Defendant Kane] promised that she would investigate the Jerry Sandusky sexual assault case. She wanted to find out why prosecutors had taken so long to bring charges, and whether that delay might have led to other children being victimized. She even brought in a prominent former federal prosecutor to lead the review, to see what was done wrong, and what could have been done better in the future. She would release, as she did, all of the findings in a public, a public report.

N.T.8/9/16, p.38-39. See a further defense reference to the Sandusky investigation, in chambers, at p.44. After objection by the Commonwealth to the above and other portions of the Opening Statement by Defense counsel, the Court ruled in part that the Defense would not be permitted to refer to “other issues involving other cases, and the way she [the Defendant] managed and handled them...” N.T. 8/9/16, p. 39. See also further statements by the Court disapproving any defense reference to “other cases” at p.41 and 42; and the Court’s final ruling at p.43-44. Prior to that ruling, Defense counsel had stated to the Court that his opening remarks, including those concerning Frank Fina, (and the Sandusky case), “goes directly to the question of her [the Defendant’s] motive.”

The Defendant was thus prohibited from introducing evidence on the theory of her defense, that contrary to the Commonwealth’s repeated arguments that the Mondesire documents were released to the *Philadelphia Daily News* as revenge by the Defendant against Frank Fina and/or other former employees of the Office of Attorney General, the Defendant actually had other, more effective and lawful means available for that purpose, if she was so inclined, including evidence concerning pornographic emails and the handling of the Sandusky investigation, among other matters. This same and other proffered evidence would also have been relevant in support of the defense that Ms. Kane would not have risked everything she had worked for and achieved by actions which were both unlawful and needless. This evidence was relevant and admissible,

especially in view of the fact that the entire theme of the Commonwealth's Opening Statement was that Defendant Kane had released the Mondesire documents for the purpose of accomplishing "revenge" against Frank Fina and/or other former employees of the OAG.

In all of these ways the Defendant's ability to present evidence in support of her theory of the case was foreclosed.

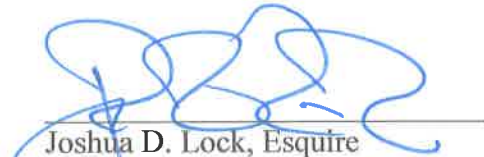
9. Objection to jury instruction. A timely objection was made to the Court's instructions to the jury (Charge of Court). Specifically, Ms. Kane objected to the Court's instruction to the jury as to what constitutes secret grand jury information, and that not all information relating to grand jury proceedings is secret. Rather, grand jury secrecy applies only to prevent unauthorized disclosure of matters occurring before the grand jury. In particular, it was alleged by the Commonwealth that Ms. Kane illegally and unlawfully released, or caused to be released, secret grand jury information without first obtaining a disclosure order permitting the release of any such information; to wit, a 2009 Memorandum authored by Deputy Attorney General William Davis, Jr. to Chief Deputy Attorney General Frank Fina, et al. concerning a 2009 grand jury investigation, transcript of interview pertaining to a 2009 grand jury investigation and/or two e-mails pertaining to a 2009 grand jury investigation. Ms. Kane requested that the Court so instruct the jury prior to the Court beginning its charge to the jury. However, the Court refused to so instruct the jury in this regard, and therefore denied Ms. Kane's requested jury instruction.

Respectfully submitted,

GOLDBERG KATZMAN, P.C.

Date: January 4, 2017

By:



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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a copy of the foregoing document upon the person(s) and in the manner indicated below. The manner of service satisfies the requirements of the Pa.R.Crim.P. 575 and Pa.R.A.P. 121:

Service via inter-office mail:

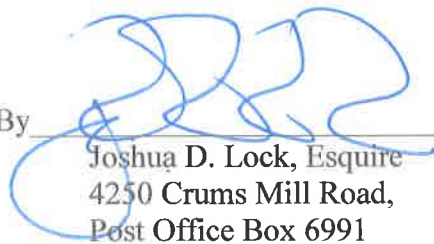
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Date: January 4, 2017