

STATE OF INDIANA)
) SS: IN THE MARION COUNTY SUPERIOR COURT 32
COUNTY OF MARION) CRIMINAL DIVISION

STATE OF INDIANA)
)
 v.)
) CAUSE NO. 49D32-2004-MR-013622
ELLIAHS LAMAR DORSEY)

STATE'S VERIFIED MOTION FOR RECUSAL

Comes now the State of Indiana, by its Prosecuting Attorney Ryan Mears, and files this Motion for Recusal pursuant to Ind. R. Crim. P. 12(B), 12(D)(2), and I.C. 35-36-5-2(1). Comments by the Honorable Mark Stoner at a hearing on March 17, 2023, regarding the potential referral of the Marion County Prosecutor's Office to the Disciplinary Commission, demonstrate bias and prejudice against the State and prevents the State from continuing to seek a fair and just resolution to this case. As the State became aware of the need for recusal at the March 17, 2023, hearing, the State now timely files this Verified Motion for Recusal and submits an accompanying Affidavit as required by Ind. R. Crim. P. 12(B), 12(D)(2), and I.C. 35-36-5-2(1).

Factual Background

On April 14, 2020, the State filed charges under 49G06-2004-MR-013622 alleging that the Defendant did knowingly or intentionally kill Breann Leath on April 9, 2020. The Probable Cause Affidavit filed under that cause and signed by Sgt. Mark Prater alleged that Breann Leath was a police officer with the Indianapolis Metropolitan Police Department on April 9, 2020.

On January 26, 2021, the State filed a Request for a Death Sentence alleging an aggravating circumstance under I.C. 35-50-2-9(b)(6)(A), namely, that Breann Leath was acting in the course of her official duty as a law enforcement officer when she was murdered.

On January 23, 2023, Defendant filed a Motion to Dismiss the Request for a Death Sentence (Defendant's Pleading #69) arguing that the Request should be dismissed because the State cannot prove beyond a reasonable doubt that Defendant knew Breann Leath was a law enforcement officer when he committed the murder. On March 8, 2023, the State filed a response to the Motion to Dismiss, arguing that the question of fact related to Defendant's knowledge is an issue for the factfinder at trial and not a proper basis for a Motion to Dismiss under I.C. 35-34-1-8. The Court held a hearing on the Motion to Dismiss on March 17, 2023.

At the March 17, 2023, hearing, when asked by the State what burden of proof the Court would be using to analyze the Motion to Dismiss, the Court responded, "at this juncture I think it's basically, uh, whether or not there is a good faith belief that the State has sufficient evidence to satisfy a prima facie case on the issue of actual knowledge to present to a jury in a death penalty case." (Trans. p. 21 l. 22 – p. 22 l. 2).¹

The Court's position is contrary to *State v. Bilbrey*, 743 N.E.2d 796, 798 (Ind. Ct. App. 2001), which held that, "when a defendant files a motion to dismiss an information, the facts alleged in the information are taken to be true" and that "it is improper for a trial court to grant a defendant's motion to dismiss an information when it is based on

¹ The State first became aware of the need for recusal at the March 17, 2023, hearing. In an effort to file timely its Motion, the State ordered a recording of the hearing through The Record Xchange and then prepared the unofficial transcript that is referenced in this Motion and accompanying Affidavit. The transcript will be filed contemporaneously with this Motion as a supporting document and a copy of the audio recording will be provided to defense counsel.

sufficiency of the evidence.” *See also Delagrang v. State*, 951 N.E.2d 593, 594-95 (Ind. Ct. App. 2011) (“Questions of fact to be decided at trial or facts constituting a defense are not properly raised by a motion to dismiss.”).

Nonetheless, the State has satisfied the Court’s own standard for proceeding with the Request for a Death Sentence, as the Court stated, “no one questions that the officer was an officer in the line of duty,” (Trans. p. 9 l. 4-5) and that “no one questions, I think, at this point, at least, I haven’t seen ~, that the defendant is the person that killed.” (Trans. p. 9 l. 5-7). The Court’s comments indicate a willingness to render a final judgment on a very specific factual issue that, by the Court’s own admission, is supported by the Probable Cause Affidavit.

The Court Equates Granting the Defendant’s Motion to Dismiss as Finding That the State is Acting Unethically

At the March 17, 2023, hearing, the Court also raised, sua sponte, an ethical concern that had not been argued by Defendant. The Court expressed the following:

I have concerns that if the State of Indiana is not able to prevail in good faith that the defendant had actual knowledge that the officer was a police officer at the time that he fired the shots, I am concerned about, uh, a prosecutor with that knowledge using in any way the death penalty as a plea bargaining leverage as to whether or not that complies (inaudible) with the rules of professional responsibility 3.8. (Trans. p. 13 l. 21 – p. 14 l. 5).

The issue of “good faith” was not the subject of the Defendant’s Motion to Dismiss, nor was it an issue raised by the defense related to the discovery process or other aspects of the case. The Court appears to base its concern primarily on the Probable Cause Affidavit and submissions made by the parties at the hearing on the Motion to Dismiss. The State declined to present evidence because a hearing on a motion to dismiss is not an opportunity to pre-litigate the trial. The State indicated to the Court that it intends to present the issue of Defendant’s knowledge with regards to the alleged aggravator to the jury at trial and it is

not appropriate to consider factual issues during a motion to dismiss hearing, to which the Court responded:

You may never get to that point, on a death penalty issue if I don't have it now. I am telling you that in my role in dealing with super due process, that I intend to deal with this issue now. Particularly if it is a violation of ethics. Because if the court believes that there isn't sufficient information to do that, the court would ~, one ~, have to consider removing the death penalty charge, dismissing death penalty qualified counsel. And also potentially sending the record over to the board of commissioners in terms of judicial qualifications and professional responsibility. (Trans. p. 17 l. 15 – p. 18 l. 2).

Certainly, a Court's indication that it intends to rule against the State is not in and of itself grounds for recusal; instead, the Court, here, has indicated that it believes that a ruling against the State *is effectively the same* as finding that the State acted unethically or in bad faith.

At the March 17, 2023, hearing the Court noted with respect to possible plea negotiations:

I believe that you cannot file a death penalty uh, without having sufficient evidence, you cannot file it, uh, without evidence and then use it in any way as a plea negotiation tool. I believe that creates, I believe that creates real ethical problems under 3.8. (Trans. p. 20 l. 8-13).

Returning to the issue of possible plea negotiations, the Court stated:

I am not interested at this point in what there have been ~, what negotiations have occurred. I am very concerned about this legal issue, whether or not negotiations could occur where part of the negotiation would be the State would drop death penalty in exchange for ~, that's my concern, that's my ~, that's my concern as to whether or not you could legally, ethically do that if there is an absence of evidence that gets you to a good faith showing to a jury that aggravator exists. That's what I'm concerned about. So, I don't want to do it ~, the rest of it, cause it would only confirm whatever concerns I have. I want to know, just, as an ethical posture, whether or not the government can use the death penalty as a negotiating tool if the government lacks good faith to believe the mitigator, specific evidence on the mitigator exists. (Trans. p. 37 l. 7-22).

The Court's Bias and Prejudice Against the State Necessitate Recusal

The Court's comments demonstrate a bias and prejudice against the State's Request for a Death Sentence such that the State's ability to further prosecute this case has been severely impaired.

"In considering a motion for change of judge, the challenged judge's ruling does not depend upon a self-assessment of actual bias or prejudice. The judge must instead determine whether the historical facts presented in support of the motion lead to a rational inference of bias or prejudice." *Allen v. State*, 737 N.E.2d 741, 743 (Ind. 2000). "The test for recusal is whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality," and "Indiana has always leaned toward recusal when reasonable questions about impartiality exist." *Cannon v. State*, 839 N.E.2d 185, 193 (Ind. Ct. App. 2005) (internal citations omitted) (transfer granted, 866 N.E.2d 770 (Ind. 2007), on issue solely related to *ex parte* communications).

Here, an objective person would have a reasonable basis for doubting the judge's impartiality. The Court stated that it intends to make a final judgment on the State's Request for an aggravator at the motion's stage. The Court's stance on the State's Request of a Death Sentence also prejudices the State's ability to further prosecute this case. The State is now in the position that an adverse ruling by the Court on the Motion to Dismiss may result in a referral of the Marion County Prosecutor's Office to the Disciplinary Commission. The Court's comments therefore serve as enticement for the State to dismiss the death request in exchange for avoiding an ethics complaint. The Court's comments also serve as a deterrent to the State potentially appealing an adverse ruling on the Motion to Dismiss, which would be the State's right under I.C. 35-38-4-2(a)(1).

The Court's comments also prohibit the State from engaging in any plea negotiations in this case, as the Court indicated that any bargained-for agreement that results in the

dismissal of the sentencing enhancement, “would only confirm whatever concerns I have.” (Trans. p. 37 l. 17-18). The Court’s comments regarding any potential plea agreement are particularly troubling because the Court implies that the state acted in bad faith by filling the enhancement. The decision to prejudge any potential plea agreement as bad faith demonstrates the Court’s bias and prejudice.

The Court’s comments at the March 17, 2023, hearing “lead to a rational inference of bias or prejudice” but more importantly, they will affect the outcome and impair the fairness of a just disposition in this matter. *Allen*, 737 N.E.2d at 743. The Court’s potential referral of an ethics complaint has prejudiced the State’s ability to prosecute this case to completion – either through trial or plea negotiations – without fear of reprisal through a possible referral to the Disciplinary Commission. Recusal is therefore necessary.

Respectfully Submitted,

/s/ Ryan Mears
Ryan Mears, 26486-49
Prosecuting Attorney

Verification

I swear (affirm), under penalty of perjury as specified by IC 35-44-2-1, that the foregoing representations are true.

/s/ Ryan Mears
Ryan Mears, 26486-49
Prosecuting Attorney