

FILED

STATE OF INDIANA) IN THE DEARBORN SUPERIOR COURT II
COUNTY OF DEARBORN)
STATE OF INDIANA) GENERAL TERM 2011
V.)
CLERK OF DEARBORN CIRCUIT COURT)
DANIEL BREWINGTON) CAUSE NO. 15D02-1103-FD-084

MOTION TO DISMISS FOR INEFFECTIVE ASSISTANCE OF COUNSEL

Daniel Brewington moves the Court to dismiss all pending charges against the Defendant for denial of counsel and denial of his right to speedy trial in this matter.

A. Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel are reviewed under a two-part test: (1) a demonstration that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms and (2) a showing that the deficient performance resulted in prejudice. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

(1) A DEMONSTRATION THAT COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS BASED ON PREVAILING PROFESSIONAL NORMS

The Defendant had two public defenders assigned to represent the Defendant in this matter. The first public defender assigned by Judge Blankenship was John Watson. The second public defender assigned by Judge Hill was Bryan Barrett. The legal services provided by the public defenders fell below an objective standard of reasonableness based on the following:

a. Indiana Rules of Professional Conduct– Rule 1.1

“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.” During the period of representation by Watson and Barrett the Defendant has not had any discussion with either Watson or Barrett concerning the matters before the Court in any detail, neither Watson nor Barrett have provided the Defendant with any information concerning factual or legal elements of the charges asserted against the Defendant, or provided the Defendant with the methods or procedures to be used in the defense of the charges.

The Defendant is indigent and entitled to competent handling of the charges asserted against him. The public defenders assigned to the Defendant’s case have not inquired of the Defendant concerning any facts related to the charges, have not inquired of the Defendant the witnesses necessary for trial to testify on behalf of the Defendant, or discuss with the Defendant the expert witnesses necessary for the trial of this matter. Attached are communications from the Defendant’s family to Barrett concerning documents or witnesses for the trial. The Defendant has been denied effective assistance of counsel as neither Watson nor Barrett have demonstrated a knowledge of the basic requirements of the Indiana Rules of Professional Conduct as the Defendant has not received the benefit of the public defenders demonstrating the ability of the public defenders to handle the Defendant’s case as neither Watson nor Barrett have inquired of the Defendant the factual issues regarding the charges or explained to the Defendant the legal elements of the charges against the

Defendant.

b. Indiana Rules of Professional Conduct– Rule 1.2

“A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.” During the period of representation neither Watson nor Barrett have conferred with the Defendant concerning the objectives of representation or the means by which the objectives of representation are to be pursued. The Defendant has not been contacted by Barrett since July 2011 and Barrett has failed to discuss the case with the Defendant. The Defendant has been unable to “impliedly” authorize Barrett to do anything as there is no contact between the Defendant and Barrett. Further, motions filed by the Prosecutor are approved or unopposed by Barrett without consultation with the Defendant.

c. Indiana Rules of Professional Conduct– Rule 1.3

“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client.” Neither Watson nor Barrett have consulted with the Defendant concerning hearings held by the Court, discussed the Defendant's rights in the Court, or otherwise communicated with the Defendant. The Defendant, although persistent concerning his desire to understand the charges asserted against the Defendant and the evidence to be utilized at the trial, has not received

the benefit of counsel at any time to review any document (only the grand jury transcript) provided by Barrett. The Defendant received the grand jury transcript less than seven days prior to trial in the mail from Barrett. The public defenders have not reviewed one document with the Defendant at any time while the Defendant has been incarcerated for the past six months.

d. Indiana Rules of Professional Conduct– Rule 1.4

“A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law or assistance limited under Rule 1.2(c).
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Neither Watson nor Barrett informed the Defendant of the purpose of court hearings, consulted with the Defendant concerning what the client's objectives were in the litigation much less how the court hearings would accomplish the client's objectives, failed to consult with the client concerning how the client's objectives would be accomplished as the attorneys never determined what the client's objectives were, failed to keep the Defendant informed of the status of the matter or

requests to take action on behalf of the Defendant, and failed to comply with reasonable requests for information, such as discovery provided by the Prosecutor, subpoena witnesses, or communicate with me. Further the attorneys failed to consult with the Defendant or explain anything to the Defendant to make informed decisions regarding representation of the Defendant. Finally, Barrett refused to accept telephone calls from the Defendant and failed to visit the Defendant after repeated promises to visit the Defendant at the Dearborn County Law Enforcement Center. Barrett advised the Defendant he was not permitted to contact Barrett's office after Barrett refused to communicate with the Defendant or answer the Defendant's phone calls.

e. Rule 1.6. Confidentiality of Information

“A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.”

Barrett revealed to the Court information concerning the Defendant’s desire to maintain the Defendant’s right to a speedy trial. The Defendant has been incarcerated for in excess of six months with no assistance from counsel assigned to represent the Defendant. The Defendant never communicated to the Court at any time the Defendant’s desire not to waive the Defendant’s right to speedy trial but the Court, after the Defendant made a request for a continuance, stated the Defendant desired a speedy trial, “was adamantly opposed to a continuance,” and the continuance would be denied. The information concerning the Defendant desiring a speedy trial was only communicated to the Defendant’s counsel. The communication to the Court of the Defendant’s desire for a speedy trial by Defendant’s attorney without consultation or approval by the Defendant breaches the confidentiality requirements between the lawyer and a client. The breach is even more horrendous when the attorney does not disclose the necessity to disclose the information to the Court to the Defendant. The obvious lack of communication with the Defendant is problematic, but the communication with the Court in a manner to jeopardize the Defendant’s right to speedy trial and effective representation, is more egregious.

f. Rule 1.14. Client with Diminished Capacity

“When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other

reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(d) This Rule is not violated if the lawyer acts in good faith to comply with the Rule.

The allegations asserted in the grand jury transcript refer to the Defendant's paranoia and ADHD repeatedly throughout the grand jury transcript. The Defendant has not been interviewed by a psychologist or psychiatrist at any time during the period of the Defendant's incarceration. The Defendant has available professional witnesses to address the claims contained in the grand jury transcript concerning the treatment of the Defendant's ADHD and address the paranoia issue. The attorneys assigned to the Defendant took no action to consult with healthcare professionals concerning the Defendant's physical or mental condition, do not understand or are indifferent to the need for the Defendant's medication to assist in the defense of the charges, and failed to consult with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

The public defender's investigator upon being informed the Dearborn County Sheriff required an order from the Court to permit the Defendant to appear in street clothes at trial, advised the Defendant's mother the individual the Defendant spoke to at the jail was imaginary or the individual with the Dearborn County Sheriff's office did not know what he/she was talking about. The Defendant repeatedly attempted to communicate with the public defender concerning the issue of appearing in street clothes at trial and the public defender did nothing to file a motion with the Court as required in the jail handbook.

g. Rule 1.16. Declining or Terminating Representation

"Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

The public defenders assigned to the Defendant's case have taken actions or failed to act in accordance with the Rules of Professional Conduct as the public defenders have failed to interview one character witness, no mental health professionals who have treated the Defendant, failed to assess the necessity of medication necessary for the Defendant to assist in the Defendant's trial, or take appropriate action to investigate allegations by the Prosecutor concerning representations at the most recent bond hearing.

h. Rule 3.3. Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. Amended Sep. 30, 2004, effective Jan. 1, 2005.

The Prosecutor has introduced evidence in this matter the Prosecutor knows to be false or failed to verify the accuracy of the representations/evidence presented to the Court. Once the evidence was presented to the Court, and after the Prosecutor knew or should have known the information to be false, the Prosecutor has failed to take any action to correct the false evidence submitted to the Court. Further, the Defendant has been unable to have assigned counsel bring this

matter to the attention of the Court either as a result of the Defendant's counsel to investigate the false evidence or complete indifference to the representations made by the Prosecutor concerning the bond set in this matter. The evidence concerning the "drive by" solicitation is factually inaccurate as proven by the records of the Hamilton County, Ohio, Justice Center. The Defendant was never in the presence or even in the same building as the individual who provided information to Shane McHenry concerning the alleged "drive by." The Defendant attempted to have the public defender investigate the matter and the public defender has not responded to any inquiries.

Further, the Defendant is even more alarmed that information demonstrating the allegations by the Prosecutor and McHenry are false, and nothing is done by the Court, the public defender, or the Prosecutor to correct the false statements.

i. Rule 3.4. Fairness to Opposing Party and Counsel

"A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." The Defendant acquired information the evidence presented by the Prosecutor concerning the "drive by" hit is false, the information was false at the time presented, and due to the lack of diligence of the Prosecutor and the investigator, the information was presented as truthful, when the Prosecutor and investigator knew or should have known the testimony was false. The Court set bond or refused to reduce bond based on the false information supplied by the Prosecutor and the investigator.

j. Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given

reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. The Prosecutor has pursued the prosecution of the Defendant when any reasonable person in a similar position knows or should know the information presented to the grand jury is false or not relevant to the charges asserted against the Defendant.

A review of the grand jury transcript makes reference to guns/firearms approximately 63 times. There is nothing on the Defendant's blog urging anyone to take up guns/firearms against anyone. The Prosecutor mentions murder approximately 19 times during the grand jury transcript and there is nothing contained in any of the blog postings referring to murder at any time. The Prosecutor makes reference to mental illness/ADD approximately 35 times during the grand jury transcript and the Defendant is denied his medication for ADHD, the public defender has not conferred with any health care professionals concerning the matter, the public defender refuses to obtain the case file from Connor to verify any of the information presented by Connor at the grand jury to use for impeachment; and the Prosecutor refers to rape, murder, and mental illness approximately 20 times in the grand jury transcript. The Prosecutor bootstraps the foregoing allegations to obtain an indictment against the Defendant in violation of law.

k. Ineffective Assistance of Counsel– hearings

The Defendant has advised Barrett of witnesses necessary for the hearing and Barrett has not

subpoenaed any character witnesses, not interviewed the Defendant's health care providers, or otherwise investigated this case. Further, Barrett has not reviewed with the Defendant the request from the Prosecutor for a motion in limine or the request for an anonymous jury at any time. Barrett has not obtained transcripts of the hearings to determine what occurred at the arraignment or otherwise moved to dismiss or suppress any statements by the Defendant at any time, including the interview of the Defendant in Ohio when Sheriff Kreinhop, then with SCU and under the direction of Prosecutor Negangard, interviewed the Defendant after Kreinhop was informed by the Defendant's Ohio counsel the Defendant was not to be interviewed.

2. A SHOWING THAT THE DEFICIENT PERFORMANCE RESULTED IN PREJUDICE

The Defendant has no witnesses, no review of the discovery with the Defendant's counsel, and no communication with Defendant's counsel concerning the case in more than two months and the trial date is October 3, 2011. The Defendant states no reasonable interpretation of the foregoing could be considered an adequate performance.

The Court selected the public defenders assigned to the Defendant. . The person who selected the attorney will have to suffer the consequences of choosing counsel unwisely. *Indiana Court Times*, 4/13/2011. The blame is not on the Defendant.

If the Court or the Prosecutor desires to raise the issue of the blogsite postings, the Court and the Prosecutor should look at the dates of the postings to determine when the postings were made and how much time passed for either Watson or Barrett to take some action on behalf of the Defendant.

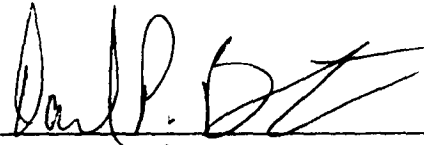
3. MOTION TO DISMISS

The Defendant moves the Court for an order of dismissal as the actions of the Prosecutor in securing the indictment, the actions of Judge Blankenship in the handling of the arraignment and the setting of an exorbitant bond, the false testimony of McHenry and the presentation of the false testimony by the Prosecutor, the assignment of two public defenders who did nothing to represent the Defendant, and the failure of the Court to appoint effective counsel to assist the Defendant requires dismissal of the charges against the Defendant. The Defendant has been incarcerated for more than six months and the Defendant's right to a speedy trial have been eviscerated by the actions of ineffective counsel, the Prosecutor, and the assignment of counsel by the Court.

The Court has appointed two public defenders to represent the Defendant and the Defendant has been woefully served by the counsel appointed. The public defenders took no action to dismiss the indictment where the grand jury was overreached and deceived in a significant manner by the Prosecutor. The review of the transcript demonstrates the Prosecutor permitted the witnesses to elicit or testify concerning matters not within the realm of experience of the witnesses and deliberately misled the grand jury to indict the Defendant as the only means to take away the Defendant's right to carry or possess a firearm. Further, the Prosecutor permitted the witnesses to delineate what they perceived or thought were the parameters of a citizen's First Amendment right when none of the witnesses had knowledge of same or, if it is argued that Judge Humphrey was knowledgeable of the First Amendment, Judge Humphrey's interpretation of the First Amendment has no basis in law or fact.

The Court, the Prosecutor, and the witnesses maybe upset with the Defendant's postings, but the avenue to resolve their differences is not through a flawed grand jury process utilized by an

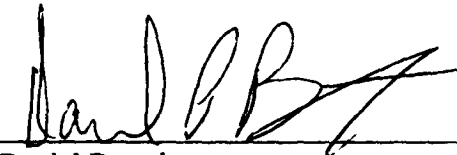
overzealous Prosecutor who has no concern for the constitutional rights of Americans. The Prosecutor went forward when at least two other police agencies determined the postings were not criminal.



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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was hand delivered to upon all parties or counsel of record including F. Aaron Negangard, Prosecuting Attorney, Dearborn County Courthouse, Lawrenceburg, Indiana 47025 this 3 day of October 2011.



Daniel Brewington