

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Petitioner,

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

HUMBERTO S.,

Real Party in Interest.

No. B193386

(Super. Ct. No. TJ15419)

ORIGINAL PROCEEDING. Petition for Writ of Mandate. Mark R. Frazin, Juvenile Court Referee. Petition denied; stay lifted.

Steve Cooley, District Attorney of Los Angeles County, William Woods and Tracey Lopez, Deputy District Attorneys for Petitioner.

No appearance for Respondent.

Michael P. Judge, Public Defender of Los Angeles County, Albert J. Menaster, Kelly O'Brien and Mark Harvis, Deputy Public Defenders for Real Party in Interest.

In this case, members of the Los Angeles County District Attorney's office were ordered recused from further participation in a juvenile proceeding in light of a series of pre-trial motions. This action was not precipitously or lightly taken by the trial court, nor should it have been. When, however, the record presents evidence that prosecutors in a

matter may fail to exercise their discretion in an appropriate manner, jeopardizing the right to a fair and just trial, such an order is a proper exercise of the court's discretion.

FACTUAL AND PROCEDURAL BACKGROUND

Real Party in Interest, minor Humberto S. was charged on December 27, 2005 in a juvenile court petition with a violation of Penal Code sect. 288.5, subdivision (a). During pre-trial preparations, counsel for the minor subpoenaed the medical and psychotherapy records of the alleged victim, Samantha F. During April and May 2006, a series of hearings concerning the disclosure of these records was held; following those hearings, minor filed a motion to recuse members of the prosecutor's office in this matter. The court granted the motion on August 21, 2006. The People filed these writ proceedings on August 25, 2006.¹

The records of the psychotherapist were subpoenaed to the court for April 10, 2006, and at that time the bench officer temporarily assigned to the matter provided the records to minor's counsel. Deputy District Attorney Hu ("Mr. Hu") appeared for the People. On May 11, 2006, the records were turned over to the People by minor's counsel, and the People, appearing through Deputy District Attorney Chiu ("Mr. Chiu"), objected to minor's possession of the reports on the grounds that the proper procedure for their subpoena and review had not been followed. At that time, minor's counsel indicated that he had also subpoenaed Samantha's medical records, which had been inadvertently opened prior to being brought to court. The court ordered that all records received by minor's counsel be turned over to the court, and that a hearing be scheduled on the procedure followed with respect to both sets of records.

Later that afternoon, minor's counsel represented in open court that he had spoken to Samantha's mother ("Mother"), who had been told by Mr. Hu on April 10 that minor's

¹ The People also filed an appeal from the order of disqualification. To achieve a prompt resolution of this matter, this Court issued an order to show cause on September 14, 2006; that order stayed further proceedings in the matter.

counsel had the psychotherapy records; that she had previously given consent for disclosure of those records; and that she was currently consenting to their release. Counsel also represented that he had an additional conversation with Samantha's father ("Father"), who had also consented to disclosure. The court set the matter over for hearing on May 15, 2006, and ordered the People to have both parents present at that hearing .

On May 15, 2006, the People filed a motion to quash both subpoenas, asserting that minor had failed to comply with the procedural requirements of Penal Code section 1326 and Evidence Code section 1560; that the records were privileged and had been produced without prior consent; that privilege had not been waived by prior production of limited medical records or by Samantha; and that the court could not authorize disclosure without a *Hammon*² hearing, which could not be held pre-trial. At the hearing, minor objected to the People's participation in the hearing; after the objection was overruled, mother testified.³ Mother stated she had not given consent to the People or minor for access to her daughter's records; she also testified that she and Father had joint and equal rights to make decisions about Samantha's treatment and care. The court indicated that, because the remaining issues would be moot if consent had been given, it was necessary to have testimony from Father. The hearing was continued to May 18, 2006.

On that date, Father testified that he had been called the previous week by minor's counsel concerning consent to access the psychotherapy records, and, as a consequence, called Mother to determine her position. According to him, Mother wished to talk to the District Attorney before deciding; she called him back to report she had spoken to the District Attorney and that "everything was okay." Accordingly, on May 11, Father gave his consent for release of the records to minor's counsel.

² *People v. Hammon* (1997) 15 Cal.4th 1117.

³ Father did not appear; Mr. Chiu advised the court he had attempted no contact with father concerning the hearing.

On cross-examination, Father was questioned about custody issues, and testified that there was a mutual agreement as to custody, as a result of which both parents have the right to seek medical treatment for the victim. On questioning by the Court, Father testified that he wanted the records released, even knowing that Mother did not wish them to be. The court tentatively ruled that Father's consent, given in court, was adequate. Mr. Chiu then asserted that Father's consent was insufficient, and urged the court to find that Mother's consent was necessary, despite the fact that there was no evidence of any family court order to that effect and that both parents had testified that each had the right to make medical decisions for Samantha. At the People's request, the matter was put over again to permit them to determine if such a family court order existed.

On May 19, Mr. Chiu reported to the court that no family law order existed, but asserted that the court did not need to follow the presumptions of Family Code section 3083 to allow Father alone to consent. When the court indicated its intent to resolve the issue consistent with its tentative ruling, Mr. Chiu then requested the appointment of a guardian ad litem for Samantha to assert her privilege. In addition, the People filed a written motion asserting a new ground to prohibit the disclosure, Health & Safety Code., section 123115; the hearing was continued again to permit argument on that motion.

The final hearing took place on May 23, 2006. After argument, the court denied the new motion, finding it to be unsupported by legal authority. After a brief recess, another member of the District Attorney's office, Ms. Boldin, appeared, indicated she had consulted with her appellate division, and asked the court to stay the release of the records; the request was granted. On June 20, 2006, this Court denied the People's writ petition challenging the disclosure order.

On July 10, 2006, the minor moved to disqualify the District Attorney's office pursuant to Penal Code section 1424, based on the proceedings discussed above and the asserted failure to respond to other discovery requests. The Attorney General's office appeared on behalf of the District Attorney's office and argued the motion on August 16, 2006; on August 21, 2006, the court granted the motion, in open court, finding that: "The

defense has provided the court with arguments and the legal authority for recusal by showing that a conflict of interest exists that is so great as to make a fair trial unlikely. In this case, the conflict arose when the prosecution sought to represent third-party interests in a juvenile delinquency proceeding. Thus, the court grants the motion as to the recusal of Deputy District Attorney Ken Chiu. Second, since the supervisors of the Compton District Attorney's officer were involved in the prosecution's case against Humberto [S.] and sanctioned the third-party representation it is likely that the conflict has spread to other deputy district attorneys." The court denied the motion to recuse the entire District Attorney's office, finding only the specified members disqualified.

DISCUSSION

This writ proceeding is not directed to the rulings of the trial court on the pretrial disclosure of Samantha's records; instead, the question before us is whether the trial court abused its discretion in recusing specified members of the District Attorney's office. The trial court's ruling was not made in a vacuum, but instead in the context of the proceedings that it observed in the courtroom. It is the trial court that is in the best position to determine whether the statutory standard, that "the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial," has been satisfied. (Pen. Code⁴, § 1424, subd. (a)(1).) Accordingly, that evaluation is remitted to the sound discretion of the trial court. (*People v. Connor* (1983) 34 Cal.3d 141, 148.)

In exercising its discretion, the trial court is charged to recognize the unique role of the prosecutor's office in our criminal justice system. Because the power and duty to charge individuals with crimes and to conduct the prosecution is vested in that office, those who make those decisions must both be, and appear to be, impartial.

"The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals. 'The prosecutor speaks not solely for the victim or the police, or those who support them,

⁴ All further references are to the Penal Code unless otherwise noted.

but for all the People. That body of “The People” includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name.’ [Citation.] Thus the district attorney is expected to exercise his or her discretionary functions in the interests of the People at large, and not under the influence or control of an interested individual. [Citation.]” (*People v. Eubanks* (1996) 14 Cal.4th 580, 589-590.)

When a recusal motion is filed, the trial court has the serious responsibility to determine whether the evidence shows it is unlikely that the defendant will receive a fair trial because the prosecutor may not exercise its discretionary function in an even handed manner. (*People v. Griffin* (2004) 33 Cal.4th 536, 569.) The trial court, to make its findings, must consider the totality of the circumstances to determine whether fair treatment of the defendant is likely in the case before it. (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 847.) Those findings must be supported by substantial evidence, and, on review, we must also determine whether the court abused its discretion. (*People v. Eubanks, supra* 14 Cal.4th at p. 594.)

The record before us demonstrates both substantial evidence to support the trial court’s findings and no abuse of discretion in determining that the actions of various members of the District Attorney’s office made it unlikely that the minor would be treated fairly during the remaining portion of the proceedings.

A. The Standard for Recusal

The standard for the interpretation of section 1424 was set in *People v. Connor, supra*, 34 Cal.3d 141, a case in which defendant, awaiting trial, attempted escape, pointing a firearm at the deputy district attorney and firing a shot which did not hit the deputy. After additional charges were filed relating to the escape, the deputy was removed from the case; the defendant moved to recuse the entire district attorney’s office. The trial court denied the motion as to the original charges, but granted it as to the charges relating to the attempted escape. On review, the Supreme Court upheld the trial court’s determination. Noting that the enactment of section 1424 changed the prior

standard, enunciated in *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, the Court concluded that the legislation permits both actual and apparent conflicts of interest to serve as the basis for disqualification “when the presence of either renders it unlikely that the defendant will receive a fair trial.” (*People v. Connor, supra*, 34 Cal.3d at p. 147.) The Court defined a conflict for these purposes as existing “whenever the circumstances of a case evidence a reasonable possibility that the DA’s office may not exercise its discretionary function in an evenhanded manner.” As a result, “there is no need to determine whether a conflict is ‘actual,’ or only gives an ‘appearance’ of conflict.” (*Id.* at p. 148.)⁵

In *People v. Eubanks, supra*, 14 Cal.4th 580, the Supreme Court returned to the question of appearance of impropriety as a basis for disqualification. In that case, the alleged victim contributed financially to the District Attorney’s investigation of the case; the trial court found this a conflict of interest, and, on review, the Supreme Court found no abuse of discretion in that determination.⁶ After reviewing the critical importance of the impartial exercise of the discretionary authority vested in the District Attorney’s office, the Court concluded that section 1424 precluded the use of the appearance of impropriety standard as an independent ground for recusal. (14 Cal.4th at p. 592.) The critical analysis in determining the existence of a conflict instead is that “the likelihood that the defendant will not receive a fair trial -- must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness.” (*Ibid.*) Determining that the facts

⁵ In reviewing the trial court’s action to determine whether substantial evidence supported its holding, the Supreme Court deferred to the trial court which was in a better position to assess the likely impact of the circumstances. (*People v. Connor, supra*, at p. 149.)

⁶ The trial court failed to make a finding as to whether the conflict was so severe that fair treatment of defendants was unlikely, but, because the record would support the exercise of discretion to make that finding, the order was affirmed. (*People v. Eubanks, supra*, 14 Cal.4th at p. 594.)

supported the conclusion that this first part of the test -- the existence of a conflict -- had been met, the Court looked to the second portion of the test: “whether the conflict is so grave as to make fair treatment of the defendant unlikely if the district attorney is not recused. In the absence of contrary evidence, we assume a trial court applied the correct legal standard. [Citation]” (*Id.* at p. 598.) This review of the finding that the conflict was disabling is on an abuse of discretion basis.

Subsequently, other cases raised different aspects of the application of the rule. In *Millsap v. Superior Court* (1999) 70 Cal.App.4th 196, the issue on appeal was whether the entire Los Angeles District Attorney’s office should be recused following charges that defendant solicited the murder of two deputy district attorneys assigned to the case. Holding that only the two deputies who were the targets needed to be recused, the trial court found no conflict that required recusal. (70 Cal.App.4th at p. 199.) On appeal, the Court reviewed the trial court’s determination concerning the existence of a conflict to determine if there was substantial evidence to support its factual findings, and reviewed the determination as to whether the conflict required recusal, and the scope of that recusal, for abuse of discretion. (*Id.* at p. 200.) The Court found no conflict that justified the recusal of the entire office, but agreed with petitioner that a real potential for actual prejudice arose from the continued involvement of the target deputies in the prosecution of the solicitation of their murders. (*Id.* at p. 203.)

In a pair of companion cases decided this year, Division Six of this district re-examined the disqualification standards again. (*Haraguchi v. Superior Court* _____ Cal.App.4th _____ [06 D.A.R. 13458] (Oct.5, 2006, (No. B191161) and *Hollywood v. Superior Court* _____ Cal.App.4th _____ [06 D.A.R. 13533] (Oct. 5, 2006, No. B188550).)⁷

Haraguchi involved a challenge to a prosecutor who, while prosecuting the case against defendant, was also actively promoting her novel which described a similar crime

⁷ On October 16, 2006, after briefing was completed, the Office of the Public Defender gave notice that it would cite these cases at oral argument.

and included details from defendant's case. The trial court denied defendant's motion to recuse both the individual prosecutor and the office, finding neither a conflict nor the likelihood that defendant would not receive a fair trial. Recognizing the test set forth in *Eubanks*, and the deferential standard of appellate review, the Court nonetheless reversed the denial of recusal as to the individual prosecutor because "[T]his court has an independent interest in policing conflicts of interest and safeguarding the constitutional rights of the accused." The Court described the prosecutor's continuing participation as not only unseemly, which would be an insufficient ground for recusal alone, but also as a disabling conflict of interest, which is properly the basis for removal. The prosecutor sought to obtain financial gain through her official position, and risked infecting the jury pool with the views expressed in her novel. Her desire to make her book successful, and her perspective on the role of law enforcement, which as expressed in the book appeared "so one-sided in favor of the prosecution and victims" was the basis for concluding that she "might not exercise her discretionary functions in an evenhanded manner" as required by law. Such a conflict, the Court found, is disabling.

In *Hollywood*, the prosecutor assigned to the case cooperated with, and gave significant information to, a producer making a film about the crime at issue while defendant was a fugitive. The defendant sought to recuse the entire District Attorney's office; after an evidentiary hearing, the trial court concluded that the prosecutor had neither violated the law nor acted out of an improper motive in cooperating with the filmmakers, and denied the motion. On review, the Court applied the standards set forth in *Haraguchi*, but placed great importance on the fact that the case involved the death penalty. The Court concluded that justice would not be served if the cooperating prosecutor remained on the case; however, on the record presented, there was no basis to recuse the entire office.

Like all of the Courts that have reviewed this question, we conclude that the test to be applied here, in reviewing the order of the trial court, remains: is there a conflict of

interest; and, if so, is that conflict so severe as to disqualify the district attorney from acting?⁸

B. The Pattern of Prosecutorial Action Satisfies The Standard for Recusal

The cases we have already discussed do not present factual scenarios analogous to this case, in which the prosecution made significant efforts to prevent disclosure of the victim's records after their subpoena by minor. To decide this case, we do not find it necessary to reach minor's argument that the prosecution may never move to quash a third-party subpoena; objection in the trial court to a failure to comply with the procedural and statutory requirements does not, by itself, mandate a finding of a disabling conflict of interest.

In *Bullen v. Superior Court* (1988) 204 Cal.App.3d 22, the prosecutor's office filed a writ petition to challenge a discovery order allowing the defense in a murder trial access to the victim's widow's home. In upholding the widow's right to privacy, the Court recused the prosecutor from further participation in the writ proceedings, finding that "Petitioner and the district attorney cite no statute, and we are aware of none, authorizing the district attorney to represent a third party in discovery proceedings in a criminal action." (*Id.* at p. 25.) Because there was no demonstrated prejudice to the defendant, no further recusal was required.

Unlike *Bullen*, the prosecutors in this case were not acting outside their role in the initial challenge to the procedures followed with respect to the subpoenaed documents. There was no financial entanglement with the victim, or involvement as a witness or victim. Unlike *Haraguchi* and *Hollywood*, no personal gain- financial or professional- was alleged or proven. But, like *Haraguchi*, the actions of the deputy district attorneys involved in the motion practice in the trial court demonstrated a one-sided perspective on the role of the prosecution and an apparent attempt to represent the victim's interest in protecting her privacy that exceeded the exercise of balanced discretion necessary to

⁸ *People v. Eubanks, supra*, 14 Cal.3d at p. 594.

ensure a just and fair trial.⁹ The motion practice here evidenced a continuous effort, based on constantly shifting grounds, which appeared designed not to adhere to the statutory procedures to preserve the integrity of the process, but instead to block minor's counsel from access to records potentially critical to his defense. Had the prosecutor's office ceased its efforts after Father consented in open court, after examination by the court, to the disclosure, the record might not have supported the order of recusal.¹⁰ But the efforts to block access to the records did not cease at that point; instead continuing assertion of new grounds caused delay and additional hearings, impeding defense preparation for trial. This record reveals substantial evidence supporting the trial court's finding, and demonstrates no abuse of discretion.

CONCLUSION

The petition is denied, and the stay of proceedings is lifted.

CERTIFIED FOR PUBLICATION.

ZELON, J.

We concur:

JOHNSON, Acting P. J.

WOODS, J.

⁹ At oral argument, petitioner argued that Mr. Hu's involvement in the matter was insufficient to require his recusal. While Mr. Chiu appeared at the majority of the hearings at issue, the record reveals that Mr. Hu discussed the initial production of records and disclosure with Mother in April, and was involved in subsequent discussions concerning her intent to prevent disclosure. This record was sufficient to support the trial court's exercise of its discretion.

¹⁰ Had the trial court ordered recusal at that point in the proceedings, the record might still have supported a finding of disabling conflict based on the failure to attempt to produce Father at the court's request. We need not reach this issue, as substantial evidence based on the entirety of the record does support the order in this case.