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Geauga County Prosecuting Attorney

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Via Email

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Re: *State of Ohio v. Michael Burkons*
Geauga County Court of Common Pleas
Case No. 21C000044

Dear Ms. Scalise:

In follow up of our telephone conversation yesterday, please be advised that I have had an opportunity to review the documents related to the above-captioned case that were delivered to our Clerk of Courts from the Shaker Heights Municipal Court. Not surprisingly, I cannot find any case similar to this one that would provide guidance as to how the prosecution should proceed. However, based upon my review of the Shaker Heights docket, Ohio Revised Code, Criminal Rules, and Procedural Posture of this case, it remains my opinion that you do not have the authority to prosecute this matter in the Geauga County Court of Common Pleas.

Ordinarily, when a criminal matter has transferred venue pursuant to Ohio Crim.R. 18, the prosecuting attorney would not change. Ohio Crim.R. 18(B)(3) states:

(3) Additional counsel for prosecuting attorney. The prosecuting attorney of the political subdivision in which the action originated shall take charge of and try the case. The court to which the action is sent may on application appoint one or more attorneys to assist the prosecuting attorney in the trial, and allow the appointed attorneys reasonable compensation.

I agree under normal circumstances that the above-cited provision would unequivocally provide you with authority to continue to prosecute this matter. Upon reviewing the case documents, I believe:

1. The municipal court did not have the authority to appoint you as special prosecutor;

2. Even if the municipal court possesses such authority, you were not properly appointed special prosecutor; and
3. As a municipal prosecutor, you do not have statutory authority to prosecute matters in the Court of Common Pleas.

It is well settled that with respect to criminal matters, a Court of Common Pleas has inherent power to appoint a special prosecutor where the prosecuting attorney has a conflict. *State ex rel. Corrigan v. Seminatore* (1981), 66 Ohio St.2d 465. Common Pleas courts have a number of inherent powers as courts of general jurisdiction. Municipal courts, on the other hand, have limited powers that are set by statute. R.C. 1901.13 sets forth the powers of a municipal court and does not include any provision for appointment of a special prosecutor. I could not find any case law where a municipal court was found to have the inherent authority to appoint a special prosecutor when there is a conflict. The powers of a municipal prosecutor are found in R.C. 1901.34(A) and they are vested in the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court. Based upon the case law and the fundamental differences between municipal courts and common pleas courts, I believe the proper procedure for a municipal prosecutor to transfer a case to a special prosecutor would be through an act of the legislative authority of the municipality.

As discussed above, even if the municipal court had the power to appoint a special prosecutor in this matter that was not done. On September 14, 2020, the Beachwood City Prosecutor filed a motion to withdraw as counsel and appointment of special prosecutor in the Shaker Heights Municipal Court. A proposed order was included with the motion. The court did not adopt the order but instead filed a journal entry on September 28, 2020 which stated “Beachwood City’s Prosecutor’s motion to withdraw from case is granted.” It is a bedrock principal of Ohio law that a court only speaks through its journal entries. *San Filippo v. San Filippo* (1991), 81 Ohio App. 3d 111, 112. Shaker Heights Municipal Court never issued an order appointing a special prosecutor in this matter. The journal entry only permitted withdrawal of the Beachwood City Prosecutor. Again, it was incumbent upon the legislative authority to then retain a special prosecutor to take over the case. Even if the municipal court was empowered to appoint special prosecutors, the Shaker Heights Municipal judge never did that here.

Finally, notwithstanding Ohio Crim.R. 18, a municipal prosecutor has limited statutory authority and is not permitted to prosecute matters in a court of common pleas. R.C. 1901.34(A) states in pertinent part as follows:

- (A) Except as provided in divisions (B) and (D) of this section, the village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court

shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which that person is the solicitor, director of law, or similar chief legal officer.

Similarly, the powers and duties of the county prosecuting attorney are set forth in 309.08(A) which states in pertinent part as follows:

(A) The prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, except for those required to be prosecuted by a special prosecutor pursuant to section 177.03 of the Revised Code or by the attorney general pursuant to section 109.83 of the Revised Code, and other suits, matters, and controversies that the prosecuting attorney is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals.

Once this matter was transferred to the Common Pleas Court, your authority as a municipal prosecutor to handle this case terminated. The statutory limits on your authority trump any provisions in the Rules of Criminal Procedure. Since this matter is now pending in the Geauga County Court of Common Pleas and there is no properly appointed special prosecutor, my office is the prosecuting authority pursuant to R.C. 309.08(A).

Upon receipt of this correspondence, I would greatly appreciate it if you could forward your file to me so that my office can review it. Thank you for your kind attention to this matter. If you should have any questions or wish to discuss this further, please do not hesitate to contact me.

Very truly yours,



James R. Flaiz
Prosecuting Attorney

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cc: Peter Pattakos, Esq. (via email peter@pattakoslaw.com)
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