IN THE

Indiana Supreme Court

IN THE MATTER OF: CAUSE NO. 19S –DI - 574

TIMOTHY BOOKWALTER
Respondent

REPORT OF HEARING OFFICER

This matter was before the Hearing Officer on the Commission's Complaint filed October 16, 2019 and the Answer of the Respondent filed December 11, 2019. A hearing was held on August 7, 2020, at which time substantial documentary evidence was submitted by both the Commission and the Respondent. In addition, testimony was received by witnesses presented by the Respondent only. The Hearing Officer took the matter under advisement pending submission of the proposed findings and conclusions of both parties. Having now received those proposed findings and conclusions and having considered the issues raised, the Hearing Officer now submits the following Report, and his recommendation to the Court.

1. Timothy Bookwalter (hereafter Respondent) is an attorney in good standing, who was admitted to practice law in the State of Indiana on October 9, 1981, subjecting him to the Court's disciplinary jurisdiction.

2. The Respondent serves as the elected prosecuting attorney in Putnam County, Indiana.

3. The Disciplinary Complaint arises from the trial of an individual named Justin Cherry (hereafter Cherry) in Putnam County, Indiana. Cherry was tried on June 11, 2018 before

a jury. The Respondent prosecuted Cherry. A fairly detailed statement of the facts and circumstances of the Cherry trial are needed in order to frame the alleged violation and to understand the conclusions reached by the Hearing Officer.

4. Cherry was prosecuted for his role in a violent home invasion committed on April 2-3, 2017 in Putnam County. In that home invasion, an elderly couple was accosted, threatened with guns, and the husband was hit in the head with the butt of a gun. The blow to the head caused significant injury to the victim, due to a brain bleed. Cherry and his three accomplices stole, among other things, the couple's vehicle, jewelry, checkbooks, cash, guns and prescription drugs.

5. During the course of the investigation of the crime, the couple's vehicle was found in Indianapolis, close to Cherry's residence. A witness saw someone exit from the vehicle, and watched them walk to the residence. The witness noted the license number and called the police.

6. Upon learning of the stolen vehicle in the neighborhood and the observations of the witness, the Putnam County Sheriff's Department secured a warrant to search the residence. The warrant was executed on April 17, 2017 and resulted in finding many of the items stolen during the burglary, including the victim's handgun. The gun was found in a vent in the floor of Cherry's bedroom. In addition to the gun, gloves were found in Cherry's bedroom that were similar to those used by the perpetrators of the crime. Boots substantially matching a boot print found at the crime scene were also recovered from Cherry.

7. At the time of execution of the search warrant, Cherry, two co-defendants and a young man named Michael Hostetter (hereafter Hostetter) were found on the premises. Hostetter was subsequently discovered to have been in the Indiana Boy's School when the home invasion

occurred, and had no role in the underlying crimes. Hostetter *did* have certain information about the crime, and it is this information and the manner in which it was procured and presented that resulted in the filing of the Disciplinary Complaint.

8. As a part of the investigation of the crime committed in Putnam County, Hostetter was interviewed while he was incarcerated on an unrelated case. The interview took place at the Marion County Jail on May 11, 2017, and an officer from the Indianapolis Police Department interviewed Hostetter in the company of an officer from the Putnam County Sheriff's Department. During that interview, Hostetter was asked for any information he had about the Putnam County case, including about the identity of any participant in the crime, specifically someone known only as "Drake".

9. Hostetter was reticent about providing any help, as he feared for his safety and the safety of his family. In order to assuage those fears, Putnam County Sheriff's Officer Pat McFadden (hereafter McFadden) assured Hostetter that if his information proved useful, he would not need to be mentioned in case documents filed in the criminal cases. In essence, no one would know that he assisted law enforcement.

10. Hostetter then revealed that while he only knew "Drake" by his first name, he described him to the officers and offered to accompany them on a drive-by of "Drake's" residence. In addition, Hostetter claimed that certain perpetrators of the crime were concerned that the "old man" got hurt. Apparently McFadden was able to use some of the location information in eventually identifying "Drake" as Charles Maybaum.

11. During the interview, additional representations were made to Hostetter about a case he had pending in Parke County if he assisted the officers. Those offers of assistance came from Officer McFadden.

12. The offers of assistance made by McFadden included the following:

a. That McFadden had a good amount of influence with law enforcement in Parke County (where Hostetter had a case) and that he felt that he could put in a good word for Hostetter with the officer there on his case; and,

b. That Hostetter's cell phone (which had been a recent gift from his mother) would eventually be returned to Hostetter after it was no longer needed.

13. Shortly over a month later, charges were filed in Putnam County against Cherry and the co-defendants. As a part of the Affidavits of probable cause and witness lists filed in those cases, Hostetter's name was mentioned together with certain information he was said to have provided.

14. The Respondent was not aware that McFadden had assured Hostetter that his assistance to law enforcement would not need to be mentioned in those documents. While the tape of the interview was available to the Respondent at that time, he had not viewed it before making the charging decisions. Unfortunately, due to the character of the co-defendants in the home invasion case, Hostetter was inadvertently put in danger.

15. On September 17, 2017, *counsel for Cherry* was given a copy of the video interview between McFadden and Hostetter, which contained the representations made to Hostetter. Cherry's counsel acknowledged receipt of the same prior to trial. It appears that counsel for Cherry did not review the video, as had it been reviewed, the potential for a "deal' in return for assistance was clearly discussed.

16. On January 9, 2018, pursuant to a plea agreement, Hostetter was sentenced for a felony burglary conviction in Parke County to 4 years of incarceration with 2 years suspended.

17. On January 29, 2018, Respondent and McFadden visited Hostetter in the Parke

County Jail. Respondent's intent was to then begin preparation for the upcoming trial in Cherry's case. At that time, Hostetter was angry. Hostetter would not disclose any information to the Respondent or to McFadden, believing that his safety had been compromised and that McFadden had not lived up to his representations in the May 11, 2017 interview.

18. When the Respondent returned to his office in Putnam County on that date, he made his first viewing of the May 11 interview with Hostetter. It was his determination after viewing the interview that Hostetter had good reason to be angry. The Respondent also felt that he had unknowingly put Hostetter in danger with the filing of the charges, discovery and probable cause affidavits that outlined Hostetter's contributions to the several home invasion cases pending in Putnam County. The Respondent then set out on a course of conduct to try to accomplish what he believed to be consistent with the representations made by McFadden to Hostetter for Hostetter's already completed cooperation in the case.

19. On that same date, the Respondent instructed McFadden by letter to release Hostetter's phone to Hostetter's mother.

20. On February 12, 2018, the Respondent traveled to the Indiana Department of Corrections facility in Plainfield, Indiana, and met with Hostetter again for a second visit. During that meeting, Hostetter informed the Respondent that he had been called "a snitch" by one of Cherry's co-defendants who was then held in the prison system, and he felt his safety was in jeopardy. Later that same day, the Respondent instructed his Victim Assistant to send an email to the Department of Corrections to make certain that Mr. Hostetter was not being housed with Paul Reese Jr., who was one of Cherry's co-defendants and was an inmate at the Indiana Department of Corrections.

21. Again on February 12, 2018, the Respondent contacted Kevin Stalker (hereafter

Stalker) of the Parke County Prosecutor's Office about Hostetter. In that phone conversation, the Respondent discussed a possible modification of Hostetter's Parke County sentence that would remove him from any jeopardy while serving the sentence he had already received in Parke County. Stalker also was told about the representations made to Hostetter by McFadden.

22. One day later, Stalker sent an email to the Respondent reciting what he believed his conversation with the Respondent to be:

> *Per our conversation, I would agree that State will NOT oppose modification to a Direct Commitment to house arrest contingent on Mr. Hostetter testifying truthfully at deposition and trial of all co-defendants in Shelby, Putnam, Owen and Parke Counties.*

23. On February 16, 2018, the Respondent once again visited Hostetter while he was incarcerated. The Respondent had not yet been able to discuss the Cherry case with Hostetter and was still attempting to prepare for trial. Hostetter again voiced his serious concerns with his safety. It can be inferred that at this time the Respondent related to Hostetter that he had contacted Stalker, and had received word that Stalker would not object to a modification to home detention if a petition were filed.

24. On March 5, 2018, Hostetter filed a motion in Parke County to have his sentence modified to home detention. On the following day, the Respondent sent an email to Stalker, asking him to relate his position about the modification to the judge in Putnam County. Unfortunately, that did not happen quickly enough, as the judge in Parke County denied Hostetter's Motion the following day without a hearing.

25. Upon learning that the judge had denied Hostetter's Motion without a hearing, Stalker asked the judge to set a hearing, and to have Hostetter transported for the same. On April 3, 2018, the modification hearing was held wherein Hostetter requested that he be placed on home detention and Stalker made no objections. About two weeks thereafter, Hostetter's Motion

was granted and he was placed on home detention on the sentence out of Parke County. At this point, any deal made with Hostetter by McFadden for Hostetter's cooperation had been fully completed, under those terms that had been related to Hostetter in the May 11, 2017 interview.

26. Sometime between Hostetter being placed on home detention in Parke County and the date of Cherry's trial, the Respondent and McFadden went to Hostetter's home to prepare for the Cherry trial. At that time, Hostetter related that while he was with Cherry, Cherry said that he had gotten the .38 handgun "from the old man's nightstand."

27. Cherry's trial began on June 11, 2018. On June 12, 2018, and while on home detention, Hostetter appeared to testify at Cherry's trial. Hostetter's testimony linked Cherry to the home invasion case in two indirect ways. First, Hostetter testified that Cherry stated "it was a good thing Drake wasn't there" during the execution of the search warrant; and second, that Cherry stated he had gotten the .38 handgun "from the old man's nightstand". Hostetter did not testify about who the "old man" was, as Cherry's statement did not relate that information to him. Hostetter further was not cross-examined about the offers to assist him made by McFadden in the May 11, 2017 interview.

28. After Hostetter testified and the trial concluded for the day, Cherry's defense attorney became suspicious that Hostetter had received a deal in exchange for his testifying in the Cherry case. His suspicion was not aroused by the McFadden interview, but by a report made to him that when Hostetter was in the hallway, he had stated to another individual that he was going to "f*** up Justin Cherry" to get out of his own cases.

29. Prior to the start of the next day's proceedings, the judge reviewed with all parties the information that he had received from Cherry's attorney regarding a possible "deal" that was not disclosed by the Respondent and related to the testimony of Hostetter. At that conference the

Respondent disclosed his emails with Stalker, and explained on the record that he called Mr. Stalker and stated "two things. I said, Pat McFadden originally said he'd put a good word in for you and he didn't. And I'm telling you he did those things. And the second thing that I did facilitate was I said there's a safety issue here in my opinion."

30. The Respondent further stated that he had checked the Court's "discovery rules" and that he did not have a duty to disclose an agreement made to testify in another county in a matter unrelated to the Cherry case.

31. In spite of his belief that he did not have such a duty to disclose his actions related to Hostetter, the Respondent did not object to the following curative measures:

a) A five-day continuance of the trial so that further investigation of any deal could be done.

b) Hostetter was brought back to the courthouse for Cherry's counsel to interview and to call to the stand for impeachment purposes if he so desired.

c) Stalker to be brought to court as a witness about any deal.

d) A final jury instruction that read as follows:

> *The State of Indiana has a duty to timely disclose any information about witness contact or assistance to the Defendant. The State did not disclose it had contacted the Parke County Prosecutor about Michael Hostetter's request for modification of his sentence. The defendant was unaware of that communication when Mr. Hostetter testified.*

32. During the intervening five day continuance, Cherry's counsel interviewed Hostetter. Hostetter informed him that "he was not promised anything to testify" in Cherry's case.

33. Given Hostetter's response to the question of a deal, Cherry's counsel decided not to call Hostetter as a rebuttal witness. Instead, Cherry's counsel called Stalker who testified about his communications with the Respondent. The Stalker emails were also put into evidence.

34. At the conclusion of the evidence and argument on June 18, 2018, the jury convicted Cherry on all counts.

35. Cherry took a direct appeal following his conviction, resulting in a Court of Appeals decision on June 21, 2019.

36. That decision laid out the significant evidence against Cherry, including:

a. cell phone tracking data putting Cherry near the scene when the offense occurred,

b. the boot print similar to Cherry's boot and found at the scene,

c. distinctive gloves like those worn by the perpetrator,

d. the victim's handgun found in Cherry's room, in a vent

e. the victim's jewelry at Cherry's apartment, and

f. the victim's safe at Cherry's apartment.

37. After reviewing the opinion of the Court of Appeals, it appears that Hostetter's testimony was not considered to be necessary to Cherry's conviction. In fact, the opinion did not mention Hostetter's testimony at all.

38. At the disciplinary hearing on August 7, 2020, the Respondent stated that the best practice would have been to disclose any communication he had with any prosecutor relating to a witness in the Cherry proceedings. He conceded that did not occur.

39. The Disciplinary Commission conceded during the final hearing and in its briefing that the Respondent, in the Cherry trial, complied with the notice requirements found in *Brady v. Maryland,* 373 U.S. 83 (1963), and that Cherry received a "fair trial."

The Violation Alleged in the Disciplinary Complaint

Rule 3.8(d) states in pertinent part that "[t]he prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal".

In its Disciplinary Complaint filed against the Respondent, the Disciplinary Commission alleged that "by the Respondent's untimely disclosure to the defense (of) the deal the Respondent helped to facilitate between Stalker and Hostetter, in exchange for Hostetter's cooperation in a case the Respondent was prosecuting, the Respondent has violated Ind. Prof. Cond. R. 3.8(d)."

It is the position of the Disciplinary Commission that even though the Respondent may have complied with *Brady v. Maryland* by making disclosure *during trial*, of the alleged deal with Hostetter, Ind. Prof. Cond. R. 3.8(d) requires more of a prosecutor. In other words, the Disciplinary Commission believes that the Indiana Supreme Court should adopt a standard of disclosure that is not co-extensive with Brady and its progeny when considering whether a Prosecutor met his ethical obligation to disclose under Ind. Prof. Cond. R. 3.8(d).

The Respondent's Defense

In making his defense to the Complaint filed by the Commission, the Respondent presented evidence disagreeing with several key ideas proposed by the Commission.

First, the Respondent disagreed that a deal had been made that was required to be reported by the Respondent.

Second, the Respondent disputed that (even if a deal had been made that needed to be reported) the Commission had presented sufficient evidence to show that a violation of the Rule had occurred. Much of this defense centered around the question of whether the testimony of Hostetter was material to the defense in Cherry's trial.

Finally, the Respondent submitted evidence that he was a man of good character, and that if there was a violation of the Rule, it was unintentional and not deserving of any significant sanction.

Conclusions of the Hearing Officer

It is the considered opinion of this Hearing Officer that the Commission has not met its burden of proof to show that the Respondent violated Ind. Prof. Cond. R. 3.8(d); and, that even if this Court were to find that the Commission's interpretation of the rule was correct, the Respondent should not be punished for violating a new interpretation of the Rule.

Was there an undisclosed "deal" that required disclosure to defense counsel?

After a review of the evidence submitted by counsel, it appears that both parties have failed to differentiate between whether there was *more than one* deal made with Hostetter in Cherry's case.

In viewing the evidence, an original offer had been made to Hostetter during the May 11, 2017 interview for his assistance in the case. That offer had been made by McFadden, but not effectively communicated to the Respondent until after the Respondent had inadvertently violated the terms of the offer.

After reviewing the Afffidavit of Probable Cause submitted by McFadden, it would be hard to imagine that the State had *not* received significant assistance from Hostetter. In that Affidavit,

he pointed the finger at more than just Justin Cherry. It was therefore reasonable for the Respondent to believe that the State had not lived up to its side of the bargain.

When the Respondent became aware of the terms presented to Hostetter in the interview, he set about a course of conduct that was meant to honor the terms of that deal. Those terms were completed when, in the middle of April of 2018, Hostetter's Motion to Modify his sentence was granted, giving Hostetter the privilege of serving his DOC sentence on home detention.

This "original deal" was effectively disclosed to the defense in the May 11, 2017 interview that had been provided to Cherry's counsel. All of the terms were there, and had Cherry's counsel reviewed the video he certainly would have been informed that some consideration must have been given to Hostetter. This apparently was what the Respondent was trying to convey to the Court during Cherry's trial when he referred to the interview being on video, and having been given to Cherry's counsel significantly prior to the trial.

Because Cherry's counsel had this information for some time prior to trial, then the Respondent could not have violated the Rule based upon this "deal" not being disclosed.

The issue then becomes whether a "second deal" was entered into as a result of the communications between the Respondent and Stalker, which were represented to be contingent upon the continued cooperation of Hostetter in the several counties mentioned in Stalker's summary email of February 13, 2018. This Officer believes that the Commission's evidence of such a deal has not been proven clearly and convincingly.

From the testimony and demeanor of the Respondent, it is clear that when he was acting to work out a change in Hostetter's commitment to the Department of Corrections in Parke County, he was doing so in order to meet the obligation made by McFadden in the May 11, 2017 interview;

and, perhaps more importantly to make up to Hostetter for his own role in inadvertently exposing him to potential violence from the Putnam County home invasion defendants.

There was conflicting evidence of what was meant in Stalker's emailed summary of his conversation with the Respondent. Did the email accurately portray the conversation, or was it simply a misunderstanding by Stalker of what Hostetter was being rewarded for? It is this conflict with what happened and what was said that convinces this Officer that the evidence of a "second deal" was insufficient, and without a "second deal" there was no duty to disclose.

This conclusion is supported as well by Hostetter's own understanding. He did not think there was a deal for his testimony in Cherry's case.

Certainly as the Respondent said in his defense, the better practice would have been to notify Cherry's counsel about the communication with Stalker prior to trial. However, Cherry's counsel had the information about a potential deal with Hostetter in his file, and briefly following up on that information would have yielded the modification in Hostetter's Parke County case.

In addition, the Respondent acted appropriately in trying to remedy the perceived violation by not objecting to a continuance, by making Hostetter available for an interview and testimony, by producing the email in question, and by not objecting to a jury instruction that favored Cherry in weighing witness credibility.

Although this Officer does not believe that a violation has been proven by the required evidentiary standard, I do not presume to conclude that the Court will agree. Because of that, this Officer would add the following consideration for the Court.

If there was an undisclosed deal, what is "timely disclosure" under the Disciplinary Rule?

The Commission acknowledges that Indiana has never specifically addressed whether Ind. Prof. Cond. R. 3.8(d) requires more of a prosecutor in the way of "timely disclosure" than is

required in *Brady v. Maryland*. It further acknowledges that in this case the Respondent complied with the disclosure requirement of *Brady v. Maryland*, and that if the Court were to find that the two standards are the same, then the Respondent would not have violated the Rule.

However, the Commission points to decisions in several other jurisdictions to inform the Court of the policy issues behind whether the standards should be the same - or whether they should be different. It is the opinion of the Commission that the standards should be different, to reflect that a prosecuting attorney's role in the criminal justice system should be above reproach, and reflect a higher calling than simply meeting the requirements of the Constitution. These are certainly laudable goals and aspirations, but they must also be weighed against the possible practical effects of such a requirement.

While it is not up to this Officer to make this determination, in weighing the advantages and disadvantages of each position it seems to me that if the obligations are not co-extensive, then more mischief could develop. A partial list of those potential problems can be found in the opinion of the Tennessee Supreme Court in *In Re: Petition to Stay Effectiveness of Formal Ethics Opinion 2017-F-163*, 582 SE3d 200 (Tenn. 2019).

Regardless of how this Court comes down on that issue, this Officer finds that the Respondent did not intentionally violate the Rule or the spirit of the Rule. While the Commission has its concerns about the integrity of the Respondent in this instance, this Officer does not. The way the issue developed, the underlying uncertainty of what constituted a "deal" to be reported, and the complexity of how the issue unfolded in the midst of trial (as well as judging the demeanor of the Respondent at the hearing) convince this Officer that the Respondent did not act intentionally dishonorably.

If the Court determines that a violation occurred, then the Hearing Officer recommends that the Respondent be excused from the violation. The novelty of the issue of law and the imposition of a retrospective violation seems unfair and not in keeping with the requirements of due process as applied to the Respondent.

December 29, 2020

Daniel J. Vanderpool, Hearing Officer