

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2009-006227-001 DT

11/17/2009

HON. GARY E. DONAHOE

CLERK OF THE COURT  
S. Yoder  
Deputy

STATE OF ARIZONA

JENNIFER K LINN  
THOMAS PURCELL LIDDY

v.

ANTONIO LOZANO (001)

MARIA L SCHAFFER  
BRENT E GRAHAM  
CRAIG MEHRENS  
JOANNE CUCCIA  
DAVID JEREMY BODNEY

D & C MATERIALS-CSC  
EXHIBITS-CCC  
VICTIM SERVICES DIV-CA-CCC

**UNDER ADVISEMENT RULING**

Joanne Cuccia's request to hold Detention Officer (DO) Adam Stoddard and Deputy Sheriff Francisco Campillo in contempt of court was taken under advisement following the conclusion of the hearing on November 10, 2009. The Court has considered the testimony of the witnesses, the exhibits and the argument of counsel.

**Preliminary Matter**

Before turning to the merits of the contempt proceeding, it is clear from the evidence that Ms. Cuccia did nothing wrong. She was appointed to represent a defendant in a criminal

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proceeding and she did her job. She achieved a favorable non-trial resolution for Defendant and was in the midst of arguing for a favorable sentence when the events in question occurred. Ms. Cuccia is a dedicated attorney and there is no evidence that she engaged in any misconduct. Any news release or media report to the contrary is false.

Defendant's counsel advised the Court that she will be filing a motion to dismiss, motion for change of venue and a motion to disqualify the Maricopa County Attorney as the prosecutor. Defendant's interests directly related to his criminal case will be addressed when those motions are ruled on by this Court. The other interests affected by the events in question will be addressed in this ruling.

**The Law**

The law that applies is well established. The first applicable principle is the security officers' status in the court. In carrying out their security duties in the courtroom, the Sheriff's employees are acting as officers of the court. *See Arpaio v. Baca*, 217 Ariz. 570, ¶ 27, 177 P.3d 312 (App. 2008).

The second principle pertains to the court's authority to address in a contempt proceeding behavior that adversely impacts people in a courthouse. In *Hirschfeld v. Superior Court In and For County of Maricopa*, 184 Ariz. 208, 211 – 212, 908 P.2d 22, 25 – 26 (App. 1995), the court addressed the issue of a court's authority to control the behavior of an officer of the court when in the courthouse and wrote:

This case is not about a refusal to obey a court order. \* \* \* Thus, the basic question is whether rude and harassing behavior between persons involved in a court proceeding which occurs out of the presence of the judge when court is in recess can be a contempt of court. \* \* \*

We conclude that such behavior is a contempt of court for the very reason expressed by the trial judge—that the court has the right and the duty to protect litigants, witnesses, attorneys and jurors from misbehavior and harassment while they are in or near the courtroom, whether they are arriving, waiting, or departing. Conduct like Hirschfeld's, because it impinges on that right and duty, lessens the dignity and authority of the court. There are a number of cases which support this conclusion. We pass over, without comment, those many cases in which the conduct actually disrupted or delayed court proceedings. The cases we do rely on all concern misbehavior that occurred while court was in recess. All of them were decided under definitions of contempt that we believe equate to “contumacious conduct which lessens the dignity or authority of the court.”

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Unlike the events in *Hirschfeld*, the conduct in question occurred in front of a judge of this court. Like *Hirschfeld*, the conduct in question was done by an officer of the court. The conduct in question disrupted and delayed the sentencing proceeding. The principles discussed in *Hirschfeld* apply here and teach that control of the conduct of all those appearing in court, whether inside or outside the courtroom, must remain in the hands of the presiding judicial officer.

As noted during the hearing, this Court is aware of the competing interests involved. On one hand is the interest that court security personnel be willing and able to immediately respond to legitimate security threats occurring in the courthouse and courtrooms. To impair that interest would jeopardize all who are present in courthouses and courtrooms everyday. Court security personnel should not hesitate to respond to a legitimate threat at a critical time because of a fear that sanctions will be imposed if, in twenty-twenty hindsight, a different course of action might be deemed to have been more reasonable.

On the other hand is the competing interest of assuring that the dignity of court proceedings is not diminished. As noted above, conduct that disrupts and delays a court proceeding impacts the dignity of the court, but it also impairs the court's ability to deliver timely justice. This Court has a responsibility to ensure that counsel are not subjected to unreasonable searches and seizures by court security personnel while performing their duties in the courthouse. No attorney, either State's counsel or defense counsel, should have to be worried that a file left momentarily unattended on counsel's table in a courtroom will be searched and documents seized without a prior determination by a judicial officer of probable cause or the existence of exigent circumstances based on a good faith belief that an immediate threat exists or that immediate criminal conduct justifies a warrantless search. No attorney should have to be concerned that while they are in the courthouse, unreasonable and unlawful conduct of court security personnel will cause damage to counsel's professional reputation or result in a breach of the attorney-client privilege. To paraphrase from *State v. Hampton*, 208 Ariz. 241, ¶ 11, 92 P.3d 871 (2004), "our system of justice cannot function if dedicated defense counsel face threats of" misbehavior and harassment while in the courthouse.

**Deputy Sheriff Campillo**

Ms. Cuccia's request to hold Deputy Sheriff Campillo in contempt of court is denied. Deputy Campillo did not remove the documents from counsel's file. He was asked by his colleague to copy the documents and he did that. He returned the documents to DO Stoddard. Deputy Campillo did not read the documents. This Court finds that there is no evidence of contumacious conduct on the part of Deputy Campillo.

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**Detention Officer Stoddard**

The evidence regarding DO Stoddard compels a different result. DO Stoddard testified that he moved behind Ms. Cuccia, who was standing at the podium with Defendant, to stand by defense counsel's table so he could be in a better tactical position because of the things that he had observed in the courtroom that day and other circumstances, including his training about the tactics of the Mexican Mafia and the jail intelligence he had heard about Defendant. DO Stoddard testified that while in that position, he could see three to four inches of a document protruding from defense counsel's file. He "briefly reviewed it [the document] with his eyes" and picked up "key words." According to DO Stoddard, those key words were "going to steal" and "money," all in the same sentence. Those words do appear in the last paragraph of the first page of the document. Therefore, DO Stoddard had to have been looking at the bottom of the page while it was in the correct reading orientation. In other words, the document was not upside down from DO Stoddard's viewing position.

The FTR recording (Exhibit 2) shows the timing of the events. After moving to the table area, DO Stoddard looked down at defense counsel's file at approximately 9:26:03 a.m. and began looking at a document contained in that file. After approximately 16 seconds, at 9:26:19 a.m., DO Stoddard pulled the document farther out of the file and continued to view the document for approximately another 21 seconds (until 9:26:40 a.m.). At 9:26:41 a.m., DO Stoddard looked up and gestured to Deputy Campillo to come over to him. DO Stoddard had as many as 37 seconds to read a paragraph consisting of three lines and 28 words.

The FTR recording is revealing in another way too. To anyone who has been involved in a sentencing proceeding, the FTR recording shows what appears to be a normal sentencing proceeding. Ms. Cuccia and Defendant are standing at the podium in the well of the courtroom. Judge Flores calls the case, establishes that Ms. Cuccia is Defendant's counsel as opposed to advisory counsel and confirms Defendant's date of birth. Counsel for the State, Ms. Linn, makes her recommendation that Defendant be sentenced to the maximum aggravated prison term, consecutive to his current prison sentence. Ms. Cuccia begins to make her sentencing recommendation and everything appears normal. Ms. Linn expresses no concern about anything taking place in the courtroom. Ms. Cuccia continues her presentation. DO Stoddard is standing at the far end of the jury box and nothing about his demeanor indicates anything out of the ordinary is happening in the courtroom. Judge Flores is not heard to express any concern regarding anything going on in the courtroom. In other words, what the FTR recording shows is a totally uneventful, normal sentencing hearing until Defendant sees DO Stoddard remove the document from counsel's file. At no time is there any indication of any immediate security threat to anyone in the courtroom or any indication that criminal conduct is afoot.

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Ms. Cuccia's testimony rebuts DO Stoddard's testimony that the document was seized and reviewed because it had not previously been searched by jail personnel. Ms. Cuccia testified that the document had been in her file for approximately two months. She testified that it had not been given to her that day while reviewing the presentence report with Defendant in the jury box. The date on the document supports Ms. Cuccia's testimony that the document had been in her possession prior to October 19, 2009. Having considered all of the evidence and the demeanor of Ms. Cuccia while testifying, the Court finds Ms. Cuccia's testimony credible.

The Court finds that DO Stoddard's conduct was unreasonable. This Court finds that there was no security threat justifying the seizure of the document from counsel's file. Nor was there any evidence that a crime was being committed or about to be committed. There was no immediate or future security threat that would have justified a reasonable detention officer in DO Stoddard's situation removing, seizing and copying a document from a defense attorney's file. A reasonable detention officer would have recognized after spending approximately 37 seconds reading the paragraph in question, that the "key words" had nothing to do with an immediate or future security threat to the jail or anyone else. Even giving DO Stoddard the benefit of the doubt that he had a right to scan the entire paragraph which was in plain sight after seeing the "key words" to determine if Defendant presented an immediate security risk, nothing in that paragraph justified DO Stoddard's continued conduct of removing the document from counsel's file and having the document copied.

Like the *Hirschfeld* case, this case is not about disobeying a court order. It is about protecting a defense attorney from misbehavior and harassment by another officer of the court. It is about protecting the sanctity of the attorney-client privilege. It is about enforcing the boundaries of the 4<sup>th</sup> Amendment. This Court is of the opinion that DO Stoddard's conduct in removing the document from counsel's file and copying the document was misbehavior that impacted the court's duty to protect attorneys from unreasonable conduct and thereby lessened the dignity and authority of the court. For proof of that point, one need look no further than the media reports about this event; those reports have cast everyone involved in a negative light. The seizure violated the 4<sup>th</sup> Amendment to the Constitution of the United States. There was no prior determination by a judicial officer of probable cause. There were no exigent circumstances justifying a warrantless search. The "crime-fraud" exception is inapplicable because even a thirty-second review of the paragraph should have revealed to any reasonable person that no crime was being proposed. There was no lawful or good faith basis for the search of counsel's file and seizure of the document.

The question then becomes what remedy should be ordered? Ms. Cuccia testified that she has three concerns – retaliation against Defendant, damage to her professional reputation and the precedent that such a search of an attorney's file might set. Ms. Cuccia's concern about her professional reputation is based on her feeling that she has been linked, in information

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disseminated to the media, to two other attorneys, one of whom has been convicted of smuggling contraband into the jail for a member of the Mexican Mafia and the other who now stands accused of criminal misconduct for allegedly passing contraband while in court to an incarcerated member of the Mexican Mafia. *See* Exhibit 4.

The search is a *fait accompli* and cannot be undone by anything ordered by this Court. The document and copies have been returned to counsel except for the copy sealed by this Court. As noted above, Defendant's primary interests will be resolved in conjunction with the motions that his counsel has advised will be filed. Whether this search and seizure sets any precedent for future conduct by court security personnel may be influenced by this ruling. The only concern left to be addressed is Ms. Cuccia's perception that her professional reputation may have been damaged in the eyes of the public and her colleagues. Because it was the public dissemination of the information that may have damaged Ms. Cuccia's reputation, perhaps by the public dissemination of information, any damage can be corrected or at least lessened. Accordingly, the purge condition focuses on that concern.

For the above reasons,

**IT IS HEREBY ORDERED** denying the request to hold Deputy Sheriff Francisco Campillo in contempt of court.

**IT IS FURTHER ORDERED** holding Detention Officer Adam Stoddard in indirect civil contempt of court.

**IT IS FURTHER ORDERED** that unless timely purged as set forth below, DO Stoddard shall on December 1, 2009, report to the Maricopa County Jail and be incarcerated therein until such time as proof is presented to this Court that he has purged the finding of contempt. Failure to comply will result in the issuance of a warrant for the arrest and incarceration of DO Stoddard.

**IT IS FURTHER ORDERED** that Detention Officer Stoddard may purge the finding of contempt and the jail sanction by arranging, on or before November 30, 2009, at a time convenient for Ms. Cuccia, a news conference to take place in the plaza on the north side of the Central Court Building where he is to give Ms. Cuccia a sincere verbal and written apology for invading her defense file and for the damage that his conduct may have caused to her professional reputation. DO Stoddard shall assure that the press release announcing the news conference is sent by email and fax to all news media outlets (print and broadcast) serving Maricopa County at least 24 hours in advance of the news conference. If at the news conference, Ms. Cuccia does not state that the apology is sufficient, DO Stoddard shall report to the jail on

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December 1, 2009 and be detained until further order of this Court upon a finding that he has complied with the purge clause.

SEALED: Envelope entitled "Submission for In-Camera Review"

FILED: Exhibit Worksheet

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