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STATE OF WASHINGTON

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NO. 80720-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KITSAP COUNTY DEPUTY SHERIFF'S GUILD, and
DEPUTY BRIAN LAFRANCE and JANE DOE
LAFRANCE, and the marital community composed thereof,

Petitioner,

vs.

KITSAP COUNTY and KITSAP COUNTY SHERIFF,

Respondents.

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FILED
SUPREME COURT
STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. Those persons are also the legal advisor to the sheriff. *See* RCW 36.27.020(2).

WAPA is interested in cases, such as this, which affirm the importance of the prosecutor's obligation as a minister of justice. *See, e.g., Callahan v. Jones*, 200 Wash. 241, 248-49, 93 P.2d 326 (1939); *State v. Stentz*, 30 Wash. 134, 139-140, 70 P.241 (1902), *overruled on other grounds by State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001). A prosecutor has "the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935). Fulfilling both aims requires trustworthy police officers, whose reports and testimony a prosecutor can confidently rely upon.

II. ISSUES PRESENTED

Whether the public's interest in protecting the innocent and in convicting the guilty requires that a prosecutor's determination, that a law enforcement officer's proven record of untruthfulness, which might compromise any trial in which he appears as a witness and any search warrant

application to which he contributes information, be given significant weight in determining whether the law enforcement officer is capable of performing the essential duties of his position?

III. STATEMENT OF FACTS

Brian LaFrance, a Kitsap County Deputy Sheriff, was terminated by the Kitsap County Sheriff for untruthfulness, incompetence, and a failure to follow orders. CP 1137. LaFrance's untruthfulness was demonstrated on numerous occasions, and involved the performance of his official duties. *See, e.g.*, CP 1213-1233; Affidavit of Dennis Bonneville, CP 965-969; Affidavit of Russell D. Hauge, CP 1027-28, ¶ 5.

LaFrance and the Kitsap County Deputy Sheriff's Guild (the Guild) grieved his termination. The arbitrator that heard the grievance expressly found that "LaFrance was guilty of much more than a few isolated episodes of untruthfulness." CP 1245-47. The arbitrator, nonetheless, ordered that LaFrance be reinstated to his employment as a deputy sheriff after submitting to and successfully completing physical and psychological fitness-for-duty examinations. CP 1253.

The arbitrator's decision was reviewed by the Kitsap County Prosecuting Attorney, Russell D. Hauge. Mr. Hauge determined that the sustained finding of dishonesty would have to be disclosed to criminal defense lawyers prior to any trial, and to judges when applying for a search

warrant. Affidavit of Russell D. Hauge, CP 1027-28, ¶¶ 6 and 7. *Accord* Affidavit of Jeffrey Jahns, CP 951-53 (citing RPC 3.8; CrR 4.7(a)(3), CrRLJ 4.7(a)(3), and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)).

LaFrances credibility problems would impact the length of trials, would result in the suppression of evidence, and would compromise the State's ability to establish guilt beyond a reasonable doubt. Affidavit of Russell D. Hauge, at CP 1028-29, ¶¶ 8 and 9. *Accord* Affidavit of Randall Avery Sutton, CP 900-02. As no amount of training could eliminate LaFrance's history of untruthfulness, the Kitsap County Prosecutor would rarely, if ever, charge a case in which LaFrance is the only law enforcement witness. Affidavit of Russell D. Hauge, at CP 1029, ¶ 11.

Based upon the Kitsap County Prosecutor's assessment that LaFrance's record of untruthfulness rendered him unfit as a witness, the Kitsap County Sheriff sought, through a constitutional writ, to set aside the arbitrator's decision on public policy grounds. *See* CP 1078-86. While the superior court denied this relief, the Court of Appeals held that "the arbitration award was unenforceable as against public policy." *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 140 Wn. App. 516, 518, 165 P.3d 1266 (2007), *review granted*, 163 Wn.2d 1038 (2008).

IV. ARGUMENT

Prosecuting attorneys occupy a unique position. A prosecutor has an obligation to protect society as a whole from individuals who commit criminal acts. *See, e.g.,* NDAA, *National Prosecution Standards*, Std. 1.3 Commentary, at 9-11 (2d ed. 1991). A prosecutor also has an obligation to guard the rights of the accused, by giving a defendant a fair and impartial trial. *See, e.g., Bennett v. State*, Del.Supr., 53 Del. 36, 164 A.2d 442, 446 (1960).

Prosecutors have a large stake in the training and professionalism of local law enforcement, as their handling of a case is crucial to the prosecutor's success. NDAA, *National Prosecution Standards*, Std. 22.1 Commentary, at 81 (2d ed. 1991). This becomes clear when one considers the special rules that have been developed to prevent the conviction of the innocent.

Prosecutors have an ethical obligation to disclose all evidence or information that tends to negate the guilt of the accused or mitigates the offense. RPC 3.8(d). This ethical obligation dovetails with the defendant's due process right to be informed of all material exculpatory evidence. *See generally Brady v. Maryland, supra.* The due process right extends to impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 154,

92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1982). Discipline imposed upon an officer for untruthfulness clearly falls within the category of “impeachment evidence.”¹ See, e.g., *United States v. Bland*, 517 F.3d 930 (7th Cir. 2008) (internal investigation of police officer should be disclosed); *United States v. Holt*, 486 F.3d 997 (7th Cir. 2007) (an officer’s reputation for untruthfulness is admissible at trial).

A defendant’s due process right to be informed of all material exculpatory evidence also extends to information known to a police officer, that the officer has withheld from the prosecutor. See generally *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). When an officer, like LaFrance, has an established record of lying to superiors about the status of cases, reports, and warrants, a prosecutor cannot be confident that the officer is not withholding material information that could prevent the conviction of an innocent suspect or the integrity of a merited conviction.²

¹WAPA is unaware of any case that supports the Guild’s position that “[t]he absence of a finding of intentional lying takes this case out of the *Brady* requirement.” *Petition for Review to the Supreme Court of the State of Washington*, at 15. See also *Guild Supplemental Brief*, at 24 (“The record never establishes any deliberate untruthfulness which would invoke any *Brady* discovery obligation.”).

²A separate concern is that an officer’s withholding of potential exculpatory evidence can result in 42 U.S. 1983 liability. See *Tennison v. City & County of San Francisco*, ___ F.3d ___, 2008 U.S. App. LEXIS 24654 (9th Cir. Dec. 8, 2008).

Prosecutors have an ethical obligation to disclose adverse facts in ex parte proceedings. RPC 3.3(f). Search warrant applications, which are submitted in ex parte proceedings, must include known information adverse to the credibility of the affiant or informants. A failure to include such information may require the suppression of any evidence obtained pursuant to the search warrant. *See generally, Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 155-56, 57 L. Ed. 2d 667(1978); *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007).

Prosecutors have an ethical obligation to refrain from filing a charge that the prosecutor knows is not supported by probable cause. RPC 3.8(a). In evaluating a case for filing, a prosecutor must consider the credibility of all witnesses. A police officer witness with a proven track record of dishonesty and the accompanying, well-earned reputation for dishonesty, can give rise to a plausible “I was framed defense”, that will clearly support a “reasonable doubt” in some cases. *Cf. RCW 9.94A.411(2)(a)* (crimes will be filed when there is sufficient evidence, in light of foreseeable or plausible defenses, to convince a jury of the defendant’s guilt). In cases where the sole witness to the offense is the dishonest police officer, such as DUI arrests, the prosecutor’s ability to protect the public through a successful prosecution is profoundly compromised.

Prosecutors, like all attorneys, have an obligation to not offer evidence that the lawyer knows to be false. RPC 3.3(a)(4). Unlike other attorneys, prosecutors, as the representative of the public, have an enhanced image in the mind of the average juror. *See Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). This enhanced image can be both a blessing and a curse.

The “curse” is that jurors dislike the presentation of cases by prosecutors that rely heavily upon individuals with criminal records or histories of dishonesty. Prosecutors, therefore, must carefully evaluate how the witness came to be involved in a case, whether anyone else witnessed the event, and whether the elements of the offense may be established without the testimony. When the suspect singles out the witness as either a confidant or an accomplice or when the witness was fortuitously at the scene of the crime, jurors are fairly understanding about the witnesses’ past drug use, criminal behavior, and other peccadillos.

Police officers, however, occupy a different position. Police officers are the living embodiment of the “law” in our communities. Police officers have the power to search, to seize, and to arrest citizens. With this power, comes an obligation to act in accordance with the highest ethical and moral standards and to conduct the business of the state only in a manner that advances the public’s interest. *Hubbard v. Spokane County*, 146 Wn.2d 699,

712, 50 P.3d 602 (2002). A failure to do so incurs harsher consequences than is visited upon civilians. *See, e.g., State v. Cook*, 125 Wn. App. 709, 106 P.3d 251, *review denied*, 155 Wn.2d 1013 (2005) (extended statute of limitations apply to any felonies committed by police officers).

A prosecutor who calls a dishonest police officer to the stand – especially where the officer’s history of dishonesty relates to his official duties –undermines the integrity of the judiciary and law enforcement. Such a prosecutor can expect an erosion of public trust that may increase the number of jury deadlocks and acquittals. *See M.T. Wells and V.P. Hans, ILR Impact Brief– Evidence, Police Credibility, and Race Affect Juror First Votes*, ILR Collection Policy & Issue Briefs, Impact Brief #11 (Cornell University ILR School 2006) (study established that a jurors perception of police duplicity is one of the most critical factors affecting the jurors’ first vote); National Center for State Courts, P. Hannaford-Agor, *Are Hung Juries a Problem?*, at 75 (2002) (police credibility problems was the leading cause of 16% of hung juries and a contributing factor in another 11% of hung juries studied). The prosecutor can also expect that the jury will discount the testimony of other members of the same department as the deceptive officer.

All of the above concerns support the basic premise that a prosecutor must exercise his or her own professional judgment when dealing with an officer who has been disciplined for acts of deception. An arbitrator’s

decision that such an officer should not be terminated does not and cannot be interpreted as a requirement that a prosecutor must file charges in cases investigated by that officer. Thus, public policy requires that the effect an officer's reputation for untruthfulness will have upon his or her ability to perform the essential duties of a police officer be given due weight in the employment context.

V. CONCLUSION

Prosecutors recognize that no one is per se disqualified as a witness based upon a bad reputation for dishonesty. Public policy, however, requires truly exceptional circumstances before a dishonest police officer is called as a witness for the State.

Respectfully submitted this 22nd day of December, 2008.

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