Washington State Supreme Court

Docket No. 98613-4

IN RE CITIZEN COMPLAINT BY THOMAS STOUT,

Petitioner,

v.

GEENE FELIX,

Respondent.

CORRECTED AMICUS CURIAE BRIEF OF ADAM P. KARP

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INTEREST OF AMICUS CURIAE

The interests of the amicus is contained within the motion to file same.

ISSUES TO BE ADDRESSED BY AMICUS

Whether CrRLJ 2.1(c) violates the constitutional prohibition against separation of powers.

STATEMENT OF THE CASE

Mr. Karp adopts the statements of the case articulated by the appellant and respondent in their briefs.

ARGUMENT

The Washington Supreme Court clearly sees nothing unfitting by private criminal prosecution, having retained CrRLJ 2.1(c) without modification despite repeated accusations of unconstitutionality since 1995, having more than once made no changes despite the Washington Association of Prosecution Attorneys and District and Municipal Court Judges Association's protestations. The citizen criminal complaint rule has been Washington law (in various forms) from the early days of its statehood and even before, when it was made a territory in 1853. In 1854, thirty-five years before the Washington Constitution was approved, territorial law permitted any person to approach a superior court judge or any justice of the peace asking that a warrant be issued for misdemeanors and felonies. Ballinger Code § 6695 (1897); Remington Revised Code § 1949 (1932); Pierce Code § 3114 (1905). Indeed, early cases before the Supreme Court discuss when private citizens appeared to prefer a criminal charge against a third party. See *State ex rel. Murphy*

v. Taylor, 101 Wash. 148 (1918); *State ex rel. Romano v. Yakey*, 43 Wash. 15 (1906).

JCrR 2.01 allowed citizen criminal complaints for felonies and misdemeanors. JCrR 2.01(d)(1963); JCrR 2.01(c) (1969). The JCrRs were replaced with the CrRLJs, providing the most current version of CrRLJ 2.1(c)(last amended in 1999). The Supreme Court's power to enact JCrR 2.01 and CrRLJ 2.1(c) derives from both the constitution and statute, vesting in it "coextensive authority" to make rules with the legislature. *Sackett v. Santilli*, 146 Wn.2d 498, 506 (2002). "It is a well-established principle that the Supreme Court has implied authority to dictate its own rules, 'even if they contradict rules established by the Legislature.'" *Id*., at 504 (*quoting Marine Power & Equip. Co. v. Dep't of Transp.*, 102 Wn.2d 457, 461 (1984)). *Sackett* cites to RCW 2.04.190 as statutory reinforcement of this authority. RCW 2.04.190 provides that:

> The supreme court shall have the power … generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state.

RCW 2.04.190(1987)(emphasis added); *see also State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1 (1928)(upholding constitutionality of RCW 2.04.190) and RCW 2.04.020(1890)(vesting plenary authority in supreme court to determine all matters according to its rules).

The Constitution does not expressly state that prosecutorial decisionmaking is only vested in the Executive Branch. Article III, § 1 merely notes that the executive department consists of several officials, including an "attorney general."

Article XI, § 5 directs the legislature to enact laws to provide for electing prosecuting attorneys as public convenience may require. Nothing in either section, however, states that publicly elected prosecutors or attorneys general retain the singular right to prosecute crimes to the exclusion of private complainants. Rather, the legislature expressly granted to the Supreme Court the right to make rules that affect criminal and civil procedure, as done with JCrR 2.01 and CrRLJ 2.1.

Washington Constitution Art. I, § 25 states that prosecutions must occur by information or indictment "as shall be prescribed by law." CrRLJ 2.1(c), like other Supreme Court rules, is law having all the force of a statute since it is a rule of criminal procedure implemented from the broad legislative grant of authority pursuant to RCW 2.04.190. *State v. Currie,* 200 Wash. 699, 707 (1939).[1] The language of the rule permits a judge to evaluate probable cause (as done in every criminal case), weigh the petition against prosecutorial guidelines recommended by the legislature under RCW 9.94A.440, and entertain other equitable considerations, including motivation of the complainant. If, and only if, all factors pass muster, may the court exercise its own discretionary authority to permit the filing of the criminal charge. Once filed, the judicial branch arguably no longer controls the course of the prosecution, though CrRLJ 2.1(c) does not distinguish *initiation* of prosecution from *actual* prosecution.

[1] *Currie* notes that the legislature delegated to the Supreme Court the responsibility of making rules relating to pleading, procedure and practice in the courts of the state, and that those rules, such as Rules of the Supreme Court 12 and 17 dealing with timely perfection of appeal, have "all the force of a statute."

While Washington's legislature has passed laws outlining how public attorneys may file charges, no authority expressly prohibits private citizens from initiating criminal complaints or prevents the Supreme Court from allowing them to be filed. A restrictive interpretation of the Washington Constitution's Article I, § 25 and Article XI, § 5 as solely granting prosecutorial power to publicly elected attorneys fails to account for the private petition's century-and-a-half longevity and staying power decades before statehood. These laws were never held unconstitutional as violating separation of powers doctrine.

Private prosecutions are not new but were part of a common practice in England and America for crime victims for several hundred years. They continue alongside public prosecutions. Michael T. McCormack, *The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law*, 37 Suffolk U.L.Rev. 497, 499-500 (2004); Kenneth L. Wainstein, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 Cal.L.Rev. 727, 751 (1988)("Although public prosecution is the norm in most criminal proceedings, this country has a strong and continuing tradition of criminal prosecution by private parties. Private parties, in fact, prosecuted all criminal cases in English and American common law, before the divergence of tort and criminal law and the creation of the public prosecutor's office.") New York permitted private attorneys to prosecute petty offenses. *People ex rel. Allen v. Citadel Mgmt. Co.,* 78 Misc.2d 626, 630 (Crim.Ct.1974). New Jersey has also sanctioned the practice of private prosecution.[2] Virginia's common law

[2]*State v. Storm,* 278 N.J.Super. 287 (App.Div.1994)(private prosecution does not deny due

allows the use of private prosecutors to assist the public prosecutor. *Cantrell v. Comm*., 329 S.E.2d 22, 25 (Va. 1985). Other states permitting private prosecutors to participate without consent or supervision of the district attorney include Alabama, Montana, and Ohio.[3] Georgia permits any person to seek a criminal warrant. O.C.G.A. 17-4-40.

Pennsylvania's Supreme Court enacted Pa.R.Crim.P. 106, which approves private criminal complaints for both felonies and misdemeanors, permitting private citizens to submit complaints to the commonwealth's attorney, who is required to approve or disapprove without unreasonable delay. If the attorney disapproves the complaint, she needs to state the reasons for disapproval and return it to the complainant. The complainant can then file the complaint with a judge of a court of common pleas for judicial approval or disapproval. In *Comm. v. Brown*, 447 Pa.Super. 454 (1995), *aff'd o.g.,* 550 Pa. 580 (1998), Mr. Buckley, a private citizen, petitioned the trial court to direct the commonwealth attorney to prosecute the charges outlined in his private criminal complaint. The trial court granted his request. The commonwealth appealed, asserting that the order to prosecute over the attorney's objection violated the separation of powers doctrine and that "the courts may never evaluate prosecutorial decisions that are based on policy

process unless there is a conflict); *State v. Avena,* 281 N.J.Super. 327 (1995); *State v. Leonardis*, 73 N.J. 360, 388 (1977)(noting that "where a prosecutor proposes to drop such a prosecution the possibility of connivance or culpable non-feasance, contrary to the public interest, activates a strong public policy for judicial superintendence of such a decision.")(Conford, P.J.A.D., concurring).

[3]*Hall v. State,* 411 So.2d 831, 838 (Ala.Crim.App.1981); *State v. Cockrell,* 309 P.2d 316 (Mont.1957); *State v. Ray,* 143 N.E.2d 484 (Ohio App.1956).

determinations." *Id*., at 461. The appeals court disagreed, highlighting the importance of Rule 106 "as a necessary check and balance of the prosecutor's decision and protects against the possibility of error." *Id*., citing *Comm. v. Pritchard*, 408 Pa.Super. 221, 233 (1991).

Wisconsin permits a "John Doe proceeding," which begins when a private citizen brings a criminal complaint before a judge. Wis. State. § 968.26. The judge then has discretion to evaluate the complaint, examine witnesses, and issue an arrest warrant. *Id*. The statute authorizing John Doe proceedings is deeply rooted in Wisconsin's history, dating back to the 19th century. *State v. Unnamed Defendant*, 150 Wis. 2d 352, 358-59 (1989), superseded by statute, 1991 Wis. Sess. Laws 88. In *Unnamed Defendant*, the Supreme Court of Wisconsin considered whether the John Doe proceeding violates separation of powers doctrine by granting judges power outside the judicial sphere. *Id*., at 355, 358. According to the court, "[t]he salient aspect of the John Doe proceeding for the purpose of this case – judicial initiation of criminal prosecution – has never appeared to be considered to be inconsistent with the doctrine of separation of powers." *Id*., at 363-64. Further, the notion that "initiation of criminal prosecution is an exclusively executive power in Wisconsin … is erroneous." *Id*., at 358. In his concurrence, Justice Day provided further justification for the validity of the John Doe proceeding by stating, "[c]rime victims should have recourse to the judicial branch when the executive branch fails to respond. This seems to me in keeping with constitutional rights." *Id*., at 372 (Day, J., concurring).

The court also acknowledged that, since John Doe proceedings were permitted at the time of the adoption of the Wisconsin Constitution, the framers likely considered the procedure's constitutionality and found it sound. *Id*., at 362. According to the court, "[a]dded weight to the constitutional validity of this procedure is given by the long and continuous use of the procedure since 1848, and the uniform acquiescence to its constitutionality." *Id*., at 362. The same principle is applied here insofar as Washington's authorization of citizen-initiated complaints dates back to our State's early history. Other states have similar procedures to CrRLJ 2.1(c).[4]

State v. Rice, 174 Wn.2d 884 (2012) does not alter this analysis. Jennifer Rice was convicted of first-degree kidnaping a ten-year-old boy, predatory first-degree child molestation, and two counts of third-degree child rape. Owing to special allegations under RCW 9.94A.835 and .837 for sexual motivation and for having a victim under age 15, her sentence was increased. Rice contended that the mandatory language of RCW 9.94A.835, which required the prosecutor to make such special allegations, violated the doctrine of separation of powers and rendered it unconstitutional. The Court of Appeals disagreed, finding that the prosecutor's charging discretion remained uninvaded for he or she still had to ascertain evidentiary sufficiency of the special allegations before making them. The

[4] See N.J. Ct. R. 7:2-2(a)(1)(a citizen can bring a complaint in accordance with a court rule that states that, upon a finding of probable cause by the judge, the judge can issue "[a]n arrest warrant or summons on a complaint charging any offense made by a private citizen."); Ohio Rev. Code Ann. § 2935.09(D)(permitting a citizen to bring an affidavit charging an offense to a judge, prosecutor, or magistrate for a determination as to whether an official complaint should be filed).

Washington Supreme Court affirmed, noting that the challenged statutes were "directory rather than mandatory," in that they "do not attach any legal consequences to a prosecutor's noncompliance, and the legislature elsewhere in the same chapter has acknowledged that prosecuting attorneys retain broad charging discretion notwithstanding statutory language directing them to file particular charges." *Rice,* at 889.

Rice had nothing to do with private petitions such as those lodged by Stout under CrRLJ 2.1(c). Besides, it is readily reconciled with that statute and rule, for one may acknowledge that the public prosecutor retains broad charging discretion to make special allegations or file a criminal charge without diminishing or nullifying the statutory and rule-based grants to private citizens to exercise their own discretion, even if it flatly contradicts the desires of the public prosecutor. CrRLJ 2.1(c)'s prescribed format for the AFFIDAVIT OF COMPLAINING WITNESS contemplates that criminal proceedings may commence from two sources (one public, one private), concurrent and non-mutually exclusive. The form states, in part, "I, the undersigned complainant, understand that I have the choice of complaining to a prosecuting authority rather than signing this affidavit. I elect to use this method to start criminal proceedings." It also states, "I (have)(have not) consulted with a prosecuting authority concerning this incident." Such language endorses the distinction between the public and private prosecutor, leaving one free to decline without prejudice to the other's right to proceed.

Nor does *State ex rel. Banks v. Drummond,* 187 Wn.2d 157 (2016) alter this analysis. When the Island County Board of County Commissioners hired Susan

Drummond to defend adopted legislation for the county and offer legal advice, the elected prosecutor Gregory Banks filed a writ of *quo warranto* to void the contract for attorney services and oust Drummond. The Supreme Court held that Banks could seek this relief per RCW 36.27.020(1-3), which made him the "legal adviser" to the county with the obligation of defending it in civil proceedings, as well as per Wash.Const.Art. XI, § 5, concluding that the board could not "unilaterally contract with outside counsel over the objection of an able and willing prosecuting attorney" as it would "unconstitutionally curtail the right of the county's voters to choose their elected official." *Id.,* at 169, 183.

This same "right" does not apply to these facts. *Drummond* concerns internal political squabbles causing a board to seek out alternate legal representation than the elected authority for defense of ordinances passed by, and decisions of, that board, using public funds; it is wholly dissimilar from the right of a private citizen to hire his own attorney, using private funds, to petition a court to initiate a criminal prosecution under laws enacted by the State Legislature. Further, in *Drummond,* the prosecutor was "able and willing" to perform the duties desired by the Board, whereas here Dorcy, the public prosecutor, was emphatically unable and unwilling to do as requested by Stout and stated his intention to dismiss any citizen complaint. Finally, Banks was the statutorily and constitutionally presumed attorney for his client, the County; here, Stout was not a client of Dorcy.

In *Protect the Peninsula's Future v. City of Port Angeles,* 175 Wash.App. 201, 213 (2013), the Court of Appeals refused to imply a private right of action from RCW 69.41.060 to obtain a search warrant due to failure to meet the *Bennett*

factors. Here, Stout need not seek any implied remedy. It is explicitly bestowed upon him by the Supreme Court.

While *People v. Municipal Court for Ventura Jud. Dist. (Pellegrino),* 103 Cal.Rptr. 645 (1972) required that any citizen criminal complaint must be approved by the district attorney before criminal proceedings are instituted, the statutory language of Cal. Penal Code §§ 740, 806, which requires that a complaint for a misdemeanor or infraction be prosecuted "by written complaint under oath subscribed by the complainant," and which "may be verified on information and belief," does not include the Washington Supreme Court safeguards against private prosecutions based on personal grievance and fanciful charges as set forth in the rigorous prerequisites of CrRLJ 2.1(c) and also in the vesting of discretion in the trial judge to make such determinations, including that of probable cause. CrRLJ 2.1(c)'s directives to the court hearing the petition resolve the due process concerns of the California Court of Appeals. Further, Pennsylvania and Wisconsin have expressly rejected the separation of powers argument made to challenge their citizen criminal complaint statutes.

As for the assertion that this court should defer to California due to the similarity between the Constitutions, a contextualized reading of Wash.Const. Art. IV § 27, reveals that a prosecution initiated by a private citizen is done by the authority of the State of Washington ("by its authority") care of the Washington Supreme Court, in which "judicial power of the state shall be vested … as the legislature may provide," which it did in RCW 2.04.190. Notably, Art. IV, § 27 may be found in Article pertaining to the Judiciary, not the Executive, branch.

Additionally, two private criminal complaint matters brought before the Washington Supreme Court were captioned at the trial level as required by Art. IV § 27 (*State ex rel. Murphy v. Taylor,* 101 Wash. 148 (1918) and *State ex rel. Romano v. Yakey,* 43 Wash. 15 (1906)).

Putting aside that the version of Cal.Const.Art. VI, § 20 relied upon in *Pellegrino* no longer exists,[5] instead of citing it as a basis to deem Cal. Penal Code §§ 740, 806 unconstitutional, the court recognized that:

> Since all criminal proceedings must be brought in the name of the People of the State of California (Cal.Const. art. VI, s 20), such procedure, if it in fact exists, has the potential for permitting any person in the name of the People of the State of California to redress a personal grievance by way of a criminal prosecution against his adversary.

Id., at 201. Further, while the California codes are ambiguous as to whether district attorney approval must be sought, CrRLJ 2.1(c) expressly states that "any person" may initiate the prosecution, whether or not she consulted with the prosecuting attorney. Lastly, in finding a separation of powers violation, the California Court of Appeals cited to Cal.Const. Art. III, § 1,[6] not Art. VI, § 20. *Id*., at 204.

Once the district court permits the complainant to file under CrRLJ 2.1(c), the prosecuting attorney controls the case's destiny, whether by prosecuting it to verdict, negotiating a plea, or dismissing. *People v. Benoit,* 152 Misc.2d 115 (1991)

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[5] A current search on Westlaw and the California Legislative Information site finds no such section in the present version of the California Constitution. While it did exist in 1879, it does not appear any more. Cf. https://www.cpp.edu/~jlkorey/calcon1879.pdf with https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=CONS&tocTitle=+California+Constitution+-+CONS

[6] This provision, too, no longer can be found for Cal.Const.Art. III, § 1, states, "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land." It is hard to follow how the citizen criminal complaint process violates this section.

declared a city code of criminal procedure, whereupon a private citizen sought to have her counsel appointed as a Special Prosecutor unconstitutional on grounds of due process and equal protection. The special prosecutor concerns of *Benoit* and *Ladenburg v. Campbell,* 56 Wash.App. 701 (1990) are not present here.

The costs of prosecution, discussed in *State v. Howard*, 106 Wn.2d 39, 44 (1985), are not a reason to find the rule unconstitutional or to affirm given that the Supreme Court explicitly provided this avenue to citizens mindful of the effect it would have and instructed the trial court to give it express consideration prior granting a citizen criminal complaint. From a policy standpoint, the cost of private prosecution petitions are borne within the counties where filed and incentivize responsivity of the elected prosecutors to take citizen complaints seriously before further adjudication is sought. See CrRLJ 2.1(c) ("I (*have*) (*have not*) consulted with a prosecuting authority concerning this incident.")

Chief Justice Alexander's statement that "Under principles of separation of powers, the charging decision is for the prosecuting attorney and we should resist the temptation to dispense hints that might influence that decision," was not joined by any of the other eight justices. Besides, it is immaterial to the issue at bar, for *Walsh* pertained to whether a defendant could withdraw his guilty plea, not whether the court could interfere with the ability of the State to refile dismissed charges, an issue even Justice Alexander acknowledged was "not presented to this court." The majority opinion never even discusses separation of powers. *State v. Walsh*, 143 Wn.2d 1, 10 (2001), *overruled o.g.* 173 Wn.2d 708 (2012).

Dorcy cites to Justice J.M. Johnson's concurrence, not joined by any others, in *State v. Korum*, 157 Wn.2d 614, 655 (2006), wherein he generally admonishes against "judicial second-guessing of the discretionary charging decisions that courts have long recognized as exclusively executive." He does so not in the context germane here but, instead, relative to accusations of prosecutorial vindictiveness in plea negotiations where a prosecutor adds or increases charges. *State v. Tracer*, 155 Wash.App. 171, 182 (2010) concerned a superior court judge's violation of separation of powers by appointing a special prosecutor whom it then directed, *sua sponte*, to amend the information to accept Tracer's guilty plea to a reduced charge. Here, no court *sua sponte* ordered that the county prosecute Stout's case. Rather, it considered a petition expressly authorized under CrRLJ 2.1(c) and its mandatory considerations.

Any concern of impartiality of the judge who authorizes private criminal complaint later hearing the prosecution can be resolved by recusal or the disqualification process, thereby responding to the concern of *In re Murchison*, 349 U.S. 133 (1955). *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-80 (2nd Cir.1973) spoke only to prosecution of federal crimes, confirming that only the Attorney General or a U.S. Attorney may file such charges. No Congressional Act or Federal Rule of Criminal Procedure exists in any form that approximates CrRLJ 2.1(c), so this decision has no value here.

People v. Smith, 53 Cal.App.3d 655 (1975) did not involve the question of private prosecution but, instead, a trial court's order allowing a defendant to withdraw a former plea of not guilty to assault by means of force likely to produce

great bodily injury and, over the prosecutor's objection, enter a guilty plea to battery, a count never charged, nor a lesser-included offense within the charged assault. Like the other cases cited by Respondent, it proves inapposite, as is *People v. Herrick*, 550 N.W.2d 541 (Mich.App.1996), a special prosecutor case holding that a declination decision did not amount to grounds for disqualification. *State ex rel. Schultz v. Harper*, 573 S.W.2d 427 (Mo.App.1978) is a writ of mandamus case, not a case brought under a Supreme Court rule of criminal procedure authorized by the Legislature.

CONCLUSION

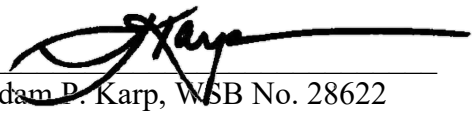
Citizens dissatisfied with prosecutorial inertia, fearing eclipsing statutes of limitations, and concerns of bias and corruption in the executive branch of government, may find solace in the still surviving avenues by which to initiate criminal prosecution the old-fashioned way. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 127-28 (1998)(Stevens, J., concurring)("private persons regularly prosecuted criminal cases" at time of nation's founding). CrRLJ 2.1(c) does not fail under the constitution.

In such instance, the private citizen asks a judge or judges to exercise discretion consistent with the well-established tradition of bilateral criminal investigation. If the district court judge authorizes the filing of a criminal complaint, the case is either privately prosecuted by the complainant or delivered to the prosecuting attorney for further proceedings. In neither instance does the court compel the prosecuting attorney to do anything. The Legislature and Supreme

Court evidently enacted, and maintained, the foregoing check and balance on prosecutorial anemia.

Dated this 2.1.21,

ANIMAL LAW OFFICES



Adam P. Karp, WSB No. 28622

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 2.3.21, I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

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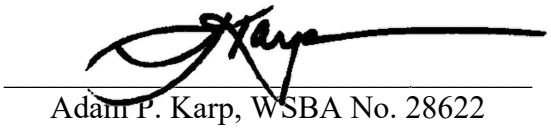

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