

Some fault DA's use of secret testimony

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Dallas County District Attorney Craig Watkins tried to stop an independent investigation into allegations of wrongdoing against constables by submitting secret grand jury testimony in a civil case, an unusual move questioned by some legal scholars.

Watkins took the controversial step during a politically charged dispute with the Commissioners Court late last year.

Watkins revealed that former FBI agent Danny Defenbaugh had testified before a grand jury - and outlined the general nature of his testimony - in a petition seeking a temporary restraining order and permanent injunction. Watkins sought to block Defenbaugh, hired by Dallas County Judge Jim Foster and two commissioners, "from pursuing any investigation" into complaints by current and former employees of Precinct 1 Constable Derick Evans and Precinct 5 Constable Jaime Cortes.

"To prove its contention that Defenbaugh is investigating criminal matters, Mr. Watkins relies on Exhibit C, which is a copy of grand jury proceedings," the petition states. It also asserts that the exhibit was sealed, which is disputed by defense attorneys.

Dueling inquiries

Defenbaugh was hired after Foster and the commissioners expressed dissatisfaction with an investigation into the constables by Watkins' office. Foster and Commissioners Ken Mayfield and Maurine Dickey also were listed as defendants in Watkins' petition.

Some legal experts question whether Watkins' use of grand jury testimony in a civil case was appropriate. Typically, even the fact that a witness has testified before a grand jury is a carefully guarded secret, and it can be disclosed only under very limited and well-defined circumstances.

"I don't understand what the prosecutor's rationale would be," said Texas Tech law professor Charles Bubany, co-author of a casebook on Texas criminal procedure. "I don't know what he's hanging his hat on to claim that he is justified in using the grand jury testimony."

Bob Schell, who heads the civil section of the district attorney's office, said a portion of the statute that addresses how grand jury testimony can be disclosed gives broad authority to prosecutors.

The law allows disclosure to a grand juror serving on the grand jury that heard the testimony, another grand jury or a law enforcement agency. It also allows disclosure to "a prosecuting attorney, as permitted by the attorney representing the state and determined by the attorney as necessary to assist ... in the performance of the attorney's duties."

That was the case, Schell said, when Defenbaugh's grand jury testimony was used to seek a temporary restraining order and permanent injunction.

Schell said grand jury testimony can be submitted to the court, which has to determine whether it is "material to the administration of justice" and can be disclosed.

"And that's exactly what we did," Schell said.

Only one copy was produced, he said, and even the defense attorneys were not permitted to see it. That copy, he said, was submitted under seal to the judge assigned to the case "for his eyes only" to determine whether the testimony could be used in the case.

John Barr, one of the defense attorneys in the case, said he did not see how the district attorney's office could use grand jury testimony against Defenbaugh and "Oh, by the way, his lawyer can't see that, and he can't see that, but you just have to trust us because we're the district attorney. That just doesn't fly."

George Dix, a University of Texas at Austin law professor and authority on criminal procedure, said he did not see how disclosing the grand jury testimony to the court -

even if only the judge was to see it - was covered by the statutes. He said that his interpretation of the statute is that the attorney representing the state "must be performing one of the enumerated duties," such as working with another grand jury or a law enforcement agency, and not performing some other duty.

"I think prosecutors play pretty fast and loose with the grand juries and the procedure, so I'm not surprised that we find something that doesn't seem to be carefully provided for," he said.

Defense attorneys objected to submission of the grand jury testimony as an exhibit and asked that it be disregarded in its entirety. The visiting judge assigned to the case, retired Dallas County district Judge Richard Mays, did just that about two weeks later. Attorneys for the district attorney's office asked that the case be dismissed in December, and that request was granted.

Schell said that to his knowledge, the use of grand jury testimony by the DA's office in a civil case was a "unique situation." He said he didn't know who made the decision to deliver the testimony to the civil section.

"I'm not sure," he said. "All I know is that it was delivered to me."

Watkins was not available for comment.

Schell said he believed Defenbaugh's grand jury testimony was critical in establishing "what we believe we needed to establish in order to protect the district attorney's exclusive jurisdiction of investigating criminal matters within Dallas County."

Properly sealed?

Foster said he was upset that Defenbaugh's testimony was handled in such a manner.

When he was called to testify before the grand jury, he said, "it was made abundantly clear to me that all of those proceedings were confidential and not to be discussed with anyone." He said he couldn't comprehend how Defenbaugh's grand jury testimony was permitted to be used in a civil suit.

Questions also have been raised about whether the grand jury testimony was appropriately sealed from public view. Prosecutors asserted that it was "statutorily sealed." However, defense attorneys in the case argued that the appropriate procedures were not followed.

Officials were unable to locate the grand jury testimony for more than a week after The Dallas Morning News asked to see it.

It was discovered Friday in the safe of Dallas County District Clerk Gary Fitzsimmons.

Judge Martin Hoffman of the 68th Civil District Court was briefly involved in the case before he recused himself and it was ultimately assigned to Mays. Hoffman said it was his recollection that the testimony was sealed when he got it. He said that civil judges routinely handle cases in which documents are submitted for review "in camera" - only by the judge - to determine how they can be used.

The permanent process to seal records, Hoffman said, takes weeks to resolve, and he gave the grand jury testimony to the district clerk to keep in the safe until the judge who would handle the case was assigned. "I assumed the new judge would handle that," he said. He recalled that attorneys from both sides were there when he issued that instruction as his court reporter recorded it.

According to a transcript, Hoffman recused himself and handed the sealed grand jury testimony to Fitzsimmons, the district clerk, to put under lock and key during a hearing Nov. 5 that lasted less than a minute. The only others in attendance were Schell and Grant Brenna, another civil assistant district attorney, according to a transcript.

Mays, who was assigned the case, said he believed that the testimony was sealed when he got it.

"Whatever authority, and for whatever reason, it was sealed before," Mays said. "I just kept it that way."

Defense attorney Wayne Gordon, who objected to use of the grand jury testimony in the civil proceeding, said that for a record to be sealed properly, a variety of steps must be

taken, including public notice and a hearing in which a judge hears arguments before he makes a decision.

“None of that took place in this case,” he said. “They say it’s a sealed record, but it’s really not.”