

IN THE MATTER OF COMPLAINT
AGAINST THE WASHINGTON COUNTY
DISTRICT ATTORNEY'S OFFICE and
VICTIM WITNESS ASSISTANCE PROGRAM,
and GERMANTOWN POLICE DEPARTMENT,

Case No. 20-285

Respondents.

PROBABLE CAUSE DETERMINATION

1. On January 28 and March 23, 2021, the Crime Victims Rights Board (“the Board”) reviewed a complaint filed by C.W.¹ against respondents Washington County District Attorney’s Office (“the DA’s Office”), Washington County Victim Witness Services (“the Victim/Witness Services”), and the Germantown Police Department (“GPD”). The Board evaluated the complaint to determine whether it stated probable cause that the respondents violated C.W.’s rights as a crime victim. *See* Wis. Stat. § 950.04(1v). The Board found no probable cause.

¹ This probable cause determination uses the victim’s initials to protect her privacy.

BOARD PROCEDURE

2. On September 9, 2020, the Board received a complaint filed by C.W.

3. Upon receipt of the complaint the Board contacted the Office of Crime Victim Services Victim Resource Center Manager Stephanie Mock. The Board asked Mock to verify that the substance of the complaint had been presented to the Department of Justice (DOJ) and that DOJ had completed its review. *See Wis. Admin. Code CVRB § 1.05(1).*

4. Victim Services Specialist Anne Kessenich informed the Board that on August 27, 2020, she completed the informal complaint process as to the issues raised in the complaint. *See Wis. Admin. Code CVRB § 1.05(4).*

5. The Board gave a copy of the complaint to each respondent and invited them to answer the complaint. *See Wis. Admin. Code CVRB § 1.05(5).*

6. On October 15, 2020, District Attorney Mark Bensen filed a letter response on behalf of the DA's Office. On October 15, 2020, Victim/Witness Coordinator Ali Krueger filed a letter response on behalf of Victim/Witness Services. And, on October 21, 2020, Detective Sergeant Penny Schmitt filed a letter response on behalf of GPD.

7. On January 28, 2021, the Board made this probable cause determination at a meeting. *See Wis. Admin. Code CVRB § 1.05(6).*

8. In making the probable cause determination, the Board considered all relevant information, including the complaint and answers. *See Wis. Admin. Code CVRB § 1.05(7)(a)–(c).*

9. On February 4, 2021, C.W. notified the Board's Operations Director, Julie Braun, that she had received records that were unavailable when she filed her complaint and that she thought were material to the Board's probable cause decision. Director Braun instructed C.W. to provide an explanation with a request to the Board to review the new evidence. C.W. prepared a memo and sent the materials to the Board.

10. Parties are informed at the beginning of each case that the Board will accept additional materials prior to the issuance of a probable cause decision only under extraordinary circumstances. To be considered, any new information must have been unavailable at the time the party filed a complaint or provided a response to a complaint. Additionally, new information must be material to the statutory or constitutional victim rights under review.

11. On March 23, 2021, the Board met to discuss reopening the probable cause review in light of C.W.'s request. The Board determined the proposed addendum could be considered because it was comprised of records C.W. received in response to a public records request fulfilled in January 2021, after C.W. filed her complaint. The Board reviewed the materials to determine

whether they contained evidence material to the statutory or constitutional victim rights under review.

12. The addendum contained allegations similar to those in the original complaint. C.W. alleged the new records provided evidence that law enforcement had probable cause to arrest the suspect well before an arrest was made. The addendum also provided additional context and details about the respondents' other discretionary decisions. Review of the respondents' discretionary decisions is beyond the purview of the Board, as discussed in this decision. The Board, therefore, concluded that the addendum did not contain new material evidence that would impact its January 28, 2021, probable cause decision.

13. The Board notifies the parties and DOJ's victim rights specialist of its conclusions through the issuance of this probable cause determination. *See Wis. Admin. Code CVRB § 1.05(8).*

STATEMENT OF THE CASE

I. C.W.'s complaint.

14. C.W. is the mother of a victim who died from injuries sustained in a car crash that occurred on December 8, 2019. The crash was caused by an impaired wrong-way driver who collided with another vehicle. C.W.'s son was a passenger in the car that caused the crash. The crash resulted in two deaths,

including C.W.'s son, and serious injuries to two others, as well as serious injuries to the impaired driver.

15. C.W. complains that GPD failed to arrest the suspect immediately. She alleges GPD violated her civil rights and deprived her of "procedural requirements" claiming that police officers are "required to act in apprehending any and all persons suspected of wrong doing" and that the failure to arrest the driver was "corruption and protection of a criminal."

16. C.W. also complains GPD did not release the name of the driver to the press upon her request.

17. C.W. next alleges that the GPD detective assigned to the case "condescendingly asked me if I was in therapy and stated that I should be as a response to my questioning why [the driver] wasn't arrested."

18. C.W. further alleges GPD provided her with incorrect information about the investigation, the suspect's criminal history, and other matters related to the case. She says that GPD lied to her about those matters to protect the suspect. She complains that GPD's explanations about interactions with officials at the hospital, and about the suspect's blood draw, were contradictory and that GPD's efforts to obtain a blood draw and place a hold on the suspect at the hospital were intentionally ineffective.

19. C.W. alleges Victim/Witness Services provided her with incorrect information about the suspect and the case and that the office coordinator

“sharply and in a put out tone” asked C.W. if she was seeing a therapist. She alleges the office “literally ignored the victim and did not offer any helpful resources” and did not give her victim rights information in a timely manner.

20. C.W. alleges that the DA’s Office colluded with GPD to “obstruct justice and protect a two time drunk driver” by not arresting the suspect until several months after the incident. She complains that the DA’s Office refused to proactively release the name of the suspect and unreasonably delayed charging the suspect. She stated that “[o]bviously there is corruption when there is no apprehension of a criminal of this nature” and speculates that the defendant has personal connections to county officials or judges. C.W. further complains that the DA did not send blood samples to an alternate lab where she believed analysis would have been faster and more accurate.

II. The respondents’ answers to the complaint.

21. In answering the complaint, GPD explains it decided not to immediately take the suspect into custody because he was not a flight risk due to his injuries. According to GPD, this decision was made in collaboration with the prosecutor who was postponing formal charging until the suspect’s blood alcohol test results were returned. GPD notes that the suspect ultimately was taken into custody when he began displaying irresponsible behaviors on social media. GPD explains that, pursuant to department policy, it did not release the name of the driver before he was formally charged with a crime.

22. GPD further explains that it advised C.W. of the department's findings and gave her the information it had at the time the conversations took place. GPD acknowledges that staff mistakenly gave C.W. incorrect information about the condition of her son's glasses found in one of the vehicles. GPD says it requested an early blood draw at the hospital and obtained a search warrant for blood drawn during the suspect's initial care. GPD states that "[t]hroughout the course of the investigation and on countless occasions, Det. Sgt. Schmitt contacted all of the victims involved to keep them up to date on the status of the investigation, to answer questions as they arose and to assist in any way possible." GPD says the detective asked C.W. about counseling "out of sincere concern for her well-being and nothing more."

23. In Victim/Witness Services' answer to the complaint, Coordinator Kreuger states that when she initially spoke with C.W. about the suspect not being arrested, she would not have had case information because the case had not yet been referred to the DA's office. Krueger explains that it is the regular practice of her office to ask victims about counseling and that, in her experience, doing so is helpful to victims. Kreuger says she planned to give C.W. referrals for counseling if she wanted them.

24. Coordinator Krueger reports that her office kept C.W. updated throughout the process as documented by emails and a report, included in her answer. The report documents contacts with C.W. including communications

about providing notice of rights pursuant to Wis. Stat. § 950.08(2r). Coordinator Krueger notes that her office had a telephone discussion with C.W. on May 27, 2020, the day before the defendant's initial appearance, and that the office sent C.W. a package that included notice of rights on May 29, 2020, the day after the initial appearance.

25. In the DA's Office's answer, District Attorney Mark Bensen asserts that his decisions about arrest and charging were based on a strategy to charge the suspect with the most appropriate and serious charge that he could prove. He states that arrest and charging were delayed so he could use forthcoming lab results in the charging decision. The suspect was eventually arrested and charged without the lab results, and the charge was later amended to a more serious charge after the results were received. District Attorney Bensen asserts that the prosecutorial strategy he advanced was appropriate and resulted in a conviction for two OWI homicide charges and two other serious felonies. Benson states that he does not know the defendant and did not give any preferential treatment to him. Bensen further asserts his decisions were consistent with the way he has handled dozens of other homicide cases.

ALLEGATIONS OF VICTIM RIGHTS VIOLATIONS

26. C.W. does not articulate a specific victim rights violation in her complaint. For this probable cause determination, the Board identifies three victim rights that may be implicated by the facts alleged in C.W.'s complaint.

27. First, C.W. alleges the respondents engaged in conduct that she perceived to be insensitive and unfair. C.W. questions the motives of GPD and Victim/Witness Services for inquiring about counseling; she alleges that GPD and the DA's Office should have proactively released the name of the suspect to the media; that GPD lied to her; and that GPD and the DA's Office improperly protected the suspect. The Board interprets these allegations as alleging that the respondents violated her right to be treated with fairness and dignity. *See Wis. Stat. § 950.04(1v)(ag).*

28. Second, C.W. complains that the DA's Office and GPD delayed arresting and charging the suspect. The Board interprets this as an allegation that the respondents' violated C.W.'s right to a speedy disposition of the case. *See Wis. Stat. § 950.04(1v)(k).*

29. Finally, C.W. alleges that Victim/Witness Services failed to provide her with "victims rights paperwork" in a timely manner. The Board interprets this as an allegation that the respondents violated C.W.'s right to be provided with written information about her victim rights. *See Wis. Stat. §§ 950.04(1v)(u), 950.08(2r).*

30. The remaining allegations in the complaint do not implicate a victim right, as required for the Board's review.

DETERMINATIONS OF FACT

31. The Board found no disagreements of material fact as to the timing of the arrest and charging of the suspect and as to when Victim/Witness Services provided C.W. with written information about her rights.

32. As to decisions or conversations that C.W. found insensitive or unfair, the Board found no disagreement of material fact regarding the content of conversations and decisions, but the parties disagree about the tone or motivation underlying those conversations and decisions.

INTERPRETATIONS OF LAW

33. The Board employs a three-step methodology to analyze the complaint: (1) whether the complainant was a crime victim; (2) whether the allegations implicate any constitutional or statutory victim rights; and (3) whether the respondents failed to comply with any duty imposed by a constitutional or statutory provision.

34. Whether a person is a crime victim is determined by statute. “A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both.” Wis. Stat. § 939.12. A crime victim is “[a] person against whom a crime has been committed.” Wis. Stat. § 950.02(4)(a)1. If the crime victim is deceased, his or her family member is a victim. Wis. Stat.

§ 950.02(4)(a)4.a. Family member means “spouse, minor child, adult child, sibling, parent, or legal guardian.” Wis. Stat. § 950.02(3).

35. Whether a respondent is subject to the Board’s authority is also determined by statute. The Board has authority to conduct reviews and issue reprimands of “public officials, employees or agencies that violate the rights of crime victims.” Wis. Stat. § 950.09(2)(a); *but see Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384 (statute unconstitutional as applied to judges).

36. Probable cause is “a reasonable basis for belief, supported by facts, circumstances, and reasonable inferences strong enough to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint.” Wis. Admin. Code CVRB § 1.02(9). Probable cause is satisfied by a believable or plausible account that the respondent probably has violated or is violating the victim’s rights. *See State v. Sorenson*, 143 Wis. 2d 226, 251, 421 N.W.2d 77 (1988).

37. The Board evaluates the limited information available to it in the light most favorable to the complainant. The probable cause determination is not the proper time to debate and resolve credibility issues if essential facts, circumstances, and reasonable inferences are strong enough to warrant a prudent person to believe a violation probably has occurred or is

occurring. *See State ex rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 614, 267 N.W.2d 285 (1978).

PROBABLE CAUSE DETERMINATION

38. While the Board is sincerely sorry for C.W.'s loss and the pain she endured as a result of her son's death, the Board finds no probable cause that C.W.'s rights as a crime victim were violated.

39. The Board reaches its conclusion after applying its interpretations of law to the determinations of fact.

40. The threshold question is whether C.W. is a crime victim. C.W. is a crime victim because she is the mother of a person who was killed by an impaired driver.

41. The next question is whether the respondents are subject to the authority of the Board. The respondents in this case are subject to the authority of the board because they are public agencies within the meaning of Wis. Stat. § 950.09(2)(a).

42. The final question is whether the allegations in the complaint implicate a constitutional or statutory victim right. As noted, the complaint includes many allegations that do not implicate a constitutional or statutory victim right and are, therefore, matters over which the Board has no authority to review. The Board considers whether the respondents violated C.W.'s rights

under Wis. Stat. §§ 950.04(1v)(ag) (fairness and dignity), 950.04(1v)(k) (speedy disposition), and 950.08(2r) (written information about victim rights).

I. Claims against GPD.

43. C.W. alleges that GPD violated her right to a speedy disposition of the case because it delayed arrest of the suspect. C.W. claims that GPD had probable cause to arrest the driver at the scene of the crash, at the hospital, and after his release from the hospital. GPD explains that it delayed arrest until the formal charging of the suspect in coordination with the DA's Office.

44. The Board concludes that GPD had discretion to delay the arrest until formal charging, even if it believed there was probable cause to arrest earlier. It is not unusual or improper for law enforcement to make an arrest decision in coordination with a prosecutor to align with prosecution strategy. The Board finds no probable cause that the decision to postpone the arrest violated C.W.'s right to a speedy disposition of the case.

45. C.W. claims that GPD failed to treat her with fairness and dignity when the detective sergeant investigating the case asked her if she was receiving counseling. The detective says she asked C.W. about counseling "out of sincere concern for [C.W.'s] well-being and nothing more." The Board does not discount how C.W. felt about the question but finds that discussing counseling resources with crime victims is common and appropriate, and there is no evidence to suggest that this question was asked with bad intentions.

46. C.W. complains that GPD should have proactively disclosed the name of the driver to the media to eliminate public conjecture that C.W.'s son caused the crash. GPD's policy of waiting until a suspect is formally charged before releasing his or her name to the media is appropriately within the agency's discretion. There is no victim right that imposes a duty on a public official to release the name of a suspect.

47. C.W. alleges that GPD intentionally provided her with inaccurate information to protect the suspect. There is no dispute that GPD relayed inaccurate information to C.W. and provided contradicting reports about interactions with hospital officials. But C.W. provides no facts to support her speculation about GPD's motive, and there is no reasonable basis to believe that GPD's mistakes were intentional.

48. The Board finds no probable cause that GPD violated C.W.'s right to be treated with fairness and dignity.

II. Claims against Victim/Witness Services.

49. C.W. alleges that Coordinator Krueger asked her about therapy in a sharp tone as a ruse to avoid answering C.W.'s questions about the suspect's arrest. Coordinator Krueger reports that asking victims about victim resources, including counseling, is a standard part of her job and something she offered out of concern for C.W. Offering resources to victims is encouraged and expected of county victim/witness offices. While C.W. interpreted

Krueger's tone as "sharp," there is no evidence Krueger's intentions were anything other than as she characterized them. The Board finds no probable cause that Victim/Witness Services violated C.W.'s right to be treated with fairness and dignity.

50. C.W. alleges a delay in receiving her victim rights information. She states that she asked for her paperwork in a phone conference on May 27, 2020, and again on May 28, 2020, but did not receive it until June.

51. Pursuant to Wis. Stat. § 950.08(2r), victim information must be provided "[a]s soon as practicable, but in no event later than 10 days after the initial appearance . . . of a person charged with a crime in a court of criminal jurisdiction."

52. The undisputed facts show that the initial appearance occurred on May 28, 2020, and the respondent mailed the victim information the next day, on May 29, 2020, in compliance with the statute. That same day, the respondent sent an email to C.W., noting that a packet with victim information had been mailed to C.W. and attaching a copy of the letter that was mailed with the packet. The Board finds no probable cause that Victim/Witness Services violated C.W.'s right to be provided with victim information pursuant to Wis. Stat. § 950.08(2r).

III. Claims against the DA's Office.

53. C.W. alleges that the DA's Office unreasonably delayed arresting and charging the suspect while it waited for lab results on the suspect's blood-alcohol level. The District Attorney ("DA") explains that he wanted to charge the suspect with the most "appropriate and serious charge that was provable," and he believed that could best be achieved if based on the results of the analysis. The DA's Office further explains that the analysis took longer than usual because it required a special methodology to discount additional drugs administered to the suspect at the hospital. The DA's Office says it did not want to use an alternative lab because the lab it was using had experience with the complicated analysis and moving the sample may have jeopardized the prosecution.

54. C.W. alleges the DA's Office should have used a different lab for the analysis and ascribes malicious intent (that the DA was trying to hide the truth) to the DA's refusal to engage a different lab. Ultimately, the DA's Office decided to charge the suspect without the lab results and later amended the charge when the blood-alcohol analysis was completed. The Board finds it was reasonable to wait for the analysis and to charge without the analysis when circumstances changed. The DA's charging decision and strategy are discretionary determinations. The Board rejects C.W.'s allegation that the DA

intentionally delayed the case to protect the suspect and finds there is no probable cause that C.W.'s right to a speedy disposition was violated.

55. Lastly, C.W. alleges the DA's Office should have proactively released the name of the suspect to the media to make it clear that her son was not the driver who caused the accident. The DA's decision about whether and when to release the name of the suspect is a discretionary determination that is not bound by any victim right. The Board finds no probable cause that the DA's Office violated C.W.'s victim rights.

ORDER

Based on the foregoing, it is hereby ORDERED:

1. That there is no probable cause that a victim rights violation occurred, so the complaint is dismissed. A finding of no probable cause is a final decision of the Board under Wis. Admin. Code CVRB § 1.05(8).

2. That the Board hereby provides notice to the parties of the right to seek judicial review of this final decision pursuant to Wis. Stat. § 227.52. Attached to this decision is a summary of appeal rights.

3. That judicial review of this final decision is governed by Wis. Stat. §§ 227.52–227.59. *See* Wis. Admin. Code CVRB § 1.10.

4. That a copy of this probable cause determination shall be provided to all parties in this proceeding and in accordance with Wis. Admin. Code CVRB § 1.05(8), as identified in the Service List below.

Dated this 10th day of May, 2021.



Chairperson Jennifer Dunn
Crime Victims Rights Board

SERVICE LIST

C.W.

[address withheld]

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