

IN THE MATTER OF COMPLAINT
AGAINST THE WASHBURN COUNTY
DISTRICT ATTORNEY'S OFFICE,

Case No. 22-003

Respondent.

PROBABLE CAUSE DETERMINATION

1. The Crime Victims Rights Board (the "Board") reviewed a complaint filed by AP¹ against the Washburn County District Attorney's Office (the "DA's Office"). The Board evaluated the complaint to determine whether it stated probable cause that the DA's Office violated AP's rights as a crime victim. *See Wis. Stat. § 950.04(1v)*. The Board finds no probable cause.

BOARD PROCEDURE

2. AP, through counsel, filed a complaint with the Board on January 27, 2022.

3. Upon receipt of the complaint, the Board contacted the Department of Justice (DOJ) Office of Crime Victim Services, which verified that the substance of the complaint had been presented to DOJ and that DOJ

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

had completed the informal complaint process as to the issues raised in the complaint. *See Wis. Admin. Code CVRB § 1.05(1), (4).*

4. The Board gave a copy of the complaint to the Respondent and invited it to answer the complaint. *See Wis. Admin. Code CVRB § 1.05(5).* Washburn County District Attorney Aaron B. Marcoux (“Marcoux”) filed a response on behalf of the DA’s Office.

5. The Board made this probable cause determination at a meeting on July 20, 2022. *See Wis. Admin. Code CVRB § 1.05(6).*

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

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

STATEMENT OF THE CASE

I. AP’s complaint.

8. AP’s husband was charged with sexually assaulting AP’s minor daughter, KP, in in a Douglas County case. The case was handled by the Washburn County District Attorney’s Office, due to a conflict of interest by the Douglas County District Attorney’s Office.

9. AP alleges that when the DA's Office first began handling the case, it contacted AP about the possibility of a plea agreement. Marcoux consulted with AP about the agreement, which would have required the defendant to serve at least five years in prison, followed by a longer period of supervision. The defendant rejected the plea agreement.

10. According to AP, Marcoux then told her that he did not accept last minute plea agreements and was committed to trial. A jury trial was scheduled for September 2020, but after Marcoux and his family contracted COVID-19, the trial was rescheduled to March 23, 2021. A pretrial hearing was scheduled for February 26, 2021.

11. While awaiting trial, AP stayed actively involved in the case, attending most court hearings and regularly meeting with Marcoux.

12. AP alleges that Marcoux reopened negotiations with defense counsel at least a few weeks before the pretrial hearing. Twenty minutes before the pretrial hearing was scheduled to begin, AP received a text from the victim/witness coordinator, Tammy Fee, informing her that a new plea agreement had been reached.

13. When AP expressed her disapproval of the plea agreement, Marcoux allegedly "became defensive and yelled at both A.P. and her 14-year-old daughter." (Compl. 5.) The judge approved the plea agreement over AP's objections.

14. AP further alleges that “the D.A.’s Office also failed to respect A.P.’s privacy through its carelessness with her personal information.” (Compl. 5.) She claims the DA’s Office filed multiple documents that jeopardized her anonymity, including witness subpoenas that listed AP’s address as the defendant’s address and a witness list that included the full name of the child victim.

15. AP raises three victim rights violations.

16. First, she alleges that the DA’s Office failed to provide a meaningful opportunity to consult with the prosecution regarding the plea agreement in violation of Wis. Stat. § 950.04(1v)(j) and Wis. Const. art. I, § 9m(2)(h), (o), and (p).

17. Second, AP alleges that the DA’s Office failed to treat her with respect for her privacy in violation of Wis. Stat. § 950.04(1v)(ag) and Wis. Const. art. I, § 9m(2)(b).

18. Finally, AP alleges that the DA’s Office failed to treat her with fairness and dignity in violation of Wis. Stat. § 950.04(1v)(ag) and Wis. Const. art. I, § 9m(2)(a). In particular, AP claims that Marcoux failed to confer with her about his negotiations with the defense, misled her as to his intent to take the case to trial, failed to timely correct the release of AP’s address, and yelled at AP and her daughter for objecting to the terms of the plea agreement.

II. The DA's Office's response.

19. On behalf of the DA's Office, Marcoux submitted a response and numerous exhibits, including the criminal complaint, bail receipt, information, a 31-page printout of court activities, a stipulation for bond modification, attorney appointment orders, transcripts from the plea hearing and the sentencing hearing, the state's witness list and subpoenas, and documentation that the witness list was filed under seal.

20. Marcoux first addressed AP's claim that he failed to confer with her regarding the plea. According to Marcoux, there were three offers to resolve the case by plea, and AP and KP were consulted prior to all three.

21. After Marcoux was appointed to the case, he and Tammy Fee met with AP and KP for nearly three hours. Marcoux "went over all of the options in the case, how cases proceed through the judicial system, what to expect, preliminary trial preparation and the fact that in the end it would be solely within Special Prosecutor Marcoux's discretion to offer, negotiate and/or enter into any plea agreement." (Resp't Resp. 3.)

22. At the end of the meeting, KP indicated that she wanted to attempt plea negotiations but had certain wishes, including that the defendant enter a plea to a felony, the felony be factually accurate to what the defendant did to her, the defendant be incarcerated until KP was an adult, and the defendant register as a sex offender.

23. After a second meeting, AP, KP, and Marcoux decided on an acceptable plea agreement to offer the defendant. Marcoux extended the offer to defense counsel on February 27, 2020. The defendant summarily rejected the offer.

24. Marcoux and Tammy Fee then met with AP and KP for a third time to discuss how to proceed from the declined offer. After discussing the matter, Marcoux extended another plea offer to the defendant. The offer was again declined.

25. Marcoux then shifted his focus from plea negotiations to trial preparation.

26. After another meeting with AP and KP, Marcoux extended a final offer to the defendant. The offer was final because the judge had a policy that he would not accept amendments to the pleadings after the final status conference. Marcoux told AP and KP that if the defendant did not accept the offer prior to the final status conference, Marcoux would be ready for trial and felt confident that the defendant would be convicted based on the strength of the evidence.

27. Because Marcoux and his family contracted COVID-19, the trial, along with the final status conference, had to be rescheduled. The DA's Office had regular contact with AP and KP during that time.

28. Shortly before the final status conference, defense counsel contacted Marcoux about a potential settlement. Marcoux told defense counsel that he “would not speak in generalities and would only consider an offer with precise terms.” (Resp’t Resp. 7.)

29. The morning of the final status conference, defense counsel contacted Marcoux and proposed a counteroffer. Marcoux thought the proposed plea agreement was in accordance with the anticipated recommendation in the presentence investigation and was consistent with KP’s wishes. Marcoux told defense counsel that he could not accept the plea agreement until he conferred the AP and KP.

30. Marcoux immediately contacted Tammy Fee and asked her to set up a virtual meeting with AP and KP. Marcoux and Fee met with AP and KP virtually. During the meeting, AP “vigorously expressed her disapproval” and accused Marcoux of extending the offer. (Resp’t Resp. 7.) Marcoux explained that he had not extended any offers since the last one was rejected; rather, defense counsel had made a counteroffer, which Marcoux immediately brought to AP’s and KP’s attention.

31. According to Marcoux, AP accused him of “working for the defense, not knowing how to do his job, that this was a ‘man’ thing and making other derogatory comments.” (Resp’t Resp. 8.) Marcoux attempted to explain that the

proposed plea agreement accomplished almost all KP's goals, but AP continued to berate Marcoux.

32. Marcoux then “clearly stated to A.P. that he did not have to accept being treated that way and was going to end the conversation.” (Resp't Resp. 9.) When AP appeared not to hear Marcoux, he repeated himself and ultimately removed himself from the virtual meeting. Marcoux says that although he “firmly reiterated he did not have to endure being treated as he was by A.P., at no point did [he] ever yell at A.P. and/or [KP].” (Resp't Resp. 9.)

33. The plea agreement was accepted by the court over AP's and KP's objection. A special hearing was held and the parties briefed the issue of whether a victim has the right to force a court to reject a plea agreement. According to Marcoux, AP's and KP's attorney “conceded that there is no support for the contention that a victim can cause the court to reject a plea agreement and the discretion to enter into a plea agreement rests solely with the State.” (Resp't Resp. 9.)

34. Marcoux next addressed AP's claim that the DA's Office failed to treat her with respect for her privacy.

35. When this case commenced, the former District Attorney entered the original pleadings and case data—including the defendant's address—into the state's database. At the time, the defendant's and victim's addresses were the same because they lived together. The former District Attorney

unintentionally failed to update the defendant's address when the defendant changed his address in court records. When Marcoux inherited the case upon becoming District Attorney, he had no reason to believe the defendant's address—which auto populated into subsequent documents—was incorrect.

36. In his response, Marcoux “apologizes for the oversight of his predecessor and assures all parties that the appropriate steps to avoid a similar mishaps in the future have already been taken under his supervision.” (Resp’t Resp. 16.)

37. Marcoux worked the District Attorney Information Technology (DAIT)² program to add a feature to the system to automatically remind staff to update the defendant's address in the system when the defendant changes his address in court records.

38. Marcoux also searched the electronic database for this case and discovered only two sets of subpoenas that were signed and sent to witnesses. The only subpoenas that had AP's and KP's address on them were their own subpoenas.

² DAIT provides IT services and support for a state-standard case management system used by courts, law enforcement, and other justice partners. See <https://dait.wi.gov/Pages/Home.aspx>.

39. Marcoux further reviewed the witness list filed in this case. While it included KP's full name, it was filed as a confidential document and was not available to the public. A redacted version of the witness list was filed later.

40. Finally, Marcoux addressed AP's claim that the DA's Office failed to treat her with fairness and dignity. Marcoux says that he (1) "conferred more with [AP and KP] on this case than with any other victim on any other case" (Resp't Resp. 18); (2) was not responsible for the failure to change the defendant's address and has since taken corrective action; (3) has never yelled at a victim; and (4) did not mislead AP and KP about his intent to pursue a trial, as evidenced by court records showing that he filed witness lists, jury instructions, and motions in limine prior to the final pretrial conference.

ALLEGATIONS OF VICTIM RIGHTS VIOLATIONS

41. AP raises three victim rights violations.

42. **Right to confer about plea agreement.** A crime victim has a right to "have, at his or her request, the opportunity to consult with the prosecution in a case brought in a court of criminal jurisdiction, as provided under s. 971.095(2)." Wis. Stat. § 950.04(1v)(j); *see also* Wis. Const. art. I, § 9m(2)(h) (a crime victim is entitled "[u]pon request, to confer with the attorney for the government.").

43. **Right to privacy.** A crime victim has a right to be “treated with . . . respect for . . . her privacy.” Wis. Stat. § 950.04(1v)(ag); *see also* Wis. Const. art. I, § 9m(2)(b).

44. **Right to be treated with fairness and dignity.** A crime victim has a right to “be treated with fairness [and] dignity.” Wis. Stat. § 950.04(1v)(ag); *see also* Wis. Const. art. I, § 9m(2)(a) (right to “be treated with dignity, respect, courtesy, sensitivity, and fairness”). This right “does not impair the right or duty of a public official or employee to conduct his or her official duties reasonably and in good faith.” Wis. Stat. § 950.04(1v)(ag).

DETERMINATIONS OF FACT

45. The Board finds no dispute of material fact between the parties.

INTERPRETATIONS OF LAW

46. The Board employs a multi-step methodology to analyze the complaint: (1) whether the complainant was a crime victim; (2) whether the respondent is subject to the authority of the Board; (3) whether the allegations are time-barred; (4) whether the allegations implicate any constitutional or statutory victim rights; and (5) whether the respondent failed to comply with any duty imposed by a constitutional or statutory provision.

47. 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” or, if that person is a child, the parent, guardian or legal custodian of that person. Wis. Stat. § 950.02(4)(a)1., 2.

48. Whether a respondent is subject to the Board’s authority is also determined by statute. The Board has authority to review complaints about “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).

49. Whether the allegations are time-barred is determined by the filing requirements in the administrative code. The Board may not consider allegations relating to “conduct that occurred prior to December 1, 1998 or more than 3 years before a complaint was filed with the board or the board was otherwise notified of the conduct,” except that the Board may consider issuing a report and recommendation concerning such conduct. Wis. Admin. Code CVRB § 1.04(5).

50. 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).

51. At the probable cause stage, 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

52. The Board finds no probable cause that AP's rights as a crime victim were violated.

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

54. The threshold question is whether AP is a crime victim. The Board finds that AP is a crime victim because her minor daughter, KP, was the victim of sexual assault, a crime punishable by fine or imprisonment or both. *See Wis. Stat. §§ 939.12, 950.02(4)(a)1., 2.*

55. The next question is whether the respondent is subject to the authority of the Board. The Board finds that the DA's Office is a public agency subject to the authority of the Board. *See Wis. Stat. § 950.09(2)(a).*

56. The next question is whether any of the allegations in the complaint are time-barred. The Board finds that none of the allegations in the complaint are time-barred because they relate to conduct that occurred within three years before the complaint was filed. *See Wis. Admin. Code CVRB § 1.04(5).*

57. The final question is whether the allegations in the complaint implicate a constitutional or statutory victim right. The Board addresses each potential victim rights violations identified above.

58. **Right to confer about plea agreement.** There is no dispute that Marcoux consulted with AP and KP about each proposed plea agreement, including the final offer proposed by defense counsel shortly before the final pretrial conference. While AP was unhappy about the timing and substance of the final offer, it is not uncommon for plea agreements to be proposed on short notice, the proposed agreement accomplished most of KP's goals for the plea, and ultimately the decision about whether to accept or reject a plea agreement is within the discretion of the district attorney. Based on these facts, the Board finds no probable cause that the DA's Office violated AP's right to confer with

the prosecution about a plea agreement. *See* Wis. Stat. § 950.04(1v)(j); Wis. Const. art. I, § 9m(2)(h).

59. **Right to privacy.** There is no dispute that the defendant's address was not timely updated in the DA's Office's database when the defendant changed his address in court records. This oversight, however, cannot be attributed to Marcoux because he was not the District Attorney at the time and has since taken remedial action to ensure that addresses are timely updated in the future. Marcoux also provided evidence that the only subpoenas that had AP's and KP's address on them were their own subpoenas and that the witness list with KP's full name was filed under seal. Viewing the information available to the Board in the light most favorable to the complainant, the Board finds no probable cause that the DA's Office violated AP's right to privacy. *See* Wis. Stat. § 950.04(1v)(ag); Wis. Const. art. I, § 9m(2)(b).

60. **Right to be treated with fairness and dignity.** The record before the Board shows that Marcoux regularly conferred with AP and KP, including before offering, accepting, or rejecting any plea agreement; kept the victims informed about his intent to pursue trial; and took remedial action when necessary to correct the actions of his predecessor. While AP also claims that Marcoux yelled at her and her daughter during a meeting, she provides no specifics about what Marcoux allegedly said, and Marcoux provides a

reasonable explanation for raising his voice. The Board finds no pattern of conduct on the part of the DA's Office that would rise to the level of a separate victim rights violation. Therefore, the Board finds no probable cause that the DA's Office violated AP's right to be treated with fairness and dignity. *See* Wis. Stat. § 950.04(1v)(ag); Wis. Const. art. I, § 9m(2)(a).

ORDER

Based on the foregoing, it is hereby ORDERED:

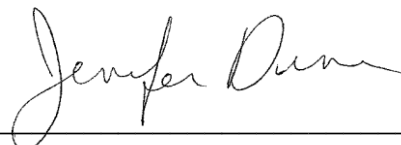
1. That there is no probable cause that a victim rights violation occurred, so the complaint is dismissed. A finding of no probable cause is a final decision of the Board under Wis. Admin. Code CVRB § 1.05(8).

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 will 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 6th day of October, 2022.



Chairperson Jennifer Dunn
Crime Victims Rights Board

SERVICE LIST

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