

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

STATE OF MISSOURI,)	
)	
PLAINTIFF,)	
vs.)	
)	
ERIC J. DEVALKENAERE)	CASE NO. 2016-CR02823
)	DIVISION 3
)	
DEFENDANT.)	

Suggestions in Opposition to Motion to Dismiss

The State, in opposition to the defendant's motion to dismiss, submits the following suggestions.

There is neither the procedural mechanism nor the substantive power for the Court to do what the defendant asks: wade into the facts of a criminal case and determine, pre-trial, that the State cannot meet its burden. And even if such a thing were proper and permissible, it would not be achieved by the current motion, which cites no evidence whatsoever to support its disputed claims. The motion does not attack the sufficiency of the indictment itself. Nor does the motion attack the charging language of the indictment, which complies with language approved by the Missouri Supreme Court. For these reasons, the Court should deny the motion.

I. There is no procedural mechanism to do what the motion asks, and the Court has no authority to do it.

The motion does not attack the sufficiency of the indictment; rather, it attacks the sufficiency of the State's evidence, Motion at pgs. 4-5, which, under Missouri law, cannot be done before the trial.

“[B]ecause prosecutors are charged with the responsibility and vested by law with the discretion to investigate the facts and the law to determine when to initiate a prosecution, this discretion also gives prosecutors the sole power to determine when to proceed with a prosecution or to dismiss it.” *State v. Clinch*, 335 S.W.3d 579, 583 (Mo. App. W.D. 2011) (internal quotation marks omitted); *see also State v. Smith*, 907 S.W.2d 301, 302 (Mo. App. W.D. 1995) (“The prosecutor has sole, unfettered discretion to enter a nolle prosequi in a criminal prosecution and the trial court may not interfere with the exercise of that discretion”).

Of necessity a prosecuting attorney is charged with the responsibility and vested by law with the discretion and legal duty to investigate the facts and the applicable law and to himself determine when a prosecution should be initiated. And by token of the same reasoning we think the discretion vested in him by law places in him the sole power to determine when he should proceed with a prosecution or dismiss it. ...

The judge on the trial bench may not know all the facts and it may be best for that judge and for the overall administration of justice that he does not know them or have the responsibility to determine whether the State could or should proceed to trial, or enter nolle prosequi.

State ex rel. Griffin v. Smith, 258 S.W.2d 590, 594 (Mo. 1953).

The Court does have the power to dismiss an indictment, but not for the reasons stated in the motion. For example, the Court could dismiss the case without prejudice due to a failure to prosecute. *State v. Honeycutt*, 96 S.W.3d 85, 89 (Mo. 2003). The Court could dismiss an indictment because the State failed to allege a necessary element. *State v. Williams*, 502 S.W.3d 90, 95 (Mo. App. E.D. 2016). Or the Court could dismiss an indictment because a defense to the charge appeared conclusively from the indictment itself. *City of Raymore v. O'Malley*, 527 S.W.3d 857, 863 (Mo. App. W.D. 2017).

The motion alleges none of those things. Instead, the motion asks the Court to accept the defendant's own version of the disputed facts and find, in advance of trial, that the State's evidence at trial will be insufficient. Motion at pgs. 4-5. Missouri law should not and does not permit that. *State v. Wright*, 431 S.W.3d 526, 533 (Mo. App. W.D. 2014). In *Wright*, the circuit court entered a pre-trial order addressing the "sufficiency of the evidence," which the parties treated as a dismissal of the case. *Id.* at 530. The court of appeals had trouble discerning what the circuit court's order had attempted to do, *id.* at 531, but it offered the following clarification.

The trial court's reliance on extensive facts, not included in the information, raises the possibility that the trial court attempted to

grant something akin to summary judgment in favor of [the defendant] on the criminal charges. But, unlike in civil cases, there is no currently recognized procedural mechanism in Missouri akin to summary judgment in the criminal context.

Id. at 533.

Similarly, in *State v. Keeth*, 203 S.W.3d 718 (Mo. App. S.D. 2006), the Southern District found that a pre-trial motion to dismiss which challenged the sufficiency of the evidence was not an authorized pre-trial motion. *Id.* at 722. Citing to the language in Rule 24.01(b)(1), which allows pre-trial motions that can be determined without the trial of the general issue, the Southern District found that a motion to dismiss based on the sufficiency of the evidence necessarily would require the presentation of the State's evidence, which occurs at trial rather than in a pre-trial motion. *Id.* at 722-23. And in *State v. Thomas*, 434 S.W.3d 524 (Mo. App. E.D. 2014), the Eastern District found that the trial court acted improperly by dismissing a charge based on a "trial" which consisted of the trial court's review of the police reports in which neither party was allowed to present evidence. *Id.* at 528. Citing back to *Keeth*, the Eastern District held that a court may not determine the sufficiency of the evidence until after the State has had the opportunity to present its evidence at a trial. *Id.*

This Court is bound by the precedent cited above and should hold that there is no procedural mechanism for a grant of the defendant's motion. Specifically, in the motion, the defendant asks the Court to accept 21 factual paragraphs in his favor and enter judgment on the basis of those facts. As discussed above, the Court lacks the authority to delve into the facts before trial, *Smith*, 258 S.W.2d at 594, and there is no procedural mechanism for it to do so. *Wright*, 431 S.W.3d at 533. Thus, the Court should deny the motion.

II. The motion cites no evidence whatsoever, and it relies on claims that are disputed and, in some cases, easily disproved.

Even if there were "something akin to summary judgment" in criminal cases (and there is not), *id.*, the motion could not come close to satisfying any such standard, because the motion cites no evidence and relies on disputed facts.

Summary judgment would require the movant to make "specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts," and here the motion does not do that. Rule 74.01(c)(1); *see also ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. 1993) (requiring citations to the record and evidence

to establish the entitlement to judgment as a matter of law and the absence of a dispute of material fact). Instead, the motion merely lays out defendant's own theory of the case in 21 unsupported paragraphs. Motion at pgs. 1-4.

The State is not required to respond to these unsupported paragraphs, but if it were required to do so, the State would dispute over half of them.¹ For example, the motion claims that "[t]he chopper's crew watched as Mr. Lamb darted into a residential driveway at 4154 College Avenue." Motion at ¶ 7. The State attaches here a video from the "chopper." *See* Exhibit A. It is up to the factfinder decide whether it depicts anyone "dart[ing]" into a residential driveway, Motion at ¶ 7, or whether it depicts someone slowly and carefully backing into the driveway, as if he lived there (which was the case). Exhibit A.² Another disputed fact is whether the defendant pointed his weapon at Roberta Merritt, the lessor of the home, before he entered her property without her consent.³ The defendant stated "[t]hat [pointing a weapon at Merritt] would be reckless,"

¹ Given the lack of legal and factual support for this motion, the State is concerned that the motion is either an attempt to prompt the State to lay out its theories of the evidence, or a mechanism to get alternative facts into the public sphere. Neither purpose is legitimate, so the State will not engage in extended discussion of the evidence unless the Court directs it to do so.

² A hard copy of this exhibit was tendered to the Court and will be provided to Defense counsel.

³ She testified that he did.

Exhibit B⁴ (excerpt from Grand Jury Testimony), which undercuts the motion's central assertion that "there is no evidence of reckless behavior." Motion at pg. 4.

Thus, for the reasons stated above, there is no such thing as summary judgment in a criminal case, but even if there were such a thing, the motion would fail to live up to that standard because it cites no evidence and relies on disputed facts.

III. To the extent the motion can be read as an attack on the sufficiency of the indictment, the motion fails.

For the reasons stated above, prior to trial, the sufficiency of the evidence cannot be judged in a criminal case, and it cannot be judged in *any* case in the manner attempted by the motion. The motion attempts to challenge the evidence, not the sufficiency of the indictment, but, to the extent the motion attempts to judge the sufficiency of the indictment, it fails.

Rule 23.01 provides that an information must state: "(1) the name of the defendant; (2) the essential facts constituting the offense charged; (3) the time and place of the offense charged; (4) the section of the statutes alleged to have

⁴ A hard copy of this exhibit was also tendered to the Court and will be provided to Defense counsel.

been violated; and (5) the name and degree, if any, of the offense charged.” *State v. Rousseau*, 34 S.W.3d 254, 258 (Mo. App. W.D. 2000). “When ruling on a motion to dismiss premised upon a claim that the charging document failed to charge an offense, the court need not examine evidence outside the four corners of the charging document itself.” *City of Raymore v. O’Malley*, 527 S.W.3d 857, 861 (Mo. App. W.D. 2017).

“[T]he fundamental test of the sufficiency of an information is whether or not it states the essential elements of the offense charged so that the defendant is adequately informed of the charge against her and the final disposition of the charge will constitute a bar to further prosecution for the same offense.” *Id.* (internal quotation omitted).

The charging document is “legally sufficient if it alleges facts establishing all the elements of the charged offense, fairly informs the defendant of the charges, and enables the defendant to plead double jeopardy to prevent future prosecution for the same offense.” *Williams*, 502 S.W.3d at 95. Furthermore, “[a]n indictment or information is deemed sufficient if it is substantially consistent with the forms of indictments or informations which have been approved by the Missouri Supreme Court.” *State v. Griffin*, 185 S.W.3d 763, 765-66 (Mo. App. E.D. 2006).

Here, the indictment tracks the Missouri Supreme Court's approved charge, so the indictment is sufficient. The following is a comparison between the Missouri Approved charge for involuntary manslaughter and the charge filed in this case.

MACHCR 14.10	Charge in this case
The (Grand Jurors) (Circuit Attorney) (Prosecuting Attorney) of the (City) (County) of _____, State of Missouri, charge(s) that the defendant, in violation of Section 565.024, RSMo, committed the class (B) (C) felony of involuntary manslaughter in the first degree, punishable upon conviction under Sections 558.002 and 558.011, RSMo, in that (on) (on or about) [<i>date</i>], in the (City) (County) of _____, State of Missouri, the defendant recklessly caused the death of [<i>Identify victim.</i>] by (shooting) (stabbing) (striking) ([<i>concise statement of other means used to cause death</i>]) (him) (her)	The Grand Jurors of the County of Jackson, State of Missouri, charge that the Defendant, in Section 565.024, RSMo, committed the Class C Felony of Involuntary Manslaughter in the First Degree , punishable upon conviction under Sections 558.002 and 558.011, RSMo, in that on or about December 3, 2019, in the County of Jackson, State of Missouri, the defendant recklessly caused the death of Cameron D. Lamb by shooting him.

The charging language lays out the essential elements of the crime—that the defendant recklessly caused the death of Cameron Lamb by shooting him, *see* § 565.024, it tracks the approved instruction, and it puts the defendant on

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notice of any potential double jeopardy issue.⁵ That ends the inquiry as to whether the indictment is sufficient. *O'Malley*, 527 S.W.3d at 861; *Griffin*, 185 S.W.3d at 765-66.

Conclusion

The motion is wholly unsupported by either the evidence or by Missouri law. Further, it arguably does not comply with Rule 55.03(c). The motion should be denied.

Respectfully Submitted,

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by,

/s/ Dion Sankar

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⁵ In drafting these suggestions, the State noticed a typo in that the words “violation of” were omitted from the indictment. With leave of Court, the State will cure that immaterial omission via an information in lieu of indictment.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was transmitted electronically through the Missouri e-Filing System on 3/12/2021 to all attorneys of record.

/s/ Dion Sankar

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