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State probes why perjury was allowed

*Tainted Wayne Co. drug case baffles legal experts; grievance panel looks into conduct.
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DETROIT -- The Michigan Attorney Grievance Commission is investigating the conduct of an assistant Wayne County prosecuting attorney in a bizarre drug case in which the prosecutor and a Wayne County Circuit Court judge admitted they allowed two police officers and an informant to lie.

The perjury-tainted testimony involved an Inkster drug case that began March 11, 2005, when local police seized 47 kilos of cocaine. They also arrested a Farmington Hills resident and bar owner who allegedly set up the deal and a truck driver who delivered the drugs.

The case was taken to trial last September by Assistant Wayne County Prosecutor Karen Plants before Judge Mary Waterstone. It ended with the conviction of truck driver Ricardo Pena, 47, and a hung jury for bar owner Alexander Aceval, 38.

Pena was sentenced to 18 to 32 years in prison and a retrial was ordered for Aceval. During pretrial proceedings for Aceval in March, defense lawyers learned of the false testimony allowed in the previous trial. Under fire from David L. Moffitt, one of Aceval's lawyers, Waterstone disqualified herself. A new prosecutor was also appointed for the retrial.

With the appointment of a new judge for the retrial, defense lawyers gained access to previously sealed transcripts of two in-chamber conferences Plants had with Waterstone.

The transcripts show Plants pointed out instances of perjury by the officers and the informant, in which they all denied a prior relationship even though the drug bust was set up by the informant.

Waterstone said the testimony was "appropriate" to blunt Aceval's lawyer's persistent efforts to learn the identity of the informant. The informant would not live through the weekend if his identity was revealed, the judge said.

Waterstone has maintained she did nothing wrong. She said she stepped aside in the Aceval retrial to ensure he received a fair trial.

"I think I tried to bend over backwards to allow everyone to ask all their questions and to be fair," she said.

"Nothing was done that was not placed on the record."

The state's Judicial Tenure Commission does not divulge whether it is investigating a judge until a formal complaint is issued.

Wayne County Prosecutor Kym L. Worthy would not discuss the case because of the grievance commission's investigation. In a statement, however, she defended Plants as one of her key attorneys and said all witnesses in the case said Plants instructed them to tell the truth.

"She is known throughout the criminal justice system as a lawyer of high integrity and competence," Worthy said.

Grievance Administrator Robert Agacinski declined comment.

Legal experts, however, said a case where perjured testimony was sanctioned was unheard of. Such actions clearly violate legal ethics, they said.

Alan Salzman, who teaches criminal procedure at University of Detroit Mercy, said he had never heard of a similar situation with a judge and prosecutor.

"They were plainly wrong. It does not make any sense to do that when there are other ways to protect a witness's identity," Salzman said. "To have (witnesses) commit this perjury is mistaken."

Gerald Lorence, Pena's appellate lawyer, said in 38 years of practicing law, he has never encountered this situation.

"There is always the allegation that the police lied or this witness lied but I never saw anything like the transcripts that divulged in-chamber hearings, on the record, between the prosecutor and the judge that actually spelled out that witnesses lied," Lorence said.

Moffitt said he is disappointed that the Appeals and Supreme Courts and the attorney general's office all declined to look into the matter.

"One has to be particularly concerned about how law enforcement does business in Wayne County," Moffitt said. "You have witnesses and police perjury and there is no acknowledgement of responsibility and no evident effort to investigate or ensure it doesn't happen again."

Last month, the Michigan Court of Appeals reversed Pena's conviction based on his lawyer's appeal over the perjury issue. Citing the "prosecutor's confession of error," the appeals court ordered Pena's case back to Waterstone for a new trial.

Pena bypassed a new trial, opting instead to cut a deal with prosecutors. He pleaded guilty to possessing more than 1,000 grams of cocaine in exchange for a sentence of 5-15 years. He agreed to testify against Aceval and prosecutors dropped two other charges, one of which carried a life sentence.

Last week, Aceval's retrial took another strange twist as Assistant Wayne County Prosecutor Paul Bernier called Waterstone as a witness.

In her testimony, the judge acknowledged the false testimony and acknowledged that court rules discourage such meetings as she had with Plants. She had never done that before, she said.

"That was the purpose of the sealed record, to make sure the Court of Appeals and the Supreme Court would have the information in the record, that there would be nothing done that was not in the record," Waterstone testified.

The retrial ended abruptly shortly after Waterstone's testimony. Another prosecution witness, Bryan Hill, was recalled to the stand and Hill sobbingly recanted his testimony, given days earlier, that gave Aceval a Las Vegas alibi for a date when Hill said he helped Aceval move more drugs. Hill testified Aceval recruited him to give false testimony.

Aceval then threw in the towel, accepted a deal from prosecutors, and pleaded guilty to intent to deliver more than 1,000 grams of cocaine in return. He will be sentenced to 10-15 years in prison.

University of Detroit Mercy criminologist Daniel Kennedy said it is obvious the case had major problems going into court.

"Everybody uses informants and there are all kinds of ways to use informants and get your conviction," Kennedy said "(Police and the prosecutor) didn't set it up that way and everybody was passing along a troubled case and no one did anything to improve it."

Allowing any perjury in a case is "just a plain violation of everybody's ethics, period," he said.

"I'm not aware of any exceptions. It's like a Catholic priest who says sometimes under certain circumstances I will tell people what was told to me in confession. Once you cross that line, you put the whole institution in jeopardy," Kennedy said.