



**IN THE
TENTH COURT OF APPEALS**

No. 10-16-00427-CR

IN RE MATTHEW ALAN CLENDENNEN

Original Proceeding

CONCURRING MEMORANDUM OPINION

While I concur in the Court's disposition of this original proceeding, I write separately to discuss the importance of discretion in our Texas jurisprudence.

The resolution of this original proceeding rests largely on the factual discretion exercised by the McLennan County District Attorney and the legal discretion exercised by the trial court.

The events and circumstances surrounding what has come to be commonly referred to as the "Twin Peaks shootout" are unique in McLennan County. That aside, the decision making on that day by the district attorney, though no doubt well intended, came very close to being an abuse of his professional discretion. Particularly, his not deferring to law enforcement on the issues of arrest and reporting can certainly be called

into question. However, even though I have significant concerns about his actions and about how close he was to abusing his discretion, I believe that he did not cross that line. *See State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex. Crim. App. 1994) (orig. proceeding) (plurality opinion) (“A trial court may not disqualify a district attorney or his staff on the basis of a conflict of interest that does not rise to the level of a due process violation.”); *see also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807, 107 S.Ct. 2124, 2137, 95 L.Ed.2d 740 (1987) (“A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity.”).

“The standard of review for disqualification of the prosecutor by the trial court is whether the trial court abused its discretion.” *Buntion v. State*, 482 S.W.3d 58, 76 (Tex. Crim. App. 2016). “The trial court abuses its discretion when its decision lies ‘outside the zone of reasonable disagreement.’” *Id.* (quoting *Apolinar v. State*, 155 S.W.3d 184, 186 (Tex. Crim. App. 2005)). Concerning these complex and, one might argue, unusual events, I believe that the trial court did not abuse its discretion and that the McLennan County District Attorney should continue in his function.

With these comments, I respectfully concur in the judgment.

REX D. DAVIS
Justice

Concurring opinion delivered and filed July 5, 2017

