# STATE OF MICHIGAN

# COURT OF APPEALS

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In re Investigation of Criminal Sexual Conduct and Misconduct in Office.

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PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

RIVERVIEW SCHOOL DISTRICT, JOHN SOHN, BARBARA DE GREGORIO, and LAURA VAN VULKENBURG,

Respondents-Appellants.

UNPUBLISHED
December 23, 2003

No. 236571
Wayne Circuit Court
LC No. 01-500102

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Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Respondents, Riverview School District and three of its employees, John Sohn, Barbara De Gregorio, and Laura Van Vulkenburg, appeal as of right an order of the circuit court that denied Riverview's motion to quash a search warrant. We affirm.

In this case, the Wayne County Prosecutor petitioned the circuit court to authorize the issuance of investigative subpoenas against several employees of the Riverview Community School District, including respondents John Sohn, assistant principal of Riverview High School, Barbara De Gregorio, secretary to the principal of Riverview High, and Laura Van Vulkenburg, a district administrator. The prosecutor was acting in response to allegations that a teacher at Riverview High had subjected a female student to "inappropriate acts," which included "'pressing in and out on [the student's] breasts from the outside of [her] coat,'" and "rubbing of her bare back above her pants" in the classroom. The petition also indicated a concern that the school district had tried to ignore or cover up the misconduct. The circuit court authorized the subpoenas.

The three individual respondents sought to have the subpoenas quashed, on substantive as well as procedural grounds. The circuit court credited arguments relating to inadequate service, and agreed to quash the original subpoenas, but ruled that the subpoenas should be reissued, rejecting the substantive challenges. Subsequently, rather than pursuing an appeal, the three

individual respondents apparently did provide the testimony demanded, acting under grants of immunity.

Next, the prosecutor obtained a warrant to search the computer network server of Riverview High for "[a]ny and all records . . . pertaining to misconduct of public official and use of computer program, computer system, or computer network to commit crime pertaining to allegations of misconduct by teacher Gary Gorman stored on the server . . . ." Respondent Riverview sought to quash the search warrant, proceeding through the same attorney that the three individual respondents used in resisting their subpoenas, all respondents waiving objections to any perceived potential conflicts of interest on counsel's part.

In an order dated August 24, 2001, the circuit court denied the motion to quash the search warrant, but elected to impound the evidence seized in chambers "until an appeal by the Riverview Community School District of the Court's rulings with respect to the factual and legal defenses presented by the district . . . has resulted in a final order." Five days after issuing that order, the court issued another order declaring the earlier one "a final order for purposes of appeal, there being no just reason for delay," citing MCR 2.604. This appeal ensued.

Petitioner challenges this Court's jurisdiction over respondents' claim of appeal, but states that it has no objection to this Court proceeding as on an application. Arguably, jurisdiction is proper as an appeal of a final order pursuant to MCR 2.604, the circuit court having impounded the property at issue pending resolution of this appeal. However, we need not address that question, as we would, if the claim of appeal was not proper, treat the brief as an application and grant leave.

Respondents' first issue on appeal raises a challenge on constitutional grounds to the felony investigative subpoenas issued for the three individual respondents, Sohn, De Gregorio, and Van Vulkenburg. Specifically, respondents maintain that the issuance of the subpoenas was unreasonable because the prosecuting attorney's office was not required to identify the crime being investigated and the evidence could not support a showing of a criminal violation. However, we decline to address this issue. "Only an individual who 'belongs to the class for whose sake [a] constitutional protection is given' can seek to invoke its protection." *People v Smith*, 420 Mich 1, 24; 360 NW2d 841 (1984). See *In the Matter of Investigative Subpoena re Homicide of Lance C Morton*, __ Mich App __; __ NW2d __ (2003) [Docket No. 247929]. Accordingly, only the three individual respondents, and not the school district, have standing to challenge the issuance of the investigative subpoenas. Those respondents chose to accept immunity and provide statements to investigators rather than pursue an appeal of the circuit court's ruling that the investigative subpoenas were valid if certain issues pertaining to service were corrected. A party situated as the three individual respondents found themselves could, immediately after losing the motion to quash the investigative subpoena, seek a stay of proceedings, MCR 7.209(E)(1) and (H)(2), while pursuing an interlocutory appeal, MCR 7.203(B)(1), and also move this Court for immediate consideration to expedite the appeal, MCR 7.211(C)(6). Under these circumstances, we think it appropriate to exercise judicial restraint and not address the issue. In effect, to address the issue at this state of the proceeding would require us to issue dicta on behalf of litigants who chose to sleep on their appellate rights. *Lothian v Detroit*, 414 Mich 160, 175; 324 NW2d 9 (1982). Such restraint is especially appropriate to the extent that respondents challenge the validity of their subpoenas on constitutional grounds. See *Rinaldi v City of Livonia*, 69 Mich App 58, 69; 244 NW2d 609 (1976) ("We will not undertake a

constitutional analysis when we can avoid it."). Moreover, because the individual respondents have cooperated with the challenged subpoenas and given the testimony demanded, the issue is moot. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) (an issue is moot if it presents abstract questions of law that do not rest upon existing facts or rights); see *In re Humphrey Estate*, 107 Mich App 778, 782; 309 NW2d 722 (1981) (identifying pronouncements of this Court on a moot issue as dicta for that reason).

Next, respondent Riverview[1] asserts that the circuit court erred in denying its motion to quash the search warrant because "there was no reporting violation, and no probable cause to believe that any employee of the [r]espondent [s]chool [d]istrict 'knowingly failed to report an instance of suspected child abuse ….'" In support of this claim, the school district faults the circuit court for not engaging in an examination of the student's written complaint and making an independent assessment of whether the complaint was one of sexual harassment rather than sexual abuse, and secondly, for not construing the reporting duty contained in Michigan's Child Protection Act in light of the federal Family Educational Rights and Privacy Act and determining whether any violation occurred on the facts of this case. Respondent Riverview maintains that engaging in either of these inquiries would necessarily result in the quashing of the search warrant and the return of the materials presently held by the circuit court pending resolution of this appeal.

A search warrant may not issue unless probable cause exists to justify the search. US Const, Amend IV; Const 1963, art 1, § 11, MCL 780.651; *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995), overruled in part on other grds in *People v Wager*, 460 Mich 118; 594 NW2d 487 (1999), and overruled in part on other grds in *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003); *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). Probable cause exists when the facts and circumstances would allow a person of reasonable prudence to believe that the evidence of a crime or contraband sought is in the stated place. *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000); *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). A magistrate's finding of probable cause is based on all the facts related in the affidavit. *People v White*, 167 Mich App 461, 463; 423 NW2d 225 (1988). The affidavits are not to be read in a negative or hypertechnical way, *United States v Giacalone*, 541 F2d 508, 514 (CA 6, 1976), but are to be interpreted with common sense and in a realistic fashion, *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992).

On appeal from a finding of probable cause, a reviewing court must look at the affidavits and determine whether the information contained in the documents could have caused a reasonably cautious person to conclude that, under the totality of the circumstances, there was a substantial basis of probable cause to conclude that the evidence sought might be found in a specific location. *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000); *People v Echavarria*, 233 Mich App 356, 367; 592 NW2d 737 (1999). Review is limited to those facts that were presented to the magistrate and are contained on the record. *People v Sloan*, *supra* at 172-173.

[1] Respondents concede that the three individual respondents have no standing to challenge the search warrant.

To sustain Riverview's challenge to the validity of the search warrant would require this Court to look outside the facts presented in the affidavit and to interpret statutory provisions relating to sexual abuse, sexual harassment, and federal and state mandatory reporting obligations. By demanding this kind of review, Riverview seeks to have a judicial determination made before any charges have been brought against any individual regarding whether any crimes can ultimately be proven and, in effect, to foreclose the ability of the state to conduct its investigation. Riverview's expectations far exceed what the law requires for either the issuance or review of a search warrant. Further, when reviewed against the standard set forth above, we agree with the trial court that no grounds exist to quash the search warrant.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White