

COLORADO COURT OF APPEALS

Court of Appeals No. 02CA2170
Arapahoe County District Court No. 01CV1305
Honorable Timothy L. Fasing, Judge
Honorable David D. Parrish, Judge

James W. Burneson,
PlaintiffAppellant,

v.

Deputy District Attorney of Arapahoe County, John Jordan,
DefendantAppellee.

JUDGMENT AFFIRMED

Division A
Opinion by JUDGE PIERCE*
Davidson, C.J., and Hume*, J., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

March 18, 2004

James W. Burneson, *Pro Se*
James J. Peters, District Attorney, Richard H. Bloch, Chief
Deputy District Attorney, Centennial, Colorado, for Defendant-Appellee
*Sitting by assignment of the Chief Justice under provisions of
Colo. Const. art. VI, § 5(3), and § 24-51-1105,
C.R.S. 2003.

Plaintiff, James W. Burneson, appeals a judgment declining his request to require defendant, John Jordan, Deputy District Attorney of Arapahoe County, to prosecute certain alleged criminal conduct. We affirm.

Plaintiff filed a complaint pursuant to § 16-5-209, C.R.S. 2003, alleging that defendant had improperly declined to prosecute three individuals for alleged perjury committed during a series of civil trials. Plaintiff sought an order from the trial court compelling defendant to file “appropriate charges . . . against the accused.”

The matter proceeded to a hearing in which plaintiff called a series of witnesses including two judges that presided over the trials in which the alleged perjury occurred. After hearing the evidence, the trial court concluded that plaintiff had failed to demonstrate that defendant

acted arbitrarily or capriciously in declining to file criminal charges against the three individuals. Consequently, the trial court denied plaintiff's requested relief.

Plaintiff contends that the trial court erred or abused its discretion in declining to require defendant to file criminal charges in the matter. We disagree.

Section 16-5-209 provides in pertinent part as follows:

The judge of a court having jurisdiction of the alleged offense, upon affidavit filed with the judge alleging the commission of a crime and the unjustified refusal of the prosecuting attorney to prosecute any person for the crime, may require the prosecuting attorney to appear before the judge and explain the refusal. If after that proceeding, based upon the competent evidence in the affidavit, the explanation of the prosecuting attorney, and any argument of the parties, the judge finds that the refusal of the prosecuting attorney to prosecute was arbitrary or capricious and without reasonable excuse, the judge may order the prosecuting attorney to file an information and prosecute the case or may appoint a special prosecutor to do so.

Section 16-5-209 is intended to permit citizens to establish through general adversary processes that a criminal proceeding should be initiated by either the district attorney or a special prosecutor. *See Feigin v. Colo. Nat'l Bank*, 897 P.2d 814, 819 (Colo. 1995); *see also Dobaish v. Tooley*, 670 F.2d 934, 937 (10th Cir. 1982)(purpose of § 16-5-209 is to allow persons who believe that a prosecuting attorney is not pursuing a case with diligence to petition the court to review the status of the case).

The party challenging a district attorney's charging decision under § 165209 must overcome the presumption that the prosecutor acted in accordance with the law. *Landis v. Farish*, 674 P.2d 957, 959 (Colo. 1984). This presumption arises from the fact that a district attorney has broad discretion in determining what criminal charges should be prosecuted. *See Sandoval v. Farish*, 675 P.2d 300, 302 (Colo. 1984).

Unless there is clear and convincing evidence that the district attorney's decision not to prosecute was arbitrary or capricious and without reasonable excuse, the district court should not order prosecution and thereby substitute its judgment for that of the prosecutor. *See Landis v. Farish, supra*.

Here, plaintiff alleged that three individuals gave knowingly false testimony concerning a sale and leaseback real estate transaction. Specifically, he alleged that the individuals gave false testimony concerning the purchase price of the office unit that was the subject of the transaction. Arguments between plaintiff and the individuals regarding the purchase price and precise nature of the transaction were the subject of three different civil trials and resulted in inconsistent findings and judgments from different trial court judges.

At the hearing, plaintiff relied heavily on the fact that in the third civil trial involving the sales transaction, the trial court found that the individuals' testimony in the first civil action had been intentionally misleading. However, the issue before the trial court under § 165209 was not simply whether the individuals had presented misleading testimony or even whether such testimony amounted to perjury. Rather, the critical inquiry in this action was whether defendant's decision not to file criminal charges was arbitrary and capricious. *See Landis v. Farish, supra.*

Substantial evidence presented at the hearing supports the trial court's determination that defendant's decision not to prosecute was neither arbitrary nor capricious. This included evidence that after receiving plaintiff's complaint, defendant assigned the matter to an investigator. The investigator then met with plaintiff and plaintiff's attorney in the civil cases, reviewed the transcripts of the civil cases, and met with three different district attorneys, including defendant, all of whom decided that the office should not file criminal charges.

At the hearing, both defendant and another district attorney assigned to consider plaintiff's allegations, testified that they reviewed the civil trial transcripts plaintiff submitted and concluded that criminal charges should not be brought. This decision was based in part on the somewhat confusing nature of the transaction in question and the fact that two judges had reached different decisions on the issue. Ultimately, both defendant and the other district attorney decided against prosecution because they did not believe there was a reasonable probability of success in obtaining a conviction. Thus, the evidence established that defendant and the district attorney's office gave proper consideration to plaintiff's allegations.

Plaintiff argues that the trial court did not properly consider the evidence because, in reaching its decision, it did not review the entire transcripts from all three civil trials and two depositions. We reject plaintiff's implicit argument that such a review was necessary for the trial court to reach a decision. We further note that during the hearing, the trial court repeatedly allowed plaintiff and plaintiff's witnesses to read various portions of the civil trial transcripts which plaintiff believed were most relevant. Thus, contrary to plaintiff's contention, we conclude that the trial court adequately considered the evidence presented at the hearing.

In sum, the evidence established that both defendant and the district attorney's office gave due consideration to plaintiff's request to prosecute the matter and, based upon legitimate discretionary factors, decided against filing criminal charges. We agree with the trial court's conclusion that plaintiff failed to present clear and convincing evidence that defendant acted arbitrarily or capriciously in declining to pursue prosecution. Consequently, we perceive no error in the trial court's decision to deny relief pursuant to § 16-5-209. *See Landis v. Farish, supra.*

The judgment is affirmed.

CHIEF JUDGE DAVIDSON and JUDGE HUME concur.