

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

WALTHAM DISTRICT COURT

DOCKET No.0751 CR 927

\_\_\_\_\_  
 Commonwealth of )  
 Massachusetts, )  
                           Plaintiff, )  
 v. )  
 Marilyn P. Devaney, )  
                           Defendant. )  
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Findings and Order

The defendant, Marilyn P. Devaney, moves to dismiss the within complaint for "vindictive" prosecution. As factual support for her request, the defendant has submitted 30 recent police reports involving reports of past assault and battery, all of which were assigned for follow up by the Waltham police. Without reference to any particular facts, the defendant summarizes that ; in 11 cases the police referred the complaining parties to seek criminal complaints ; in two cases the police sought criminal complaints themselves; and in one other case the investigation is ongoing. No particular analysis is offered by the defendant of these 14 cases; nor is any reference made to the other 16 cases (except to note that the defendant's case is the only one of these 30 that was "upgraded" to a felony charge after investigation).

There is a well-settled presumption "that criminal prosecutions are undertaken in good faith, without intent to discriminate." Commonwealth v. Franklin, 376 Mass.885, 894(1978). Consequently, the defendant bears the initial burden of presenting evidence "which raises at least a

reasonable inference of impermissible discrimination." *Ibid.* To be successful, the defendant must show (1) "that a broader class of persons than those prosecuted has violated the law"; (2) "that failure to prosecute was either consistent or deliberate"; and (3) "that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex." *Ibid.* "[O]nce a defendant has raised a reasonable inference of selective prosecution, the Commonwealth must rebut that inference or suffer dismissal of the underlying complaint." *Id.* at 895. See Commonwealth v. An Unnamed Defendant, 22 Mass. App. Ct. at 235.

In this matter the defendant contends that the discrimination she alleges is motivated by her notoriety as a local politician. Ms. Devaney is, of course, a Watertown Town Council member as well as a Governor's Councilor. In her pleadings she states that she is "controversial and both well-liked and well-disliked." She asserts generally that the follow up investigation and prosecution by the Waltham police is "part of a political agenda that the Waltham police are assisting in."

Ultimately, in any event, the defendant has not alleged discriminatory prosecution based upon some impermissible classification such as race, gender, national origin, religion, sexual orientation or the like. Nor has the defendant suggested that the prosecution is based upon or affects the proper exercise of any constitutional rights such as free speech, the right to vote, to freely associate or assemble. She does not offer any suggestion of an improper infringement of her civil rights, either constitutional, statutory or procedural.

Accordingly, the Motion to Dismiss must be Denied.

July 23, 2008

  
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Gregory C. Flynn, I.