

Conroe man claims former assistant DA tampered with evidence

By Catherine Dominguez, Staff writer Updated 11:26 am CST, Monday, February 25, 2019



Photo: Jason Fochtman, Houston Chronicle / Staff Photographer

Businessman Mark Johnston has filed a federal lawsuit against several current and former Montgomery County employees alleging they wrongfully had his probation revoked in 2014. Johnston is serving a 40-year theft charge at the Darrington Unit with the Texas Department of Criminal Justice in Rosharon.

A Conroe businessman is suing several current and former Montgomery County employees, claiming they tampered with evidence in a sales tax case which caused his probation to be revoked, sending him to prison for 40 years. New York-based attorney Ty Clevenger filed the federal civil suit in the Southern District of Texas Jan. 31 on behalf of Mark Johnston. The suit names in their individual capacity former Montgomery County Assistant District Attorney Nicole Czajkoski, District Attorney's Office investigator Erin Smith, sheriff's deputy Alton Neely and probation officer Russell Stilley along with two private citizens. The lawsuits accuses the defendants with conspiring to violate Johnston's civil rights.

Montgomery County prosecutors filed a motion in March 2014 to revoke Johnston's probation, alleging 19 probation violations. Johnston was sentenced by 221st state District Judge Lisa Michalk for failing to remit sales taxes collected from car sales.

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Johnston, who claims he pleaded true on the advice of his attorney, has been housed in the Texas Department of Criminal Justice's Darrington Unit near Rosharon since being sentenced.

"I was thunderstruck by this," Johnston told The Courier. "I feel the system has failed in providing my constitutional rights and the safe guards that were established to have a fair hearing and fair opportunity. I feel the lawsuit will reveal the truth about (Czajkoski) conduct and what happened at the DA's office during the time frame of my revocation proceedings."

"I believe once the DA's office reviews the facts they are not aware of, they will do the right thing."

However, Assistant County Attorney Daniel Plake fired back on behalf of Czajkoski, Smith, Neely and Stilley, motioning for the dismissal of the suit instead of responding to the allegations calling it "nothing more than a collateral attack of the allegation he pled 'true' to and for which is currently incarcerated."

Plake states in the motion the case should be dismissed for lack of subject matter jurisdiction and or failure to state a claim.

"Mark Johnston is a crook, everyone that has dealt with him knows he is a crook and he continues to steal and lie from prison," Czajkoski said, adding she is "not even a little bit" concerned about the suit. "I have done nothing wrong. I know it will be dismissed. I'm confident of that."

The lawsuit

In 2009 Johnston, who owned and operated a car dealership in Conroe, was placed on probation for theft in an amount greater than \$200,000, a first-degree felony, relating to his car dealership business.

According to the 19-page lawsuit, it wasn't until late 2018 that Johnston learned about the alleged efforts by former Montgomery County Assistant District Attorney Nicole Czajkoski was trying to get his probation revoked.

"Czajkoski was searching for ways to revoke (Johnston's) probation as early as 2012 and she tampered with evidence in order to achieve that result," the suit states.

In July 2012, Czajkoski subpoenaed Woodforest National Bank in Conroe for documents related to all accounts "associated" with Johnston. While the bank provided all the documents requested, the lawsuit alleges Czajkoski and Montgomery County District Attorney investigator Erin Smith forwarded only some of the documents to an investigator at the Office of the Texas Comptroller of Public Accounts and "deceived" the investigator to believing they had forwarded all the bank records.

If Czajkoski and Smith had provided all the records to the state, Johnston claims in the lawsuit, it would have shown the accounts were under the control of Johnston's business partner, not Johnston. Johnston also had been making deposits into the accounts even though he did not have access to or control over those account.

The suit claims the deposits made by Johnston were sufficient to cover all sales taxes, regardless of whether his partner actually remitted those taxes to the state and some of the taxes actually had been paid by Johnston's business partner using accounts withheld from the comptroller investigator.

By not providing all the documents, the suit states, the investigator with the comptroller's office wrote a report accusing Johnston of intentionally failing to pay the sales tax. The suit alleges Czajkoski knowingly presented the false information to a Montgomery County Grand Jury which resulted in an indictment and Johnston's probation being revoked.

Motion to dismiss

According to Plake's 15-page motion, the suit lacks subject matter jurisdiction, which is the authority of a court to hear cases of a particular type or cases relating to a specific subject matter. Johnston's suit, Plake states, is barred by the Rooker-Feldman doctrine, which states federal courts do not have jurisdiction to review decisions of state courts.

"Unsuccessful litigants may not circumvent the Rooker-Feldman doctrine by framing their claim as original claims for relief, if the claims are inextricably intertwined with the state court judgment," the motion states. "This courts review of claims previously litigated in the state court will constitute an impermissible collateral attack on the state court's judgment.

"(Johnston) lost in state court and is now trying to relitigate the case by casting it as a civil rights case in federal court."

Plake stated Johnston has failed to state a claim because he failed to demonstrate he can prove any facts which would entitle him to relief. The complaint, Plake notes, must be "liberally construed in the claimant's favor and all factual allegation taken as true."

"The court is 'not bound to accept as true a legal conclusion couched as a factual allegation,'" Plake states in the motion.

Additionally, Plake notes Johnston's statute of limitations has expired despite Johnston's claim he was not aware of Czajkoski's efforts until last year and Johnston pleadings are insufficient to identify a state law claim.

"Mr. Johnston's pleadings do not sufficiently state why, neither he nor his prior attorneys, could not have discovered this evidence earlier," Plake states.

The federal court has made no ruling in the case.