

STATE OF NEW YORK
SUPREME COURT

COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

BRIAN BALL

Defendant.

Ind. #2009-0731

Filed: 8/21/09

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APPEARANCES: Michael C. Green, Esq.
Monroe County District Attorney
Sandra Doorley, Esq.
First Assistant District Attorney, of Counsel

Muldoon and Getz
Jon P. Getz, Esq., of Counsel
Attorney for Defendant

DECISION AND ORDER

FRANCIS A. AFFRONTI, J.

The Defendant in the above-entitled matter, by Notice of Motion dated August 27, 2009, seeks dismissal of the Indictment pursuant to CPL Sec. 210.20(1)(c) on the basis that he was deprived of his right to testify before the Grand Jury in accordance with CPL Sec. 190.50(5) and to give "relevant and competent evidence". The

Indictment alleges criminal conduct occurring on November 18, 2005, approximately four years ago, while Defendant was acting in his capacity as a Town of Greece police officer. It accuses him of one count of Offering a False Instrument for Filing in the First Degree, one count of Falsifying Business Records in the Second Degree, and two counts of Official Misconduct.

Defendant denotes that, although he duly served by hand delivery a written request to testify upon the Monroe County District Attorney, by notice dated June 24, 2009, prior to the filing of the Indictment, he was never advised of the "nature and scope" of the Grand Jury presentation despite repeated demands for such information, both orally and in writing. The prosecution admits receipt of the request, responding to it by letter dated August 17, 2009 which said little more than the Defendant was scheduled to testify on August 20, 2009. Thereafter, the prosecution acknowledges several conversations with defense counsel, during which she said that she would not inform or disclose to the Defendant the "precise nature of the proceeding" until just before his scheduled appearance. It would be only then, immediately before the Defendant actually "entered" the room to testify, that the District Attorney would release to him the Grand Jury's "specific nature of the inquiry".

On August 19, 2009, the day before the Defendant's scheduled appearance, his attorney hand-delivered to the prosecution yet another request inquiring once more, in substance, of the scope of the investigation, and that he be given "notice as to what was being considered" so that he could provide "relevant and competent evidence". The Defendant maintains that he then received two telephone calls from the District Attorney wherein she initially indicated she would "consider" his request and then,

following that discussion during the second conversation, that she "might" disclose the information once the Defendant appeared for testimony. Later the same date, the Defendant notified the prosecution that his request to testify was being withdrawn due to the People's refusal to comply with his several earlier demands. Subsequently, the "nature" of the inquiry was never disclosed to the Defendant before his arraignment on the Indictment, the prosecution explaining that had he testified he would have then been given the "nature of the Grand Jury's very limited investigation".

The aforesaid factual and chronological scenario surrounding the relevant events in question is mainly undisputed as confirmed by the documentary submissions by counsel.

In substance, the Defendant proffers that if told and informed of the scope of the charges being investigated he would have had the opportunity to consider them and respond accordingly. If so, he would have then been able to give relevant and potentially exculpatory explanations to the Grand Jury which, according to him, could have changed the ultimate findings as to each count in the Indictment. The Defendant also argues in support of his position that even the alleged facts which form the Indictment are totally unrelated to any disciplinary charges for which he was suspended without pay as a Town of Greece police officer.

In rendering this Decision, the Court has thoroughly reviewed counsel's legal memoranda in support of, and in opposition to, the present motion.

By opposition, the prosecution submits that the Defendant was, in fact, given sufficient and adequate notice of the Grand Jury proceeding "as well as the general nature of the inquiry", and then withdrew his request to testify before "further specifics

were provided". As a result, therefore, the District Attorney concludes that her obligation to the Defendant was thereby legally satisfied.

Clearly, from the facts presented, the prosecution did not reveal to the Defendant the nature or subject of the investigation, either written or verbal, and the evidence before this Court decidedly establishes that the prosecution failed to disclose in any manner whatsoever, even the general scope of possible charges surrounding the Defendant. Such failure to do so, as opined by the People, is based upon the investigation being "sealed" and that the "subject matter" was to "remain unknown to ensure a full and fair presentation". Thus, according to the prosecution, "it was not unreasonable to withhold disclosure" until the Defendant testified, at which time he would be told of the "precise nature of the inquiry".

"[A] prospective Defendant has no constitutional right to testify before a Grand Jury" (*People v. Smith*, 87 N.Y.2d 715, 719 [1996]). Rather, it is a right provided by statute (see CPL Sec. 190.50) and a valued right which must be scrupulously protected because it may affect the Grand Jury's consideration of evidence that is otherwise exclusively presented by the People (see *People v. Smith, supra*; *People v. Evans*, 79 N.Y.2d 407, 413-414 [1992]; *People v. Degnan*, 246 A.D.2d 819 [1998]; *People v. Greco*, 230 A.D.2d 23, 27 [1997]).

A person is entitled to notice of a pending Grand Jury proceeding either when he serves a written request to appear before the Grand Jury or when he is the subject of an undisposed of felony complaint (see CPL Sec. 190.50[a],[b]; *People v. Lindahl*, 33 A.D.3d 1125 [2006]). Although the Defendant was not previously charged by a felony

complaint, since he timely asserted his right to appear and testify, the District Attorney was required to give notice "reasonably calculated to apprise him of the Grand Jury proceedings so as to permit him to exercise the right to testify" (*People v. Pattison*, 63 A.D.3d 1600 [2009], quoting *People v. Jordan*, 153 A.D.2d 263, 266-267 [1990]; see *People v. Lindahl, supra*; *People v. Greco, supra*). Similarly, if proper notice had been given, the Defendant would then have been afforded the right to detail his "version of the events before being examined by the prosecutor" (*People v. Smith*, 84 N.Y.2d 998, 1000 [1994]). Furthermore, without such notice concerning why a Defendant is a target of an investigation, he becomes subject to the questioning of the prosecution without any ability to defend himself and respond in a relevant and meaningful manner.

CPL Sec. 190.50(5)(b) expressly mandates that when the District Attorney is required to give a defendant notice of a Grand Jury Proceeding he must not only be informed of the "time and place" he will be heard, but precedent requires that implicit in the above-noted statutory guarantee, the District Attorney must also "give the defendant some idea of the nature and scope of the Grand Jury inquiry so as to enable him to appear meaningfully as a witness" (*People v. Adams*, 190 A.D.2d 677, 678 [1993], lv denied 81 NY2d 1010 [1993]; see also *People v. Simmons*, 178 A.D.2d 972 [1991]; *People v. Smith*, 155 Misc.2d 596 [Orange Co. Ct. 1992]; *People v. Hall*, 150 Misc.2d 551 [Sup.Ct., Queens Co. 1991]; *People v. Diaz*, 144 Misc.2d 766 [Sup.Ct., Bronx Co. 1989]).

When a defendant has been arraigned on a felony complaint, notice that the charges in the complaint are to be presented to a Grand Jury usually suffices to give

notice of the nature and scope of the Grand Jury presentation (see *People v. Knight*, 1 A.D.3d 379 [2003]; *People v. King*, 234 A.D.2d 319 [1996]; *People v. Choi*, 210 A.D.2d 495 [1994]; *People v. Simmons*, *supra*). In the instant case, however, since no felony complaint had been filed, the Defendant was totally unaware of, and had no idea as to the "areas that were the concern of the grand jury inquiry" to enable him to appear meaningfully as a witness (see *People v. Root*, 87 Misc.2d 482, 487 [Sup.Ct., Bronx Co. 1976; see also *People v. Adams*, *supra*) except that they were somehow related to his performance as a police officer at some time during his twenty-three year employment by the Town of Greece.

Even assuming, as the District Attorney asserts, that she would disclose the specific nature of the Grand Jury's proceeding to the Defendant immediately prior to his scheduled testimony, such notice would clearly not have afforded him a reasonable time or a meaningful opportunity "to consult with counsel and decide whether to testify before [the] Grand Jury" (*People v. Sawyer*, 96 N.Y.2d 815, 816 [2001]; *People v. Degnan*, *supra*). Disclosure at that time would surely be unreasonable and deprive the Defendant of his right to appear to give testimony (see *People v. Fields*, 258 A.D.2d 593 [1999]; *People v. Degnan*, *supra*).

In serving a dual role as both advocate and a public officer, a District Attorney is charged with the duty of fair dealing with the accused (see *People v. Huston*, 88 N.Y.2d 400, 406 [1996]; *People v. Lancaster*, 69 N.Y.2d 20, 26 [1986]) which encompasses the notice provision pursuant to CPL Sec. 190.50 (see *People v. Jordan*, *supra*). Moreover, in Grand Jury proceedings, the prosecutorial objective of seeking an Indictment is

tempered by the District Attorney's obligation to insure that justice is done (see *People v. Huston, supra*; *People v. Pelchat*, 62 N.Y.2d 97, 104 [1984]).

This Court's interpretation of CPL Sec. 190.50(5) is guided by the basic maxim of statutory construction that the intent of the Legislature should be discerned and the statute construed in a manner guaranteeing that its objectives are furthered and not frustrated (see *People v. Evans, supra* at p. 413; *People v. Jordan, supra* at p. 267). The determination that the Defendant was entitled to reasonable notice of the nature and scope of the Grand Jury proceeding comports with the fundamental or basic justification for an Indictment by Grand Jury, namely, "to prevent the people of this State from potentially oppressive excesses by the agents of the government in the exercise of the prosecutorial authority vested in the State" (*People v. Evans, supra* at p. 414, quoting *People v. Iannone*, 45 N.Y.2d 589, 594 [1978]). Conversely, to accept as the People submit, that the Defendant was not entitled to know anything at all about the Grand Jury's subject matter and inquiry until moments before his testimony would, under the circumstances, render his undeniable right to appear and testify before that body utterly futile and meaningless.

In the case at bar, the prosecution's patent failure to inform the Defendant of the nature and scope of the pending investigation, even in the most general terms, within a reasonable time, unquestionably denied him his unequivocal right to testify at the Grand Jury, which impaired the integrity of that proceeding. Accordingly, dismissal of the Indictment herein is mandated (see CPL Sec. 210.20[1][c]; 210.35[4]) and the Defendant's motion is granted in its entirety.

In addition to the above, by Notice of Motion dated October 2, 2009, the Defendant requests an Order that the above-entitled Indictment be dismissed pursuant to CPL Sec. 210.30 because the evidence presented to the Grand Jury was not legally sufficient to establish the offenses charged or any lesser-included offense and that the Grand Jury proceedings were defective.

Court review of Grand Jury proceedings is confined to the legal sufficiency of the evidence, and not to weigh the proof or examine its adequacy (See *People v. Jensen*, 86 N.Y.2d 248 [1995]; *People v. Galatro*, 84 N.Y.2d 160 [1994]). Further, in New York, Indictments must be founded upon competent evidence which excludes the use of hearsay as the only evidence to substantiate a critical element of an offense (See *People v. Swamp*, 84 N.Y.2d 725, 726 [1995]; *People v. Oakley*, 28 N.Y.2d 309 [1971]).

Although the proof submitted in this matter at Grand Jury need not establish guilt beyond a reasonable doubt (see *People v. Mills*, 1 N.Y.3d 269 [2003]; *People v. Bello*, 92 N.Y.2d 523 [1998]), the People must present "evidence legally sufficient to establish a prima facie case, including all the elements of the crime and reasonable cause to believe that the accused committed the offense to be charged" (*People v. Jensen*, 86 N.Y.2d 248, 251-252 [1995]; see also *People v. Watson*, 32 A.D.3d 1199 [2006]; *People v. Stanley*, 19 A.D.3d 1152 [2005]).

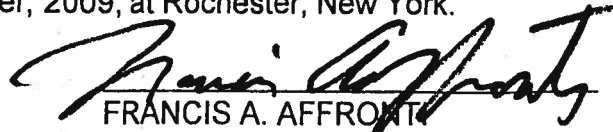
Upon this Court's review of said Grand Jury minutes it is determined that the Indictment must be dismissed because the evidence presented, even when viewed in the light most favorable to the People, was legally insufficient to establish a prima facie

case that Defendant committed the crimes or any less included counts (see *People v. Carroll*, 93 N.Y.2d 564).

Therefore, the Defendant's motion to dismiss the Indictment for legal insufficiency is hereby granted in its entirety.

This shall constitute the Decision and Order of the Court.

Dated this 2 day of November, 2009, at Rochester, New York.


FRANCIS A. AFFRONTI
Supreme Court Justice