

People v. Andria Sergio, 3508/07
Decided: July 26, 2007

Justice Neil Jon Firetog

KINGS COUNTY
Supreme Court

Justice Firetog

The issue before this court is whether the prosecution's disclosure of the substance of defendant's grand jury testimony in a Voluntary Disclosure Form ("VDF") breached the secrecy of the Grand Jury or whether it was compelled by the notice requirements of CPL §710.30. Moreover, if such disclosure was unauthorized under CPL §710.30 what, if any, is the appropriate sanction under the circumstances.

Defendant claims that the disclosure violated the secrecy of the Grand Jury under CPL §190.25(4)(a) and [PL §215.70](#). She seeks: (1) the dismissal of the indictment pursuant to CPL §§210.35(5) and 210.40; (2) the appointment of a special prosecutor pursuant to [New York County Law §701](#); (3) the referral of the matter to the disciplinary authorities in violation of [Disciplinary Rule 7-107 \(NYCRR §1200.38\)](#) of the Code of Professional Responsibility; (4) preclusion of the use of defendant's Grand Jury testimony by the People on their direct case; and (5) disclosure of the complete Grand Jury presentation to defendant.

The People argue that notice was required under CPL §710.30 because: (1) the Assistant District Attorney was acting as a public servant eliciting a statement from defendant; (2) the statement could potentially be determined by a court to be involuntary; and (3) the law in this area is unsettled. The People also assert that even if notice was not required, sanctions are inappropriate under the circumstances.

On June 25, 2007, defendant's application seeking a special prosecutor was referred to this court and was denied from the bench. The following constitutes the written order of the court, and addresses all other outstanding issues in the motion.

BACKGROUND

On April 18, 2007 defendant, with counsel in attendance, testified before the Grand Jury investigating the death of a newborn child. On April 20, 2007, the Grand Jury voted a true bill and indicted defendant for one count each of hindering prosecution in the first, second and third degrees ([PL §§205.65, 205.60, 205.55](#)), tampering with physical evidence ([PL §215.40\[2\]](#)) and

improper disposal of a dead body of a human being (Public Health Law §4102[1][d]).

On May 1, 2007, defendant was arraigned on the indictment. At that time the Assistant District Attorney served and filed a VDF that included notice of an oral statement by defendant and notice of defendant's "statement to the grand jury in sum and substance" consisting of a fifteen line synopsis of defendant's Grand Jury testimony. The VDF also contained notice of the People's intention to offer the statements at trial and alerted defendant that a complete transcript of defendant's testimony would be provided along with a copy of defendant's oral statement. The following day information, apparently derived from the synopsis, appeared in two newspaper articles and on a television and radio newscast.

CPL §710.30 NOTICE

Criminal Procedure Law section 710.30 provides, in pertinent part, that "[w]henver the people intend to offer at trial evidence of a statement made by a defendant to a public servant which statement if involuntarily made would render the evidence thereof suppressible . . . they must serve upon the defendant a notice of such intention, specifying the evidence to be offered." A "public servant" is defined as "a public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state" ([PL §10.00\[15\]](#)).

While there is no reason to dispute the characterization of a state prosecutor as a public servant, the People's singular focus on this benign role is misplaced in this instance. The Assistant District Attorney is present in the Grand Jury pursuant to CPL §190.25(3)(a) to perform a prosecutorial function necessary to conduct the proceeding (see [People v. Sayavong, 83 NY2d 702, 707 \[1994\]](#)). She is the legal advisor to the Grand Jury, instructing the Grand Jury concerning the law and with respect to its duties (CPL §190.25[6]). The Assistant District Attorney must determine the competency of witnesses to testify (CPL §190.30[5]), instruct the Grand Jury on the legal significance of the evidence (CPL §190.30[6]) and call witnesses believed to possess relevant information or knowledge (CPL §190.50[2]). Thus, it is the Assistant District Attorney's responsibility to elicit and submit evidence to the Grand Jury for its investigation and evaluation (CPL §190.55[2][a]). The role of public servant is irrelevant in this context and is completely subsumed by the prosecutor's responsibilities and duties to provide for and guide the Grand Jury and to the prosecutor's "exercise of completely impartial judgement and discretion." ([People v. DiFalco, 44 NY2d 482, 487 \[1978\]](#)).

The procedures that defendant must follow in order to exercise her statutory right to testify before the Grand Jury vitiate any concerns about the voluntariness of her testimony. It was her responsibility to request the opportunity to testify (CPL §190.50[5][a]) and she must be in strict

compliance with the signing of the waiver of immunity (CPL §190.45). Thus, "[t]he notice of intention to offer evidence need not be served upon defendant where there is no question of voluntariness." ([People v. Greer, 42 NY2d 170, 178 \[1977\]](#); see [People v. Jones, 236 AD2d 217, 219 \[1st Dept 1997\]](#); [People v. Padron, 118 AD2d 599, 600 \[2d Dept 1986\]](#)).

Finally, even though defendant was provided with notice of her grand jury testimony and of the People's intention to use it at trial, it was unnecessary because defendant had actual notice of the proceeding that she participated in under the guidance of counsel (see [People v. Michel, 56 NY2d 1014 \[1982\]](#)[notice not required where counsel was an active participant in negotiations, drafting and signing of defendant's confession]).

GRAND JURY SECRECY AND SANCTIONS

In light of the determination by this court that the disclosure of the sum and substance of defendant's Grand Jury testimony was not compelled by the notice requirements of CPL §710.30, the conclusion must be drawn that the People violated the secrecy of the Grand Jury.

Under CPL §190.25(4)(a) "[g]rand jury proceedings are secret" subject to limited exceptions. Evidence before the Grand Jury may be examined by those officially involved in the investigation or those specifically authorized by court order. A public prosecutor may not disclose the nature or substance of any Grand Jury testimony, evidence or any decision, result or other matter attending a Grand Jury proceeding, except in the lawful discharge of her duties or upon written order by the court. Penal Law section 215.70 proscribes criminal liability for a public prosecutor who intentionally discloses to another the same type of information, except in the proper discharge of her official duties or upon written order of the court.

The People argue that because of the inconsistency with which various trial courts have, in their experience, held notice of a defendant's statement before a Grand Jury to be required, they exercised extreme caution and made the substance of defendant's Grand Jury testimony available to defendant within the statutory time period. While their position has been held here to be incorrect, their uncertainty is understandable in light of the few reported cases that reached different results with regard to notice requirements (see [People v. Kratky, 122 Misc 2d 949 \[Sup Ct, NY County 1984\]](#) [the court held that the People were required to file notice of a defendant's grand jury testimony]; [People v. Steele, 134 Misc 2d 629 \[Sup Ct, NY County 1987\]](#)[grand jury testimony was not held to be a statement to a public servant and therefore notice was not required]; [People v. Mejia Real Estate, 176 Misc 2d 316 \[Sup Ct, NY County 1998\]](#)[court held that notice requirement, if mandated, was satisfied by annexed transcript]).

Penal Law section 215.70 is not applicable in this situation because the prosecution did not act intentionally. For the element of intent to be

established, a person must engage in conduct with the conscious objective of causing a particular unlawful result ([PL §15.05\[1\]](#); [People v. Atkinson, 21 AD3d 145 \[2d Dept 2005\]](#)). In this instance the People's actions were misguided, but not criminal.

With regard to the sanctions demanded by defendant, this court has already denied defendant's application pursuant to County Law §701 for a special prosecutor on the grounds that it was unwarranted under the circumstances. The standard for disqualifying a district attorney is especially high because such removal implicates separation of powers considerations ([Matter of Schumer v. Holtzman, 60 NY2d 46, 55 \[1983\]](#)). "The courts, as a general rule, should remove a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence." ([Id.](#)). The appearance of impropriety, alone, is insufficient and the actual prejudice or risk must be demonstrated to be so substantial as could not be ignored ([Id.](#)).

Here defendant has failed to demonstrate actual prejudice. The disclosure in the VDF was not in the form of a stealthy leak designed to gain tactical advantage over an adversary or to manipulate the press or public opinion. Rather it is was a balanced presentation of a synopsis of the defendant's testimony that fairly reflected her testimony and her version of the Facts concerning the allegations that were swirling around her.

Equally inappropriate is the remedy of dismissing the indictment in furtherance of justice (CPL §210.40) or based on the purported impairment of the integrity of the Grand Jury (CPL §210.35[5]). CPL §210.40 permits the dismissal of an indictment if it "is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating the conviction or prosecution of the defendant upon such indictment . . . would constitute or result in injustice." The statute enumerates ten factors that the court must examine and consider "individually and collectively" in reaching its conclusion. By arguing that the court need only consider the single factor of "any exceptionally serious misconduct of law enforcement personnel" (CPL §210.40[e]) defendant has failed to comply with statute. Moreover, this court does not consider the prosecutor's actions to rise to the level of "exceptionally serious misconduct".

"CPL §210.35(5) provides that a grand jury proceeding is defective when 'the integrity thereof is impaired and prejudice to the defendant may result'" ([People v. Houston, 88 NY2d 400, 409 \[1996\]](#)). "Dismissal of indictments under CPL §210.35(5) should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury." ([Id.](#)). In this instance, the filing of the VDF had no bearing on the decision reached by the Grand Jury.

The referral of the prosecutor to disciplinary authorities is inappropriate and the defendant's reliance on DR-107 is misplaced. The purpose of that

disciplinary provision is to prevent attorneys associated with a criminal case from making extra-judicial statements that would interfere with the administration of justice ([Markfield v. Association of the Bar of the City of New York, 49 AD2d 516 \[1st Dept 1975\]](#)). In other words, the rule is designed to prevent the manipulation of public opinion with comments that go beyond the public record. Because the VDF is part of the public record, defendant's proposed punishment does not apply.

Finally, pursuant to CPL §240.70(1), defendant seeks to preclude the introduction of her Grand Jury testimony on the People's direct case and to obtain the complete transcription the Grand Jury proceeding. The crafting of sanctions against a party for failure to comply with the rules of discovery is a matter directed to the discretion of the trial court. Having found no evidence of prosecutorial bad faith and no prejudice to defendant, there is no basis upon which to grant defendant's application.

All other matters pertaining to this indictment are respectfully referred to the judge before whom the indictment is pending.