

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-4

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THE PEOPLE OF THE STATE OF NEW YORK : BY: WILLIAM M. ERLBAUM, J.
: :
-against- : DATE: March 3, 2009
: :
OMAR PERALTA, : INDICT. NO. 2356/2008
DEFENDANT. :
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Defendant, Omar Peralta, has submitted an omnibus motion, dated January 12, 2009, seeking: inspection and release of the Grand Jury minutes and dismissal or reduction of the indictment; a Bill of Particulars; discovery; suppression of physical evidence; suppression of identification evidence; a Sandoval hearing, including discovery pursuant to CPL 240.43; and a reservation of the right to make further motions. By "Affirmations in Opposition" dated January 5, 2009 and January 20, 2009, the People consent to some of the relief sought, oppose other relief, demand so-called "reciprocal discovery", and furnish to the defendant some items of particularization and discovery.

In People v. Huston, 88 NY2d 400 [1996]), the New York State Court of Appeals set forth the responsibilities and critical functions of the Grand Jury, specifically it's obligation to investigate criminal activity and to protect individuals from unfounded prosecutions. The Court found that if the Grand Jury is

improperly influenced, the integrity of Grand Jury proceedings is impaired. The Court stated that the New York State Legislature "requires that an indictment be dismissed where the Grand Jury proceeding is defective (see, CPL 210.20[c]). Moreover, dismissal of the indictment is specifically compelled by statute when the integrity of the Grand Jury proceeding is impaired and prejudice to the defendant may result (see, CPL 210.35[5])" (see, Huston at 401). The issue evaluated by the Court of Appeals in Huston was whether prosecutorial misconduct in the Grand Jury proceeding rendered the indictment in that case fatally defective. The Court found that, "because the prosecutor's misconduct was intentional, usurped the function of the Grand Jury and biased the proceedings against the defendant, it impaired the integrity of the Grand Jury proceedings and created a substantial risk of prejudice to the defendant" (see, Huston at 402). The Court of Appeals dismissed the indictment.

The errors committed by the prosecutor during the Grand Jury presentment in Huston included his assuming the existence of repudiated facts during his questioning of witnesses; his using inadmissible hearsay testimony to conform witnesses' accounts of the crimes being charged; vouching for certain witnesses; and his "imparting his personal opinion regarding the proper inferences to draw from the testimony or physical evidence, asking impermissible and inflammatory questions, and conveying -- both directly and indirectly -- his belief in defendant's guilt" (see,

Huston at 406).

The Court has inspected the Grand Jury minutes underlying indictment number 2356/2008, charging the defendant with the crimes of Robbery in the Second Degree and Criminal Possession of Stolen Property in the Fifth Degree. Unfortunately, many of the errors committed by the prosecutor in Huston were committed by the prosecutor in the case at bar. The Court finds that the same types of improprieties as occurred in Huston took place throughout the instant Grand Jury presentation. Accordingly, this Court concludes that dismissal of the indictment is required.

The complaining witness testified before the Grand Jury that on December 15, 2007, between 2:45 AM and 3:18 AM, inside the store located at 79-02 Parsons Boulevard, Queens County, he was working as a cashier. He testified that, "[s]omebody came next to me and pointed into my back and told me to open the register and give him the money" (see, Grand Jury minutes, dated October 16, 2008, page 4, lines 10-11). He continued that this individual, later identified as the defendant, took the money from the register, attempted to leave the location, and was stopped, and held for the police, by a fellow employee. The complainant indicated that though he did not see one, he thought the defendant had a handgun.

The defendant in this case testified before the Grand Jury. He did not dispute that he was the individual who robbed the

complaining witness on the night in question. Instead, his defense was that he did not have a weapon, and he did not act like he had a weapon.¹ Essentially, he implored the Grand Jury to indict him for the crime of Robbery in the Third Degree, instead of the crime of Robbery in the Second Degree.²

This case presents a set of unique facts in that the defendant actually admitted his guilt. Though he insisted that he did not have nor display a weapon, and that he was not guilty of the higher degree felony (Robbery in the Second Degree), he conceded that he did indeed commit a robbery against the complainant. It was the job of the Grand Jurors in this case to evaluate and weigh the testimony and evidence presented to determine whose version of events, the complainant's or the defendant's, they believed, and then to indict the defendant accordingly. However, the Assistant District Attorney in this case put her hand on the scale in favor of the complainant,

¹ Though it appears that no weapon was recovered from the defendant upon his arrest, the Court notes that that fact is irrelevant to sustain a charge of Robbery in the Second Degree, as a defendant could be found guilty of Robbery in the Second Degree, for displaying what appears to be firearm, by simply placing his hand in his pocket and acting like he has a gun (see, People v. Knowles, 79 AD2d 116 [2nd Dept 1981]. See also, People v. Jenkins, 118 Misc2d 530 [1983].

² Robbery in the Third Degree [PL 160.05] is defined as forcible stealing. Robbery in the Second Degree [PL 160.10(2)(b)] is defined as forcible stealing, along with the extra element that during the course of committing the crime, the defendant "displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm".

denying the defendant an impartial opportunity before the Grand Jury, and thereby violated her "duty of fair dealing" (see, People v. Huston, 88 NY2d 400, 406 [1996]), and her duty "not only to secure indictments but also to see that justice is done" (see, Huston at 406). The Court finds that the cumulative errors committed by the People during the Grand Jury presentation in this case "rendered the indictment fatally defective" (see, Huston at 408).

Before beginning its analysis of the Grand Jury presentation in the case at bar, the Court first notes that if the complaining witness were the only witness to testify before the Grand Jury in this case, and if the defendant had not testified, it is likely that the Court would have found sufficient evidence to sustain the indictment, and would not have found that the defendant had been prejudiced. Though there were some improprieties during the complainant's testimony, which will be discussed throughout the body of this opinion, "typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment" (see, Huston at 409). However, in this case, since the complainant was not the only witness to testify, and the defendant testified, credibility was the central issue for the Grand Jury to determine. It was its responsibility to determine whether the complainant or the defendant "was the more reliable witness" (see, Huston at 408), and how much weight should be

accorded to each of the witnesses' testimony, and it was to do that "uninfluenced by the opinion of the prosecutor" (see, Huston at 408).

The most egregious misbehavior committed by the People during the presentation of evidence in this case concerned the testimony of Police Officer Powell, when he was recalled as a witness before the Grand Jury (see, Grand Jury minutes, pages 15-16). Officer Powell testified that he viewed a video of the events that transpired in the store on the night in question, and based upon his evaluation of the video, he was able to see the actions of the defendant. The officer stated that the defendant "was basically simulating that he had a firearm with his hands and he was sort of pressuring the side of the victim. He wouldn't let the victim turn around. He kept poking at him with his hand" (see, Grand Jury minutes, page 15, lines 15- 18). The officer continued that he was not able to see whether the defendant actually had a weapon, or something else at the complainant's side, but that he could see the defendant pushing into the complainant's side (see, Grand Jury minutes, page 15, lines 19- 25).

There are many problems with the admission of this hearsay evidence before the Grand Jury. Initially, it must be noted that the officer was not, himself, a witness to the crime, and the People did not play the video described by the officer for the Grand Jurors. The Grand Jury was denied an opportunity to view

the video, to evaluate it, or to decide for itself what it showed, and what if anything it proved. Also, the People never elicited any testimony to establish the authenticity of the video, or any information as to it's recovery, it's condition, it's clarity, or it's current location. Instead, the Grand Jurors only heard Officer Powell's opinion as to what he saw on this alleged video and what he thought it demonstrated which, besides being hearsay, is completely and totally irrelevant. In effect, the officer was made the fact finder and co-opted the job of the Grand Jury.

By presenting this inappropriate testimony to the Grand Jury, the People bolstered the testimony of the complainant and derailed the testimony of the defendant. The testimony about what the video allegedly showed, was offered to support the People's position that the defendant committed the crime of Robbery in the Second Degree, and to undermine the defendant's position that he committed only the crime of Robbery in the Third Degree. In fact, the officer's testimony presents as being completely tailored to meet the elements of Robbery in the Second Degree. The effect of denying the Grand Jury the opportunity to view the video took out of it's hands it's responsibility to determine what it represents. The testimony of Officer Powell "usurped the function of the Grand Jury, which remains the exclusive judge of the facts with respect to any matter before it" (see, Huston at 407).

Furthermore, it must be remembered that this case is essentially about whose testimony the Grand Jury would credit, the complainant's or the defendant's. The testimony by Officer Powell, completely supporting the complainant's testimony, put the defendant in harm's way that the Grand Jury, impressed by the police officer, would give "great weight to [the officer's] beliefs and opinions" (see, Huston at 407). This would, in turn, likely lead them to believe the complainant over the defendant, no doubt causing a situation where "prejudice to the defendant" (see, Huston at 409) was manifest. Under these circumstances, how would the defendant have a chance to convince the Grand Jurors of his position when his testimony was competing against the testimony of a police officer saying he saw a video of the defendant committing the crime of Robbery in the Second Degree?

Additionally, the officer's testimony as to the unseen video, was used to discredit the defendant during his testimony. During cross-examination of the defendant, while questioning him regarding his specific acts during the robbery, the People asked the defendant, "And you do realize that there is a video in this case showing you doing what you did, right?" (see, Grand Jury minutes, page 27, lines 18- 19). The defendant answered affirmatively. The Court finds that by questioning the defendant while making reference to the officer's testimony regarding the unseen video, the People's intentionally conveyed to the Grand Jury that the complainant's testimony was more credible than

that of the defendant. Furthermore, since the Grand Jury did not see this video, no doubt, neither did the defendant. To question the defendant on this topic was therefore improper and extremely prejudicial. The Court finds that when the defendant answered on cross-examination that he knew there was a video showing his actions in this case, his credibility was completely undercut. The defendant did not dispute the existence of this videotape purportedly showing what he did, and the Grand Jurors heard Officer Powell's testimonial that it supported the People's contention concerning an alleged weapon. Clearly, this manipulation was contrary to the thrust of the defendant's intent during his testimony, admitting his guilt to Robbery in the Third Degree and asking the Grand Jury to indict him for that crime.³

The prosecutor in this case also committed another pervasive error throughout her cross-examination of the defendant which contributed to the impairment of the integrity of the Grand Jury proceedings, to wit, vouching for the complainant and bolstering his testimony. The prosecutor repeatedly questioned the

³ The Court also notes that the importance of this videotape, as well as its non-display to the Grand Jurors, was not lost upon the members of the Grand Jury. In fact, at the conclusion of the People's charge on the law to the Grand Jury, a juror asked the prosecutor, "Excuse me. I just have a question. He- - if this were to go to trial does the jury get to watch the surveillance?" (see, Grand Jury minutes, page 41, lines 22-24). The People responded to the Grand Juror by instructing the Grand Jury to base its decision on the evidence before it, which no doubt included the testimony of Officer Powell describing the video.

defendant as to why the complainant's version of the incident in question should not be believed by the Grand Jurors. The Court takes note of the following questions posed by the People to the defendant during cross-examination regarding the issue as to whether or not the defendant acted as if he had a weapon (see, Grand jury minutes, page 24, line 21 - page 25, line 18):

Question by the People: "You understand that [the complainant] is not someone that you know, right?"

Answer by the defendant: "No. I don't know him".

Q: You never had an argument with him?

A: No.

Q: Never seen him before, right?

A: No.

Q: You haven't been in that store?

A: (Nodding.)

Q: You have to answer yes or no so she can-

A: No. Sorry.

Q: It's okay. You have to understand that, you know. I guess the Grand Jury and I would like to know what would be the reason why [the complainant], if he's not angry with you and has no reason to makeup things why he would indicate that you pushed to his side, I mean, do you know, why he would do that if he has no issue with you?

A: I have no idea why. Excuse me, did he say that?

Q: Well, you saw the criminal complaint you were charged

with.

A: I did.

Q: That's what's indicated.

As evidenced by this line of questioning, it is clear that the People vouched for the complainant's truthfulness. Furthermore, the prosecutor also improperly questioned the defendant about what the complainant's intent was, and improperly attempted to impart to the Grand Jury the notion, without basis, that the complainant must be truthful. Additionally, the People, perhaps inadvertently, informed the Grand Jurors that the complainant presented his version of the events, not only to the Grand Jury, but also in a criminal court complaint. As with the videotape discussed supra, the Grand Jurors did not see the complaint, and the defendant was put in a position of having to dispute it.

The People continued with this line of questioning by asking the defendant, after he stated, "...but that's the thing I'm trying to reiterate I never acted or simulated that I had a weapon", "You don't know why there is any reason why [the complainant] would say something other than what happened?" (see, Grand Jury minutes, page 26, lines 12- 19). After the defendant responded that he did not know why the complainant would do that, the Prosecutor asked, "You know there's a video?" (see, Grand Jury minutes, page 26, lines 12- 19).

This type of improper questioning continued after the defendant again informed the Grand Jury that while robbing the complainant he did not display or act as if he had a weapon. The People responded to him by asking, "Do you understand that other people come in here and swear under oath and tell other versions of this story, you're aware of that?" (see, Grand Jury minutes, page 28, lines 8- 10).

This questioning by the prosecutor obviously prejudiced the defendant. By asking the defendant these questions that he could not possibly answer, which clearly intended, in an unfair and improper manner, that he was being less than truthful, and by putting him in a position of explaining evidence that he had not seen, the prosecutor was not honoring her obligation to the defendant of fair dealing. Furthermore, she was making herself an unsworn witness and vouching for complainant's credibility by conveying to the members of the Grand Jury her belief in the complainant's story and her disbelief in the defendant's testimony, instead of carrying out her duty to have "completely impartial judgement and discretion" (see, Huston at 406).

These errors in the Grand presentation were compounded by the prosecutor's bolstering of the complainant's testimony through the use of leading questions. The Grand Jury minutes at page 4, lines 10- 11 indicate that the complainant testified that someone "pointed" into his back while demanding money. However, the People responded to this statement by the complainant by

characterizing the actions of the individual who was robbing the complainant as if the individual "poked" him in the back (see, Grand Jury minutes, page 4, line 12). This characterization of poking, much stronger than pointing in terms of describing a robbery with what appears to be a weapon, was then adopted by the complaining witness. This description is then carried throughout the complainant's testimony through the questions posed by the prosecutor. In fact, it is even carried through to Officer Powell's testimony when the officer described the video, and his observations of the defendant, "[h]e kept poking at him with his hand" (see, Grand Jury minutes, page 15, line 18).

The Court takes note of another aspect of the Grand Jury presentation. In his omnibus motion, dated January 12, 2009, at pages 9- 10, the defendant moved to dismiss the indictment on the ground that the defendant testified before the Grand Jury while wearing, not by his choice⁴, orange colored prison pants. The People do not contest this allegation.

It is improper for a defendant to be compelled to wear prison attire while testifying before the Grand Jury, unless the People issue curative instructions to the Grand Jury to dispel any possible prejudice (see, People v. Di Fondi, 275 AD2d 1018 [4th Dept 2000], leave denied, 95 NY2d 933 [2000]). In the case

⁴ The defense submits that while the People allowed the defendant to change out of his orange prison shirt, the People refused to allow the defendant to postpone his testimony to give him an opportunity to change his pants.

at bar, the People failed to issue any such instruction. The Court finds that for a case which turns essentially on credibility, the fact that the defendant was required to testify while in prison clothes, "impinged on the function of the Grand Jury to assess believability" (see, People v. Calate, 178 Misc2d 190 [1998]) and essentially denied the defendant any opportunity to convince the Grand Jury that he committed Robbery in the Third Degree instead of Robbery in the Second Degree.

Finally, the Court notes that despite the defendant's insistence that he was guilty of Robbery in the Third Degree, not Robbery in the Second Degree, the People never charged the Grand Jury on the elements of Robbery in the Third Degree, and never presented the Grand Jurors with the option of indicting the defendant on that charge. The Court is well aware that the charges that are submitted to the Grand Jury is a matter within the discretion of the People (see, People v. Crumbaugh, 156 Misc2d 782 [1993]). However, the prosecutor, in her role of legal advisor to the Grand Jury (see, CPL 190.25[6]) certainly had a basis to do so. Considering the unique facts presented in this case, it certainly would have been the better practice.

What occurred in this case, in its totality, brings to mind the immortal teaching of Mr. Justice Sutherland speaking for the Court in Berger v. United States, 295 US 78, 88 [1935], concerning the duties of the public prosecutor, that, "[h]e may prosecute with earnestness and vigor- indeed he should do so.

But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one".

Accordingly, based upon the above discussion, and the "cumulative impact of the prosecutor's improper tactics" (see, Huston at 412), the Court finds that the Grand Jury proceedings in this case were seriously impaired, and that the defendant was palpably prejudiced. The instant indictment is therefore dismissed. The People are granted leave to represent this case to another Grand Jury within 45 days of the issuance of this opinion. Given this result, it is not necessary for the Court to decide the defendant's other applications.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to distribute copies of this decision and order to the attorney for the defendant and to the District Attorney.

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WILLIAM M. ERLBAUM, J.S.C.

