

People v Sweeting

2006 NY Slip Op 30132(U)

June 5, 2006

County Court, Cayuga County

Docket Number: 0000402/0061

Judge: Mark H. Fandrich

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STATE OF NEW YORK
COUNTY COURT COUNTY OF CAYUGA

THE PEOPLE OF THE STATE OF NEW YORK,

-vs-

INDICTMENT No. 2006-040

PATRICK SWEETING,

Defendant

BEFORE:

HON. MARK H. FANDRICH
Acting County Court Judge
Cayuga County

APPEARANCES:

HON. JAMES B. VARGASON, ESQ.
District Attorney of Cayuga County
JON E. BUDELMANN, ESQ.
Chief Assistant District Attorney
Courthouse Annex
Auburn, New York 13021

DENNIS P. SEDOR, ESQ.
Attorney for Defendant
108 Genesee Street
Auburn, New York 13021

MEMORANDUM DECISION AND ORDER

[* 2]

Fandrich, Mark H., J.

The following facts are not in dispute. The defendant herein was originally arrested on February 26, 2006 by Auburn Police Department charged with Criminal Contempt in the First Degree [P.L. Section 215.51(b)(3)], Assault in the Second Degree [P.L. Section 120.05(3)], Resisting Arrest [P.L. Section 205.30] and Aggravated Harassment in the Second Degree [P.L. Section 240.30]. He was arraigned by Auburn City Court Judge Michael F. McKeon at the police department on February 26, 2006. The defendant was remanded to Cayuga County Jail without bail. He was re-arraigned on the two felony and two misdemeanor complaints in Auburn City Court before Judge McKeon on February 27, 2006 and bail was set in the amount of \$5000 cash/\$5000 bond. A pro forma not guilty plea to the charges was entered on behalf of the defendant by Judge McKeon and the matter adjourned to March 6, 2006 for a preliminary hearing. Auburn City Court requested the assignment of counsel for defendant from the Cayuga County Article 18-B assigned counsel plan administrator. Bond was posted on February 27, 2006 and defendant released.

By letter dated February 28, 2006 from Lloyd E. Hoskins, Administrator of the Cayuga County Assigned Counsel for the Indigent Program, attorney Norman J. Chirco, Esq. was requested to "(p)lease accept assignment to represent the above-named defendant". Attorney Chirco has submitted his affidavit to this Court. Prior to acting with respect to representation of the defendant, attorney Chirco was advised on March 3, 2006 that defendant had retained other counsel. He (attorney Chirco) took no action in this case.

On March 3, 2006, the docket records of Auburn City Court indicate that attorney Dennis P. Sedor had been retained to represent the defendant. The manner or method used by Mr. Sedor to communicate his status as defendant's retained attorney to the city court is not clear. Attorney Sedor did not file a notice of appearance either with Auburn City Court nor with the District

Attorney's office and he has not filed a notice of appearance with this Court.

Although the specific manner or method by which attorney Sedor's request was communicated to Auburn City Court is in dispute, the city court docket records indicate that on March 6, 2006 at Mr. Sedor's request defendant's case was adjourned to April 18, 2006.

By letter dated March 16, 2006 addressed only to attorney Norman J. Chirco, the People notified Mr. Chirco that defendant's case would be presented to "the next available grand jury" and that "(i)f your client wishes to testify on his own behalf, inform me in writing on or before March 27, 2006." The People's letter notice of March 16, 2006 was not addressed or mailed to the defendant.

The People presented this case to the Cayuga County Grand Jury on March 29, 2006. Defendant was indicted by the grand jury on that date without his having given testimony before that body. The instant indictment was filed with this Court on April 6, 2006. The defendant was thereafter arraigned on the indictment before this Court in the presence of his attorney Dennis P. Sedor on April 25, 2006.

He now brings this motion pursuant to CPL Sections 190.50(c) to dismiss the indictment upon the People's denial of the defendant's right to testify before the grand jury.

The People have filed with the Court and served upon the defendant a copy of their affirmation in opposition to Defendant's motion. Oral argument was had before the Court on May 2, 2006. The Court also acknowledges the receipt of the People's two letters dated May 4, 2006 submitted in opposition of defendant's motion, copies of which were provided to defendant's counsel.

The issue before this court is whether the People afforded the defendant notice of his right to testify before the grand jury in conformity with the requirements of CPL 190.50(5)(a). For the

reasons that follow, the Court concludes that the notice provided by the People was insufficient.

A defendant's right to be informed when a criminal charge is being or is about to be or has been submitted to a grand jury is set forth in CPL Section 190.50(5)(a), which provides, in pertinent part that when a defendant "...has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending grand jury proceeding... the district attorney must notify the defendant or his attorney of the prospective or pending grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein". A failure to accord the defendant a reasonable time to exercise his right to appear before the grand jury impairs the integrity of the grand jury proceeding and requires the dismissal of any resulting indictment [see, CPL 190.50(5)(c)] People v. Evans 79 NY2d 407 (1992). A defendant's right to testify before the grand jury must be scrupulously protected People v. Corrigan 80 NY2d 326 (1992).

The statute contemplates "actual" rather than technical notice to the defendant and, at the very least, must be reasonably calculated to apprise the defendant of the grand jury proceeding so as to permit him to exercise his right to testify. People v. Jordan 153 AD2d 263 (2nd Dept. 1990), lv denied 75 NY2d 967. This concept of reasonableness is not stagnant and must be applied to the particular facts of each case. People v. Jordan, id.

A variety of factors contributed to the defendant's lack of actual notice in this case. Attorney Chirco was assigned to the case, but did not undertake actual representation because he was notified by a telephone call that the defendant had retained private counsel. Attorney Sedor, who was retained by defendant, did not file a notice of appearance with the court, nor did he notify the District Attorney's Office that he was representing defendant. The District Attorney, therefore, sent the notice to Attorney Chirco because he was the only attorney of whom they were aware. Attorney

Chirco either misplaced or ignored the notice, and did not forward it to either Attorney Sedor or to the defendant. The District Attorney did not send a notice directly to the defendant, as they could have done but were not required to do. The culpability for the lack of notice can be attributed to all the parties involved, except for the defendant himself, who ultimately cannot be denied his right to actual notice of the grand jury proceedings pending against him as required by CPL 190.50(5)(a) because of the combination of errors or omissions made by others.

This case is distinguishable from case law cited by the People in support of their position that, in the particular circumstances presented herein, the People's actions accorded defendant reasonable notice of the grand jury proceeding. Specifically, in People v. Ward 234 AD2d 723 (3rd Dept. 1996) the prosecution adequately complied with CPL 190.50(5) by giving the defendant's first assigned attorney who was then defendant's attorney of record written notice of the grand jury proceedings even though such notice was not given to the attorney subsequently representing the defendant. Here attorney Chirco was the only person to be sent the People's notice of the prospective grand jury proceedings, but Mr. Chirco was never the attorney of record for the defendant. The mere assignment of counsel does not constitute actual representation People v. Steward 217 AD2d 919 (4th Dept. 1995).

Accordingly, based upon the foregoing, it is hereby

ORDERED that the motion made by the Defendant pursuant to CPL Section 190.50 is granted with leave to the People to re-present the matter to another grand jury.

Dated: ~~May~~ ^{June} 5, 2006



Hon. Mark H. Fandrich
Acting County Court Judge, Cayuga Co.