SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART DV.

THE PEOPLE OF THE STATE OF NEW YORK	:	Decision and Order
	:	Indictment No. 5283/2007
	:	Jill Oziemblewski, Esq. Assistant District Attorney
-against-	:	For the People
	:	Judith O. Karpatkin, Esq. Legal Aid Society For the Defendant
	:	Date: October 23, 2007
MARLANA LEE Defendant,	:	Leventhal, J.

The defendant stands charged in the indictment with Assault in the Second Degree and Criminal Possession of a Weapon in the Fourth Degree. The defendant moves to dismiss the indictment on the grounds that her statutory right to testify before the Grand Jury was violated (CPL §190.50 [5][a]). The court in deciding this application has considered the defendant's motion, the People's answer and defense counsel's reply.

STATEMENT OF FACTS

On April 22, 2007, Marlana Lee is alleged to have stabbed her boyfriend Paul Nixon in the abdomen with a kitchen knife. The defendant was arrested on May 29, 2007 and arraigned in the Criminal Court on a felony complaint on May 30, 2007. At the arraignment, defense counsel served Cross Grand Jury notice of her intention to testify before the Grand Jury. The case was adjourned for June 4, 2007 for Grand Jury action. However, there was no Grand Jury action on that day and Cross Grand Jury notice was reaffirmed. Defense counsel scheduled defendant to

appear before the Grand Jury on the morning of June 12, 2007. The People sent a letter notifying the defendant of the date, time and location of her scheduled appearance to her address at the program she was attending and also left a message notifying defendant's supervisor, Mr. Moses, of the defendant's scheduled appearance. On June 12, 2007, the defendant failed to appear, claiming she did not receive any communication regarding her Grand Jury date and was at a job training program earlier that morning.[1] The People agreed to reschedule defendant's appearance for the morning of June 14, 2007. At the new time and date selected, defendant once again failed to appear. The People attempted to contact defense counsel informing her that her client had not appeared and her client's right to testify would be waived, as the Grand Jury would be voting the case in the morning session.[2] Defense counsel contacted the People, in the afternoon, to attempt to reschedule a third appearance for her client. However, the People were unwilling to reschedule because the case had been voted out.

DISCUSSION

The right afforded a defendant to give testimony to the Grand Jury is a statutory right given by the state of New York. It is not a right prescribed by the federal or state constitution. In fact, "the right to testify before a Grand Jury is not an absolute or inherent right, nor is it a 'fundamental right' set forth by the Constitution or by the Supreme Court" (*People v. Padin,*

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[1] Defendant appeared later in the day on June 12.

[2] Defense counsel states in her reply affirmation that ultimately the defendant did come in to testify that afternoon. The Assistant District Attorney was at a training when the defense counsel tried to reach her. Moreover, the Assistant District Attorney had already presented the case to the Grand Jury in the morning.

184 Misc.2d 974 [2000], *citing People v. Fox,* 175 Misc.2d 333 [1997]; *see also United States v. Williams*, 504 U.S. 36, 52 [1992], *People v. Thomas*, 213 A.D.2d 73, 79 fn2 [1995], *and People v. Feliciano*, 207 A.D.2d 803, 804 [1994] [All standing for the proposition that a suspect under investigation has no right under the common law to testify before a Grand Jury.]). Therefore, the defendant's claim to the right to testify must fall within the statutory limits of CPL §190.50 (*see People v. Mateo*, N.Y.L.J., 5/15/98 p. 33, col. 5 for a good discussion on the evolution of a defendant's right to testify).

The People are initially responsible to comply with CPL §190.50[3] by notifying the defendant of his/her right to appear before the Grand Jury and to afford the defendant a "reasonable time to appear" (*People v. Smith,* 87 N.Y.2d 715 [1996]; *see People v. Quinones,* 280 A.D.2d 559 [2001] *People v. Jordan,* 153 A.D.2d 263 [1990]).[4] The notice must be "reasonably calculated to apprise the defendant of the Grand Jury proceeding"[5] (*People v. Quinones,* 280 A.D.2d 559, *citing People v. Jordan,* 153 A.D.2d 263). The People owe "a duty of fair dealing to the accused" (*People v. Jordan,* 153 A.D.2d 263, *citing People v. Pelchat,* 62 N.Y.2d 97 (1984)) and once the People have given actual notice to the defendant then the People must consistently act in good faith (*People v. Gray,* 158 Misc.2d 597 [1993]; *see People v.*

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[3] "The clear objective of the notice provisions of CPL 190.50 . . . is that defendant receive 'meaningful and timely notice of the Grand Jury proceeding'" (*People v. Leggett,* 196 Misc.2d 727 [2003], *citing People v. Jordan,* 153 A.D.2d 263 [1990]).

[4] "The concept of reasonableness is not a stagnant one and must be applied to the particular facts of any given case" (*People v. Johnson,* 168 Misc.2d 798 [1996], *citing People v. Taylor,* 142 Misc.2d 349 [1989]).

[5] Telephone notification to the defendant's attorney is considered sufficient notification (*People v. Smith,* 191 A.D.2d 598 [1993]; *see People v. Quinones,* 280 A.D.2d 559 [2001]).

Theard, 155 Misc.2d 475 [1992]).

The People satisfied their burden of notifying defendant of her right to appear before the Grand Jury. The defendant was arraigned and served written notice on the People of her intention to appear before the Grand Jury as prescribed by CPL §190.50 (5)(a). The People notified the defendant by letter of the date, time and location of her scheduled appearance before the Grand Jury pursuant to CPL §190.50 (5)(b). The Assistant District Attorney even went so far as to notify defendant's supervisor[6] by message of defendant's scheduled appearance before the Grand Jury. While defendant claims that she did not have her own telephone number, did not receive the notification letter by the People, and was not given the message of her scheduled appearance by her supervisor, her defense attorney was notified of her client's scheduled appearance. The defense counsel candidly concedes that the People afforded defense counsel with appropriate notice of her client's appearance.[7]

The mailing of the notification of defendant's scheduled appearance to her program, as well as her attorney being notified, constitutes a presumption that defendant received such notice (*People v. Smith*, 191 A.D.2d 598 [1996]).[8] The fact that defense counsel was unable to reach her client is of no import. "[C]ounsel's inability to locate her client did not render the notice unreasonable or improper." (*People v. Choi,* 210 A.D.2d 495 [1994]). Additionally, defendant

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6 Defendant was residing at a program where Mr. Moses was her supervisor.

7 "It is true that, Ms. Oziemblewski did give notice to defense counsel and was accommodating in rescheduling appearances." (*See* Defendant's Memorandum of Law in Support of Motion to Dismiss, p. 6.)

8 In fact, defendant must have either received such written notice or was notified by her program supervisor or attorney as she did in fact appear later in the afternoon of June 12.

should have contacted her defense attorney if she was unaware of her scheduled appearance. The fact that the defendant did not contact her defense attorney is not the People's fault (*People v. Malik,* 6 A.D.3d 313 [2004]). It is the defendant's responsibility to keep in touch with her attorney (*People v. Patterson,* 270 A.D.2d 120 [2000]; *see also People v. Perez,* 158 Misc.2d 956 [1993]). Thus, notice was properly given to the defendant to appear before the Grand Jury.

The defendant had more than a reasonable time to appear. Defendant was given two opportunities to testify, once on June 12, 2007 and once on June 14, 2007. Four days (*People v. Pugh,* 207 A.D.2d 503 (1994)) and seven days (*People v. Johnson,* 168 Misc.2d 798 (1996) have been found a sufficient and reasonable length of time to appear before a Grand Jury. Defendant in the case at bar was accorded a week's notice to appear. This is more than a sufficient amount of time.

Not only did the People act reasonably in notifying defendant, but the People continuously acted in "good faith" by accommodating the defendant. The People allowed the defendant to come in for a second appearance when she missed her first scheduled appearance. This was done in a "good faith" attempt to allow defendant to exercise her statutory right to testify. The People were not obligated to reschedule defendant's appearance before the Grand Jury for a third time, as defense counsel had requested (*People v. Quinones,* 280 A.D.2d 559 [2001]). Thus, defendant's claim that the People have been unreasonable is unfounded.

In *People v. Savareese,* 258 A.D.2d 484 (1999), defendant's failure to appear was looked at as being "of his own creation" and the indictment was not dismissed. Defendant in the matter *sub judice* did not make it to her first scheduled appearance because she was at a job training. This may also be viewed as defendant's "own creation" for not appearing. While job training is

important, her appearance before the Grand Jury should have taken priority. The defendant here was not denied her statutory right to testify. "Although she was aware that a Grand Jury proceeding was imminent, the defendant made no effort to remain in contact with her attorney, the court, or the People . . . Rather, the defendant failed to communicate at all relevant times without excuse or explanation" (*People v. Quinones,* 280 A.D.2d at 560).

The defendant's failure to appear twice for her Grand Jury date in effect constituted a waiver or perhaps a forfeiture of her right to testify. The right to testify is an opportunity for the defendant and not an absolute right to be taken at defendant's convenience. In *People v. Theard,* 155 Misc.2d 475 (1992), the defendant was accorded two opportunities to appear before the Grand Jury and the court held that "the People have met their statutory obligation. The defendant's failure to appear before the Grand Jury, or to contact the District Attorney on the two prior occasions, constituted a *clear waiver* of his right to appear. He cannot be heard to complain because he was not notified on a third occasion" (emphasis added) (*see also People v. Ferrara,* 99 A.D.2d 257 [1984]).

Here the People acted fairly by allowing the defendant one more opportunity to testify. The People acted fairly in fulfilling their statutory duty. It is the defendant's obligation to appear.[9] The scheduling of defendant's appearances was not unilateral, but done in consultation with defense counsel.

The People gave actual notice, acted in continuous good faith and were fair in notifying defendant of her scheduled appearance. Defendant, on the other hand, failed to appear twice to

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[9] "Surely, the doctrine of fairness at the Grand Jury level applies to both sides and not only to the People" (*People v. Douglas,* 162 Misc.2d 643 [1994]).

testify.

Accordingly, the defendant's motion to dismiss the indictment is denied.

This constitutes the Decision and Order of the Court.

J.S.C.

HON. JOHN M. LEVENTHAL
Justice of the Supreme Court