

**People v Fox**

2007 NY Slip Op 34518(U)

September 6, 2007

Supreme Court, Kings County

Docket Number: 8607/06

Judge: Jill Konviser

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that his confession did not take place until several hours later, at approximately 8:30 or 9:00 a.m., and only after the detectives yelled at him for several hours and deprived him of food and Miranda warnings.

The defendant does not contend that Ms. Nicolazzi was present at the 61<sup>st</sup> precinct at the time this first statement was made. Nor does he assert that she has any personal, first-hand knowledge with respect to the timing of that statement. Rather, in an attempt to undermine the credibility of the police witnesses, the defendant seeks to question Ms. Nicolazzi regarding any conversations she may have had with police witnesses with respect to the timing of the defendant's first statement.<sup>2</sup>

As the defendant wishes to call Ms. Nicolazzi as his witness at trial on this one precise matter, he contends that she should be disqualified from prosecuting the case.

See People v. Paperno, 54 N.Y.2d 294 (1981).

### **The People's Response**

The People, by way of an affirmation and memorandum of law prepared by Ms. Nicolazzi, oppose the defendant's motion. Ms. Nicolazzi asserts in her affirmation, inter alia:

On October 10, 2006, the first contact I had with anyone regarding defendant was with Detective Frank Byrnes. He called me at approximately 5:08 a.m. He informed me that defendant was at the 61<sup>st</sup> precinct and had made both an oral and written statement implicating himself in the crimes

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<sup>2</sup>The defendant does not seek to disqualify Ms. Nicolazzi on the ground that she later obtained the defendant's videotaped confession. See Defendant's Motion at 6 ("It must be emphasized that the defendant does not move to disqualify ADA Nicolazzi because she is the person who secured the videotaped confession.")

committed against Michael Sandy. We discussed what the defendant had said. We also discussed the taking of a video-taped statement. I told him I would notify the Homicide Rider and then get back to him.

People's Affirmation at 1-2.

In addition, attached as an exhibit to Ms. Nicolazzi's affirmation are copies of cellular telephone records that purportedly show that she received a telephone call from the 61<sup>st</sup> precinct at approximately 5:08 a.m. on October 10, 2006.

The People assert that the disqualification motion should be denied as testimony from Ms. Nicolazzi would be inconsistent with the defendant's claim that his first statement was made at approximately 8:30 or 9:00 a.m. on October 10, 2006.

### **Conclusions of Law**

The law is well settled that for a prosecutor to be disqualified from representing the People at trial, a defendant is required to make "a significant showing that the prosecutor's prior investigative or prosecutorial conduct will be a material issue at the trial." People v. Paperno, 54 N.Y.2d 294, 296 (1981); see People v. Cannady, 243 A.D.2d 642 (2d Dept. 1997), lv. denied, 91 N.Y.2d 889 (1998); Morgenthau v. Altman, 207 A.D.2d 685 (1<sup>st</sup> Dept. 1994), lv. denied, 84 N.Y.2d 812 (1995). In this case, the defendant does not seek to question the prosecutor with respect to her conduct. Rather, the defendant seeks to elicit testimony from her about what police personnel may have told her with respect to the time they first obtained a statement from the defendant. As no "significant showing" has been made that the investigative or prosecutorial actions

taken by the prosecutor will be a material issue at trial, the defendant's motion to disqualify Ms. Nicolazzi is denied.

The defendant's motion is denied for the additional reason that he has not shown that the prosecutor will testify in a manner adverse to the People as he has not shown that the prosecutor's testimony would support his position that the first statement was taken at approximately 8:30 or 9:00 a.m. on October 10, 2006. See People v. Paperno, 54 N.Y.2d at 298; People v. Wilhelm, 34 A.D.3d 40, 54 (3d Dept. 2006); People v. Williams, 231 A.D.2d 751 (2d Dept. 1996); People v. Cosentino, 7 Misc.3d 1022(A), 2005 WL 1130241 (Sup. Ct. Queens Co. May 12, 2005) (Rotker, J.).<sup>3</sup>

The defendant's motion to disqualify Ms. Nicolazzi from prosecuting this case is denied. Further, the defendant's request to call Ms. Nicolazzi as a defense witness with respect to the issues raised herein is also denied.

This constitutes the Decision and Order of the Court.

Dated: Brooklyn, New York  
September 6, 2007

~~RON. J. KONVIER~~  
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J.S.C.

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<sup>3</sup>The defendant has not claimed that the prosecutor should be disqualified due to the unsworn witness rule. See People v. Paperno, 54 N.Y.2d at 300.