

**People v Drayton**

2010 NY Slip Op 33982(U)

October 28, 2010

Supreme Court, Kings County

Docket Number: 5347/2010

Judge: John P. Walsh

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS - CRIMINAL TERM - PART 50

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THE PEOPLE OF THE STATE OF NEW YORK,

By: JOHN P. WALSH  
J.S.C.

-against-

Dated: October 28, 2010

DAYQUAN DRAYTON,

Indictment No. 5347/2010

Defendant

DECISION and ORDER

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The Court has read the Grand Jury minutes and examined the presentation of the evidence before the Grand Jury *in camera* for the purposes of (1) determining whether the People's presentation was legally sufficient to support the counts in the indictment, (2) whether the instructions provided to the Grand Jury were proper, (3) whether the indictment meets the requirements imposed by the CPL and (4) whether anything in the presentation impaired the integrity of the Grand Jury proceedings.

In reviewing these minutes and the People's presentation for legal sufficiency, the court must view the evidence in the light most favorable to the People (*People v. Warner-Lambert Co.*, 51 NY2d 295, 299) and consider whether that evidence, when viewed in that light, if unexplained and uncontradicted, and deferring all questions as to the evidence's weight or quality, warrants a conviction.

The People are required to establish a *prima facie* case (*People v. Mayo*, 36 NY2d 1002 at 1004; the "Grand Jury may not indict unless the People present evidence establishing a *prima facie* case of criminal conduct" [see *People v. Dunleavy*, 41 AD2d 717, *aff'd* 33 NY2d 573; *People v. Jennings*, 69 NY2d 103 at 114]). The Grand Jury does not sit to determine the guilt or the non-guilt of a defendant (*People v. Swamp*, 84 NY2d 725, 729). Rather, it sits "to assess whether there is adequate basis for bringing a criminal charge" (*U.S. v. Williams*, 504 U.S. 36). "As long as the Grand Jury could rationally have drawn the guilty inference," the evidence is legally sufficient (*People v. Deegan*, 69 NY2d 976 at 979). That other innocent inferences could have also rationally been made by the Grand Jury is irrelevant (*Deegan*, *supra*, at 979). "The primary function of the Grand Jury in our system is to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to criminal prosecution" (*People v. Calbud, Inc., et. al.*, 49 NY2d 389 at 394).

CPL 190.65(1) authorizes an indictment when "(a) the evidence before it is legally sufficient to establish that such person committed such offense . . ." (legal sufficiency) "and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense" (reasonable cause).

“Legally sufficient evidence,” a purely legal concept, is “competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof” (CPL 70.10[1]). “Reasonable cause to believe that a person committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it” (CPL 70.10[2]). “Reasonable cause focuses on whether the evidence is of sufficient weight and persuasiveness to establish a reasonable likelihood the defendant committed the offense” (Preiser, Practice Commentaries, CPL 70.10, McKinney’s Consolidated Law of New York Annotated). In fulfilling its function, except as provided in CPL 190.30, a Grand Jury’s decision to indict must be based on *competent* and *admissible* evidence allowing that body to have reasonable cause to believe that the accused committed an offense (see People v. Reyes, 75 NY2d 590).

Since CPL 190.65(1) establishes two evidentiary requirements for an indictment, to wit., legal sufficiency (CPL 190.65[1][a]; CPL 70.10) and reasonable cause (CPL 190.65[1][b]; CPL 70.10), the court’s review of evidentiary sufficiency is limited to a determination of whether the competent evidence establishes the elements of the crime (legal sufficiency) (see People v. Galatro, 84 NY2d 160). As a result, the court lacks authority to examine whether the Grand Jury presentation was sufficient to establish reasonable cause since that determination is exclusively that of the Grand Jury (People v. Jensen, 86 NY2d 248).

Pursuant to CPL 210.20(1)(b), when this court issues a decision, it looks to CPL 190.65(1) which imposes a two prong standard which the Grand Jury must meet before voting an indictment: “the first prong requires that the People present a prima facie case” while “the second dictates the degree of certitude grand jurors must possess to indict” (Jennings, supra at 115). This court is then required to make a decision regarding the People’s presentation of the evidence before the Grand Jury, a decision limited only to the legal sufficiency “since the adequacy of the proof to establish reasonable cause is necessarily within the exclusive fact-finding function of the Grand Jury” (Jennings at 115). It follows that questions of credibility are not to be considered by the court as such questions are in the exclusive province of the Grand Jury (Jennings, at 115); nor may this court examine the adequacy of the proof to establish reasonable cause when and if that determination involves the weight or quality of the proof (see People v. Reyes, 75 NY2d 590, 593). As noted in Jennings, supra, all questions as to the quality or weight of the proof should be deferred and the court should not consider the weight of the proof, so long as the People establish a prima facie case with the degree of certitude the Grand Jurors must possess to indict. In considering the sufficiency of Grand Jury evidence, a reviewing court “may neither resolve factual questions in anticipation of the task properly left for trial . . . nor usurp the role of the Grand Jury by substituting its own inferences for those the Grand Jury has drawn” (People v. Ballou, 121 AD2d 861, 862, lv denied 68 NY2d 809).

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In Grand Jury presentations dependent wholly on circumstantial evidence, a reviewing court's inquiry is limited to "whether the facts, if proven, and inference that logically flow from those facts, supply proof of every element of the charged crimes" (*Deegan*, supra, at 979).

Applying these general legal principles to the presentation under consideration, the evidence presented before the Grand Jury was legally sufficient to establish and support the finding(s) in all the count(s) of the indictment (see *People v. Pelchat*, 62 NY2d 97; *Calbud, Inc., et al.*, supra).

As to the court's second inquiry, in this presentation, the assistant district attorney correctly charged the Grand Jury with respect to the applicable law. The Grand Jury instructions under consideration did not have to meet the same criteria as the instructions given to trial juries (see *Calbud Inc., et al.*, supra 394). The People's instructions to the Grand Jury do not have to be given with the same degree of precision as those given to a petit jury (see *People v. Valles*, 62 NY2d 36). CPL 190.30(7) establishes two separate and distinct standards for instructions applicable to petit jury trials and for instructions applicable to the Grand Jury. At a petit jury trial, the court is mandated and obligated - "must" - instruct the jury "with respect to the significance, legal effect or evaluation of evidence" while, in an equivalent situation in a Grand Jury proceeding, the district attorney "may" so instruct (*People v. Darby*, 75 NY2d 449). "The District Attorney must give guidance adequate for the Grand Jury to carry out its function" (*Valles*, supra). Grand Jury instructions are "sufficient if the district attorney provides the Grand Jury with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime" (*Calbud Inc., et al.*, supra at 394, 395). Furthermore, assuming a failure to properly instruct the Grand Jury pursuant to CPL 190.25(6) - when necessary or appropriate, the district attorney must instruct the Grand Jury on matters before it - dismissal is not compelled or necessarily warranted. The question the reviewing court must address is does the omission of necessary or appropriate instructions impair the integrity of the Grand Jury (*People v. Pacheco*, 56 AD3d 381; see also *People v. Darby*, supra).

As to the written indictment itself which results from the People's Grand Jury presentation, CPL 200.50 details its requisite form and content. At a minimum, the indictment should list the name of the court in which it was filed, the title of the action, a separate count for each offense charged, an accusatory statement by the Grand Jury as to each count, a statement that the offense was committed in a designated county which demonstrates geographic jurisdiction and provides a notice of venue (see Taub v. Altman, 3 NY3d 30) and a specification of date or period of time of the offense. While the signature of the foreperson acknowledging the action of the Grand Jury appears to be a statutory necessity, People v. Rupp, 75 Misc.2d 683 held that the foreperson's signature requirement is merely directory and clerical in nature, the absence of which is not a ground for dismissal. The same holds true for the (apparent necessity) of the District Attorney signature. However, People v. Sanchez, 144 Misc.2d 262, held that the typed name of the District Attorney on the indictment satisfies this requirement

Certain formalities are mandated. For instance, in the case of an "armed felony" count, since certain limits are placed upon (1) plea bargaining (at CPL 220.10[5][d][i]), (2) sentencing (at Penal Law 70.02[5]), (3) juvenile offender removal (at CPL 210.43[1][b]), and (4) youthful offender eligibility (at CPL 720.10[2]), the indictment must advise the defendant that the offense is an "armed felony" and specify the weapon used or displayed (at CPL 200.50[7][b]; however, the strictness of his necessity was somewhat eased when an indictment merely alleged the use of a "handgun" (a term not even defined in the Penal Law), without any further detail [see People v. Singleton, 72 NY2d 845]). Similarly, the indictment must advise the defendant if he is being charged with a "hate crime" (at CPL 200.50[4]; Penal Law 485.05[3]) or a "crime of terrorism" (Penal Law 495.05[3]) as the Penal Law provides special additional penalties in those cases. However, this in no way eliminates a necessary finding by a jury regarding special aggravating factors which elevates the degree of the crime (see Apprendi v. New Jersey, 530 U.S. 466).

Pursuant to CPL 200.50(7)(a), as a jurisdictional requirement, an indictment must also contain a "plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's commission thereof. The statement must, with sufficient precision, clearly apprise the defendant of the conduct which is the subject of the accusation. This may be satisfied by the count(s) in the indictment tracking the language of the statute. However, when the allegations are defined solely by the language of the statute, there is a possibility of insufficient notice to the defendant. Under that circumstance, sufficient facts must be provided by way of a Bill of Particulars (see People v. Sanchez, 84 NY2d 440; People v. Grega, 72 NY2d 489 at 495).

The indictment and the Bill of Particulars, when necessary, serve three purposes: (1) as notice to the defendant so as to allow preparation of a defense; (2) protecting the defendant's New York State constitutional right to be prosecuted on a valid accusatory instrument conforming to the CPL's requirements; and (3) as a defendant's protection from subsequent prosecution on the same facts violating the constitutional right to be free from multiple jeopardy (see People v. Grenga, supra).

It is the court's responsibility to ensure that the indictment does not violate CPL 200.30(1), to wit., that it is not multiplicitous - when two or more separate counts charge the same conduct (see *People v. Senisi*, 196 Ad2d 376 [2<sup>nd</sup> Dep't 1994]; *People v. Kindlon*, 217 AD2d 793 [3<sup>rd</sup> Dep't 1995]) - and that the indictment does not violate CPL 200.30(1), to wit., that is that it is not duplicitous - when a count impermissibly charges more than one crime.

Generally, a well-crafted indictment provides notice of the charges, guards against variance, avoids duplicitous charges within a count and protects the defendant against double jeopardy. Beyond the specific charges in the indictment, a criminal indictment also serves to provide "the defendant with fair notice of the accusations made against him, so that he will be able to prepare a defense." It also provides a "means of ensuring that the crime for which the defendant is brought to trial is in fact one for which he was indicted by the Grand Jury, rather than some alternative seized upon by the prosecution" (*People v. Sanchez*, 84 NY2d 440, 445). An indictment also protects a criminal defendant from prosecution at another later time for the same offense. Therefore, "an indictment must allege the crime charged with sufficient specificity to enable the defendant, once convicted, to raise the constitutional bar of double jeopardy against subsequent prosecutions for the same offense" (*Sanchez*, supra).

Litigation involving deficiencies in an indictment usually centers these issues: (1) whether shortcomings in the allegation can be met by supplying supplemental information in a bill of particulars or discovery (*People v. Cohen*, 52 NY2d 584, 587); (2) whether an error or omission can be cured by an amendment to the indictment itself (see CPL 200.70, which permits a court to order amendment of an indictment with respect to defects, errors or variances from proof relating to matters of form, time, place, names of persons and the like, when such an amendment does not change the theory or theories of the prosecution as reflected in the evidence before the Grand Jury . . . or otherwise tend to prejudice the defendant on the merits); and (3) whether any such defects are waived by failure to object or by the entry of a guilty plea. In the court's review of the Grand Jury presentation herein, it also considered these potential issues.

Lastly, when the court considers the question of any impairment of Grand Jury proceedings, it looks to CPL 210.35(5) which provides: "A grand jury proceeding is defective with the meaning of paragraph (c) of subdivision one of section 210.20 when \* \* \* [t]he proceeding otherwise fails to conform to the requirements of article one hundred ninety to such a degree that the integrity thereof is impaired and prejudice to the defendant may result." This "demanding test" is "very precise and very high" especially in the context of the "policies underlying it." Whether impairment of the Grand Jury proceedings occurred must be answered before the court considers the "additional prejudice prong." Only after both matters are determined, can the court grant the "final plenary remedy of dismissal" (*People v. Darby*, supra).

**The defendant's motion to dismiss the indictment is denied.**

**This constitutes the decision and order of the court.**

**Dated: October, 2010  
Brooklyn, New York**

  
A handwritten signature in black ink, consisting of a vertical line with a large loop at the top and a smaller loop at the bottom, crossing a horizontal line. The signature is positioned above the printed name.

**John P. Walsh, J.S.C.**