

**People v Edwards**

2011 NY Slip Op 30143(U)

January 12, 2011

Sup Ct, Kings County

Docket Number: 8390/2010

Judge: Esther M. Morgenstern

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Supreme Court of the State of New York  
COUNTY OF KINGS IDV 2 \_\_\_\_\_ x  
PEOPLE OF THE STATE OF NEW YORK

Dated January 12, 2010

: Indictment 8390-2010

-against-

: DECISION\ORDER

CALVIN EDWARDS,  
Defendant.  
\_\_\_\_\_ x

Present:  
Hon. Esther M. Morgenstern  
J.S.C.

Defendant was arraigned on September 19, 2010 in Criminal Court Part AR-3A and charged with Criminal Contempt in the Second Degree (PL §215.50-3) and Harassment in the Second Degree (PL §240.26-1) under Docket 2010KN074720. The charges resulted from an incident alleged to have taken place at the home of the Complainant at 106-22 Farragut Road in the County of Kings on Sept. 18, 2010. The Complaint alleged that on September 18, 2010 Defendant knocked on the door of the Complainant's home and stated that he wanted to give money to the children. The Defendant and Complainant have a child in common and the Complainant previously was granted three full Orders of Protection from antecedent Criminal Court and Family Court proceedings which directed the Defendant to stay away from the Complainant and her home. An Order of Protection remained in effect until March 16, 2015 under Docket 2010KN003343.

Defendant was arraigned, *inter alia*, on misdemeanor charges including Criminal Contempt in the Second Degree. The Defendant moves to dismiss the instant Indictment by Notice of Motion dated October 23, 2010 and returnable November 16, 2010. Counsel for Defendant moves to dismiss the Indictment by Notice of Motion filed October 26, 2010 and returnable November 16, 2010.

Defendant was arraigned in Criminal Court on September 19, 2010 and charged with Criminal Contempt in the Second Degree on misdemeanor complaint 2010KN074720. The matter was adjourned to September 24, 2010 in DV-2. On September 24, 2010 in DV-2 the matter was adjourned to October 4, 2010 for Open File Discovery and adjourned to October 12, 2010 for hearings and trial. The matter was transferred to IDV-2 on October 21, 2010 and Jonathan Fink, Esq. was assigned to represent the Defendant as felony 18-b counsel. The People

without notice to Defendant or counsel or permission of the Court, presented the case to the Grand Jury which resulted in Indictment 8390/2010 charging the Defendant with six counts of Criminal Contempt in the First Degree and three counts of Criminal Contempt in the Second Degree.

The Indictment was filed on October 7, 2010 prior to the October 12, 2010 adjournment date. It charged the Defendant with six counts of Criminal Contempt in the First Degree and three counts of Criminal Contempt in the Second Degree. The Defendant was arraigned on the Indictment on October 21, 2010 and Defendant pled Not Guilty to the charges in the Indictment. The matter was adjourned to November 16, 2010 for the People to provide Grand Jury minutes for *in camera* inspection. Before that adjournment date, the Defendant filed his *pro se* motion to dismiss the Indictment and defense counsel filed an additional motion to dismiss the Indictment. The People filed an Affirmation in Opposition to Defendant's Motions to Dismiss on November 15, 2010.

Defendant moves for an order dismissing the Indictment pursuant to CPL 210.35 on the ground that the People violated their obligation to permit the Defendant to testify before the Grand Jury pursuant to CPL 190.50[5][a]. Defendant and defense counsel maintain that Defendant's right to notice of the Grand Jury proceedings and to testify therein was violated.

#### Discussion

A Grand Jury proceeding is not intended to be an adversary proceeding, except to the limited extent that the governing statute gives a defendant or person about to be charged the right to testify and to request that persons designated by them to be called to testify. People v. Pacer, 9 Misc.3d 545, (2005).

"Under CPL 190.50 [5] [a], this right to testify accrues only if, prior to the filing of the indictment, the defendant serves written notice of his or her intent to testify upon the district attorney. However, the district attorney is under no obligation to inform a person that a Grand jury proceeding is pending against him or her 'unless such person is a defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is subject of the prospective or pending grand jury proceeding.' (CPL §190.50 [5][a]). The Second department has made clear that the plain meaning of the statute compels the conclusion that absent an arraignment upon a felony complaint, a prosecutor has no duty to inform a defendant that a Grand Jury presentation is underway...". People v. Haughton, 15 Misc.3d 1101(A), (Supreme Court, Kings Cty 2007). The Defendant's right to testify before the Grand Jury is purely statutory. People v. Norbert, N.Y.L.J. January 18, 2008 34, (col. 1). The

Defendant's right to testify accrues only when prior to filing an Indictment the Defendant serves written notice of intent to testify on the District Attorney.

CPL 190.50 states in pertinent part:

Grand jury; who may call witnesses; defendant as witness

1. Except as provided in this section, no person has a right to call a witness or appear as a witness in a grand jury proceeding.

2. The people may call as a witness in a grand jury proceeding any person believed by the district attorney to possess relevant information or knowledge.

3. The grand jury may cause to be called as a witness any person believed by it to possess relevant information or knowledge. If the grand jury desires to hear any such witness who was not called by the people, it may direct the district attorney to issue and serve a subpoena upon such witness, and the district attorney must comply with such direction ...

5. Although not called as a witness by the people or at the instance of the grand jury, a person has a right to be a witness in a grand jury proceeding under circumstances prescribed in this subdivision:

(a) When a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request and stating an address to which communications may be sent. The district attorney is not obliged to inform such a person that such a grand jury proceeding against him is pending, in progress or about to occur unless such person is a defendant who 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. In such case, 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;

(c) Any indictment or direction to file a prosecutor's information obtained or filed in violation of the provisions of paragraph (a) or (b) is invalid and, upon a motion made ...

must be dismissed; provided that a motion based on such a ground must be made not more than five days after the defendant has been arraigned upon the indictment ...

A Defendant who is not arraigned in local criminal court on a felony complaint has no right to notice from the People of any possible Grand Jury action. In the case at

bar, the Defendant filed a *pro se* motion to dismiss the indictment since according to the Defendant, "Prior to arraignment (Criminal Contempt in the Second Degree- a class "A" Misdemeanor) I was provided a consultation by my court-appointed attorney, Ellen E. Edwards, who asked me several questions about the events which led to my arrest. Despite the fact that I have a true account which would have probably resulted in a vote of 'no true bill' ... defense counsel declined to discuss my grand jury options with me and chose not to serve written Notice of Intent to Testify" before the Grand Jury. (Defendant Affidavit in Support of Motion to Dismiss October 23, 2010). An examination of the Misdemeanor Jacket confirms that Defendant was arraigned on September 19, 2010 in Criminal Court on misdemeanor charges only and that no Grand Jury notices were served at the arraignment in AR-3A.

Contrary to the contentions of the Defendant, there is no jurisdictional limitation on the People's right to seek an indictment without permission of the court. See People v. Ortiz, 150 Misc.2d 602 (Supreme Court, Kings Cty 1991). In addition, all the cases cited by the Defendant in support of the motions to dismiss the Indictment are distinguishable from the case at bar in that the underlying criminal complaints had felony charges attached to them.

Significantly, it is uncontroverted that Defendant never served written notice of his desire to testify before the grand jury as required by CPL 190.50[5][a] until after the Grand Jury voted on Indictment 8390-2010. A defendant has every right to raise the issue of the People's failure to accord him opportunity to appear and testify before a grand jury, but it is inconceivable that the Legislature intended the remedy of a defect in the proceedings to be used as a loophole or subterfuge to avoid prosecution. People v. Willis, 114 Misc.2d 371 (1982).

The right of a Defendant not charged with a Misdemeanor upon a felony complaint to testify before a Grand Jury is proscribed and the right of any Defendant to so testify before a grand Jury is waived when the Notice of Intent to Testify is not served and a motion to dismiss is not made within five days. See, People v. Munoz, 207A.D.2d 418 (2d Dept. 1994).

Based on the foregoing, the Defendant did not have a right to notice of the proceedings before the Grand Jury. The Defendant did not have a right to testify before the Grand Jury under the circumstances in this proceeding since he was not arraigned on a felony charge.

Motions to dismiss denied without a hearing.

**ENTERED**  
JAN 14 2011  
NANCY T. SUNSHINE  
COUNTY CLERK

ENTER,



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Esther M. Morgenstern, J.S.C.