

People v Smith

2011 NY Slip Op 31145(U)

April 7, 2011

Supreme Court, Bronx County

Docket Number: 4251/10

Judge: Ralph A. Fabrizio

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**SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: CRIMINAL DIVISION, PART 35**

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THE PEOPLE OF THE STATE OF NEW YORK

**Indictment No. 4251/10
Decision and Order**

-against-

RUE SMITH

Defendant

-----X
FABRIZIO, J.

Defendant moves to dismiss the indictment pursuant to CPL 210.35, alleging that the prosecutor improperly questioned him before the grand jury about unspecified instances of prior arrests, terms of prison confinement, and whether he was currently on either parole or probation. Defendant further asks the Court to inspect the grand jury minutes to see whether the prosecutor gave any limiting instructions about the role that such testimony would play in their consideration of all the evidence. The People have not addressed any of the defense allegations in their response to the motion. Upon inspection of the grand jury minutes, the Court grants the motion.

Defendant was held for grand jury action on a felony complaint charging him with criminal sale of a controlled substance in or near school grounds. An undercover police officer appeared before the grand jury and testified, in substance, that defendant and another individual sold him crack cocaine. Defendant waived immunity and testified before the grand jury, denying that he had sold narcotics, and denying that knew the alleged accomplice. He testified that he left his apartment, which was located in the

building outside of which the alleged sale occurred, and was taken into custody by police officers. As defendant completed his short narrative without interruption by the prosecutor, the prosecutor asked defendant whether he had completed his “story,” Shortly after asking defendant, “So it is your story that your weren’t hanging outside of the building,” the following exchange occurred:

Q; You have been arrested before, have you not?

A: Yes, I have been.

Q: So you are familiar with the criminal justice system?

A: Yes, I am.

Q: You have spent some time in prison, correct?

A: Yes, ma’am.

Q: Are you currently on parole or probation?

A: No ma’am.

Defendant argues that these “questions served no probative value and their answers prejudiced the Grand Jury from a fair and impartial evaluation of the evidence.” The Court agrees. Moreover, the charge given to the Grand Jury in this matter contained no instruction whatsoever advising them the legal use of this testimony.

The Grand Jury serves as a “buffer between the State and its citizens,” and thereby acts as a bulwark against prosecutorial excesses (see People v Huston, 88 NY2d 400 [1996], quoting People v Calbud, Inc., 49 NY2d 389, 394, 396). The prosecutor is entrusted, as a public officer and an advocate, with the duty to ensure the fairness of the process, including proper questioning of witnesses, giving sufficient legal instructions, and eliciting admissible evidence (see id. at 88 NY2d 406). Dismissal of an indictment pursuant to CPL 210.35 is a “drastic” and “exceptional” remedy, and

should be used only in “those instances where prosecutorial wrongdoing, fraudulent conduct or errors [that] potentially prejudice the ultimate decision reached by the Grand Jury” are implicated (People v Huston, 88 NY2d at 409; see People v Ramos, 48 AD3d 984, 985 [3rd Dep’t 2008]; People v Mujahid, 45 AD3d 1184, 1185 [3rd Dep’t 2007]). This is one of those rare cases where dismissal is warranted.

When a defendant testifies before a Grand Jury, that individual has a right to expect that the jury will be able to properly assess his or her credibility. In connection with such an evaluation, a prosecutor is entitled to question a defendant appearing before a grand jury about “specific criminal and immoral acts.”see People v. Sorge, 301 N.Y. 198, 200 [1950]. Thus, defendant could have been appropriately questioned about any prior specific criminal conviction relevant to his credibility, as well as facts about any relevant uncharged crimes about which the, prosecutor had a good faith basis. (see People v. Betts, 70 N.Y.2d 289, 292 [1987]; People v. Jones, 239 A.D.2d 234, 235 [1st Dep’t 1997]). This is not at all what occurred in this case.

It is hornbook law that a defendant may not be questioned about a past arrest, or even a past indictment. (Barker and Alexander, Evidence in New York State and Federal Courts § 6:59 [West 2001]; Prince, Richardson on Evidence § 6-409 [Farrell 11th ed 1995]). In People v Miller, 91 NY2d 372, 380 [1998], the Court recognized that “we have repeatedly held that the fact of an arrest or an indictment filed incident to an arrest is ‘not a permitted area for impeachment’”(quoting People v Rodriguez, 38 NY2d 95, 101 [1975]); see also People v Morrison, 194 NY 116 [1909] [stating over a century ago that such tenet was well settled even at that time]; People v. Coyne, 73 AD2d 628 [2nd Dep’t 1979]. The reason for this rule of law is plain: an arrest or indictment is a mere accusation and is not relevant to the credibility of any witness (Morrison, 194 NY

at 117).

Here, asking defendant whether he “had been arrested before” was completely improper. Moreover, following up this question with one about whether he was “familiar with the criminal justice system,” without any reference to the basis for such “familiarity,” was improper in this case for the very same reason. While the questions about whether defendant had been in prison and might have been on parole or probation but was no longer under such supervision were at least indicative of the existence of a prior conviction, these questions were never linked to any specific conviction. The length or type of a certain sentence imposed by a judge in a particular case is not on its own a credibility related factor. Moreover, the prosecutor’s choice to use general terms like “have you ever been” arrested, or been to prison, or whether defendant was still on parole or probation at the time of his testimony, left the jury to speculate about how many times the defendant has actually been arrested and/or convicted. Thus, the overall import of this line of questioning bore no relevance to a specific and valid assessment of defendant’s credibility.

While the questioning alone was decidedly improper, the prosecutor compounded the error by failing to give an instruction to the jury advising them that they could not consider evidence about defendant’s prior criminal contacts for anything other than an evaluation of his credibility. Given the improper nature of the questioning, the Court does not hold that such a charge would have cured the error. However, the prosecutor’s failure to give any type of limiting instruction is indicative of a pattern of misconduct. And, since only two-witnesses appeared before the grand jury – the police officer and defendant – a proper credibility determination was important. Defendant was alleged to have sold drugs that he took out of his waistband; there was no

evidence that any drugs were recovered from defendant's person. The fact that the prosecutor deprived him of a proper assessment of his credibility in this two-witness presentation through improper cross-examination and an imbalanced legal instruction, "potentially prejudice[d] the ultimate decision reached by the Grand Jury," (People v. Huston, 88 N.Y.2d at 409), and thereby merits dismissal of the indictment in this case.

There were legitimate lines of cross-examination that the prosecutor could have explored in connection with specific past convictions that appear on defendant's record. They conducted a classically improper cross examination about unspecified arrests, sentences and "familiarities" not tethered to any specific conviction. The People are given leave to represent this case to a new grand jury, and cautioned to conduct a proper cross-examination and provide proper legal instruction should defendant elect to testify.

This constitutes the decision and order of the Court.

Dated: April 7, 2010

Hon. Ralph Fabrizio