

**People v Foster**

2011 NY Slip Op 34188(U)

February 15, 2011

Sup Ct, Kings County

Docket Number: 6342/2009

Judge: John P. Walsh

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

-----X  
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

RYAN FOSTER, NATHANIEL MALONE,  
JACQUES SYLVESTRE, YANIRA SANTIAGO

Defendants

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

Dated: February 15, 2011

Indictment No. 6342/2009  
Indictment No. 6343/2009

DECISION and ORDER

-----X  
In Indictment 6342/2009, these four (4) individual defendants and are charged in various combination in a one hundred sixty-four (164) count indictment with various crimes including one (1) counts of Enterprise Corruption in violation of Penal Law 460.20(1), six (6) counts of Grand Larceny in the Second Degree in violation of Penal Law 155.40(1), thirty-two (32) counts of Grand Larceny in the Third Degree in violation of Penal Law 155.35, one hundred eighteen (118) counts of Grand Larceny in the Fourth Degree in violation of Penal Law 155.30(1), two (2) counts of Criminal Possession of Stolen Property in the Second Degree in violation of Penal Law 165.52 and five (5) counts of Criminal Possession of Stolen Property in the Third Degree in violation of Penal Law 165.50.

In Indictment 6343/2009, Jacques Sylvestre is charged with one (1) count of Criminal Possession of a Weapon in the Second Degree in violation of Penal Law 265.02(1) and one (1) count of Criminal Possession of a Weapon in the Fourth Degree in violation of Penal Law 265.01(1).

The Court has read the Grand Jury minutes and examined the presentations of the evidence before the Grand Juries *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.

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The People are required to establish a *prima facie* case (*People v. Mayo*, 36 NY2d 1002 at 1004) inasmuch as 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). 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” 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]). This definition connotes a purely legal concept. “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]). “This definition focuses on the issue of 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). Pursuant to these definitions, and except as provided in CPL 190.30, a Grand Jury’s decision to indict a defendant with an offense must be based on both *competent* and *admissible* evidence which allows that body to have reasonable cause to believe that the accused committed an offense (see *People v. Reyes*, 75 NY2d 590). (emphasis supplied)

CPL 190.65(1) establishes two evidentiary requirements for an indictment, to wit., legal sufficiency (CPL 190.65[1][a]) and reasonable cause (CPL 190.65[1][b]) both of which are defined in 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 (*People v. Galatro*, 84 NY2d 160). 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).

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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). 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).

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).

Initially, the court observes that this particular Grand Jury presentation was both complex and exhaustive. It included numerous witnesses and hundreds of exhibits. The presentation of the evidentiary portion of the People’s case occupies approximately hundreds of pages.

In applying the general legal principles noted previously to this particular presentation, the court concludes that 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).

The most complex of the crimes charged is Enterprise Corruption. Article 460 defines several terms critical to defining the conduct by which the crime of Enterprise Corruption is committed, the persons who may commit it and the *mens rea* necessary for its commission. For purposes of the crime of Criminal Enterprise, an enterprise may be a formal legally cognizable entity like a corporation or it may be an informal group like a criminal organization or even a gang (Penal Law 460.10[2]; Penal Law 175.00[1]; Penal law 460.10[3]). While the federal RICO statute does not use the term "criminal enterprise," the statute defines an "enterprise" to include any "group of individuals associated in fact although not a legal entity. The United States Supreme Court has held that because the terms "enterprise" includes an "association in fact," it encompasses purely criminal enterprises as well as legitimate ones (*U.S. v Turkette*, 452 U.S. 576).

Unlike the RICO statute, New York's OCCA requires that a "criminal enterprise" be comprised of a "group of persons," rendering one person incapable of being considered a "criminal enterprise."

To present a legally sufficient *prima facie* case to the Grand Jury, the prosecutor must submit evidence which displays three characteristics: (1) the group of persons must "share a common purpose of engaging in criminal conduct." To count as part of the "group of persons" constituting a criminal enterprise, an individual must share in the criminal purpose of that enterprise (see *People v. DeMenus*, N.Y.L.J., April 13, 1995, p. 28, col. 4 [Sup. Ct. New York County 1995]); (2) the group must be "associated in an ascertainable structure distinct from a patterns of criminal activity;" and (3) the group must have a "continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents" (Penal Law 460.10[3]. See *People v. Cantarella*, 160 Misc.2d 8, 14, where the court linked the phrase "criminal incidents" to the Penal Law's definition at 40.12[2][a]).

It should be noted that the difference between a "criminal enterprise" and a "conspiracy" is that the members of an "enterprise" must share a "common purpose of engaging in criminal conduct" which need not be so specific as to constitute a "conspiracy" - there need not be an agreement to commit a specified crime (see Penal Law 105.00).

When considering whether the People have presented sufficient evidence of a criminal enterprise in which a group of persons are associated in an ascertainable structure distinct from a pattern of criminal activity, the court need not find evidence of a rigid association resembling a corporate flow chart (see *People v. Wakefield Financial Corp.*, 155 Misc.2d 775, 785). All that is required is that the form of the association be "ascertainable." There is a sharp distinction between New York and federal law on this issue. In *People v. Besser*, 96 NY2d 136, 143, the Court of Appeals noted that the structure of a criminal enterprise must be distinct from a pattern of criminal activity and further noted that the criminal enterprise must be "cognizable" and extend "beyond the common plan or scheme encompassing the criminal acts." However, the United States Supreme Court has held that for an association in fact to constitute a RICO "enterprise," it need not have "an ascertainable structural hierarchy beyond that inherent in the pattern of racketeering activity in which its members engage" (*Boyle v. U.S.*, 129 S. Ct. 2237).

One other observations in the court's assessment of the Grand Jury presentation: while the structure of a criminal enterprise must be distinct from the pattern of criminal activity charged in an enterprise count, it need not be distinct from that of any legitimate enterprise to which the criminal enterprise is connected or any legitimate enterprise victimized or employed in the commission of the patterns of criminal activity. Therefore, the People are relieved of any obligation to prove a distinction between the "criminal enterprise" and a legitimate enterprise (see Governor Cuomo's Approval Memorandum)

In evaluating the sufficiency of the evidence presented to the Grand Jury on a "pattern of criminal activity" (defined as conduct "constituting three or more criminal acts" committed "by persons charged in an enterprise corruption count" (Penal Law 460.10[1]). For three or more criminal acts to constitute a "patterns," they must meet three (3) other requirements. Penal Law 460.10(4)(a) defines a "pattern of criminal activity" as conduct constituting three or more criminal acts that "were committed within ten years of the commencement of the criminal action" in which enterprise corruption is charged. This definition appears to exclude from consideration criminal acts by persons who are not charged in the enterprise count.

A second requirement is that the criminal acts have "continuity" (see Penal Law 460.10[4][b]). This requirement excludes from consideration as a criminal act isolated incidents or those incidents so closely related and connected in point of time or circumstances of commission as to constitute a criminal offense or criminal transaction as those terms are defined in CPL 40.10. The third requirement to a pattern of criminal activity is that the acts exhibit a relationship to each other. Taking a more narrow approach to this than that taken in the RICO statute, New York's OCCA has been held to require courts to discern a pattern of criminal activity by the criminal acts relationships to each other through a common scheme or plan (Penal Law 460.10[4][c][1]; *People v. Ruiz*, 130 Misc.2d 191). Alternately, criminal acts may be part of a patterns because they "were committed, solicited, requested, importuned, or intentionally aided by person acting with the mental culpability required for the commission thereof and associated with or in the criminal enterprise (Penal Law 460.10[4][c][ii]). In substance, the criminal acts forming a pattern of criminal activity may be linked as part of a pattern either by their relationship to each other or by the relationship between the persons committing those acts.

In defining the crime of Enterprise Corruption, the statute mandates the People meet three elements. Obviously, the level of proof necessary to meet these elements in a Grand Jury presentation is considerably less than that required before a guilty verdict may be rendered.

The first element is that the defendant must "participate in a pattern of criminal activity; (2) the defendant must engage in one of the following three proscribed forms of conduct - (a) conducting or participating in the affairs of an enterprise through a pattern; (b) acquiring or maintaining any interest in or control of an enterprise through a pattern; or (c) investing the proceeds of a pattern in an enterprise; and (3) the defendant must have knowledge of the existence of a criminal enterprise and the nature of its activities and be employed by or associated with that enterprise.

In examining the evidence as to the defendant's participation in a pattern of criminal activity, the court must find that the defendant allegedly committed at least three of the criminal acts included in the patterns of criminal activity either as a principal or an accomplice (Penal Law 460.20[2]). If the patterns of criminal activity charged in an enterprise count includes more than three acts, each of the defendants charged with enterprise corruption may be criminally responsible for a different combination of three. This requires sufficient evidence to allow the Grand Jury to determine whether a *prima facie* case has been presented as to the defendant's "guilt" on each criminal act comprising the pattern.

With respect to the secrecy of the Grand Jury proceedings, as may or may not be relevant to this particular Grand Jury presentation, if and when the People offered the testimony of an accomplice as evidence that a defendant engaged in a pattern of criminal activity, the People did not have to meet the burden placed on them by CPL 60.22 - the corroboration requirement - as to each and every predicate act. Relieved of that obligation extends to each of the criminal acts alleged to be part of the pattern of criminal activity. CPL 60.22 applies only to the crime of Enterprise Corruption taken as a whole (People v. Besser, 96 NY2d 136). To that extent, the Grand Jurors were properly instructed.

Penal Law 460.20(2) restricts which criminal acts may be included in establishing a defendant's participation in a pattern. For instance, the defendant's own criminal acts must include two criminal acts which "are felonies other than conspiracy (Penal Law 460.20[2][b]); two of the defendant's acts must have occurred within five years of the commencement of the criminal action (Penal Law 460.20[2][b] and one of those two acts must be a felony; lastly, each of the defendant's alleged criminal acts must have occurred within three years of a prior act (Penal Law 460.20[2][c]).

There are a host of ways for the defendant to challenge Enterprise Corruption charges in an indictment (or, for that matter, at trial). The defendant may claim that particular criminal acts with which he is charged do not qualify as part of his or her participation in the patterns because they are not supported legally insufficient evidence, or because they are not linked to other acts in the pattern by a common scheme or plan or by their connection to a criminal enterprise or because the People failed to demonstrate that the defendant committed them with intent to participate in or advance the affairs of the criminal enterprise.

Were this court to determine that the Grand Jury presentation did not *prima facie* establish that the patterns acts for which the defendant is charged is less than three, or if the remaining criminal acts do not meet the requirements of seriousness, timeliness and continuity necessary to establish the defendant's participation in the pattern of criminal activity - that is, that two are not felonies other than conspiracy, two were not committed within five years of the filing of the accusatory instrument, and each was not committed within three years of another, the court would be constrained to dismiss the Enterprise Corruption count (see People v. Besse, 96 NY2d 136, 147). However, the Penal Law only requires that each defendant charged with Enterprise Corruption engaged in at least three criminal pattern acts and not with all purported criminal acts submitted in support of that count.

By sustaining the Grand Jury presentation, the court has considered and rejected all of these purported challenges. Future motions directed at the Enterprise Corruption count should consider the court's evaluation of the Grand Jury presentation as to that count.

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Preliminarily, in considering the legal sufficiency of the prosecutor's instructions on the law to this Grand Jury, the court observes that the instructions occupy one hundred eighteen (118) pages of transcripts. Moreover, the Grand Jury was specifically charged on geographic jurisdiction as to the Enterprise Corruption count. As noted previously, the Grand Jurors were also properly instructed under what circumstances they needed to find corroboration of an accomplice's testimony.

Beside those specific findings, 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).

Pursuant to CPL 200.50(7)(a), an indictment must 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 with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the accusation." This is a jurisdictional requirement which 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, the possibility of insufficient notice to the defendant arises; then 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).

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The indictment, together with the Bill of Particulars when necessary, serves three purposes: (1) as notice to the defendant so as to allow preparation of a defense; (2) by protecting the defendant's New York State constitutional rights to be prosecuted on a valid indictment properly voted by a Grand Jury and conforming to the CPL's requirements; and, (3) as protection for the defendant from subsequent prosecution on the same facts in violation of his 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 which occurs 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 which occurs when a count impermissibly charges more than one crime.

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 as predicated on legally insufficient evidence is denied.

This constitutes the decision and order of the court.

Dated: February 15, 2011  
Brooklyn, New York



John P. Walsh, J.S.C.