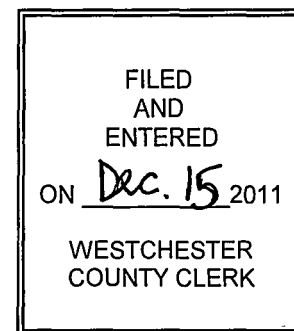


People v Allen
2011 NY Slip Op 34234(U)
December 14, 2011
County Court, Westchester County
Docket Number: 11-0612
Judge: Barbara G. Zambelli
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X



THE PEOPLE OF THE STATE OF NEW YORK

- against -

DOUGLAS ALLEN,

Defendant.

-----X

ZAMBELLI, J.

DECISION & ORDER

Indictment No.: 11-0612

FILED

DEC 15 2011

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The defendant has been indicted for promoting prostitution in the third degree allegedly committed on or about between August 21, 2010 and December 3, 2011 in the County of Westchester. He now moves by notice of motion with supporting affirmation with exhibits for omnibus relief. The People's response consists of an affirmation in opposition and a memorandum of law with exhibits. Defendant also submitted a reply memorandum.

P.L. §230.25 provides that "a person is guilty of promoting prostitution in the third degree when he knowingly (1) advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes, *or a business that sells travel-related services knowing that such services include or are intended to facilitate travel for the purpose of patronizing a prostitute, including to a foreign jurisdiction and regardless of the legality of prostitution in said foreign jurisdiction.*" (Emphasis added). The statute was amended in 2007 to include the italicized language and it is under this language that defendant is being prosecuted.

Upon consideration of the above papers, as well as review of the grand jury minutes and exhibits and the consent discovery order entered in this case, the motion is disposed of as follows:

1. MOTION TO INSPECT / DISMISS / REDUCE

The Court has conducted an in camera inspection of the minutes of the grand jury proceedings. Upon review of the evidence presented, this Court dismisses the indictment with leave to the People to re-present. While the evidence before the grand jury was legally sufficient to support the crime charged, the integrity of the grand jury was impaired so that prejudice to the defendant may have resulted (CPL §210.35(5)).

Dismissal of an indictment under CPL §210.35(5) is appropriate “where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the grand jury. The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment and the degree of inappropriate prosecutorial influence or bias.” (People v. Huston, 88 N.Y.2d 400, 409 (1996)). The review of the grand jury minutes in this case reveals that there were several errors in the grand jury presentation which cumulatively impaired the integrity of the proceedings to such a degree that prejudice to the defendant may have resulted (see People v. Tomaino, 248 A.D.2d 944, 946 (4th Dept. 1998)).

Although the prosecutor is afforded wide discretion in presenting evidence and legal instructions to a grand jury (People v. Robinson, 89 N.Y.2d 648, 653 (1997); People v. Mitchell, 82 N.Y.2d 509, 515 (1993); People v. Perry, 187 A.D.2d 678 (2d Dept. 1992), such discretion is not unlimited, as it is well-settled that the prosecutor performs the dual role of advocate and public officer during a grand jury presentation, charged not only with

the duty to secure indictments, but also with the concomitant duty to ensure that justice is done (People v. Huston, 88 N.Y.2d 400, 409 (1996) (citations omitted); see also People v. Pelchat, 62 N.Y.2d 97, 105 (1984)).

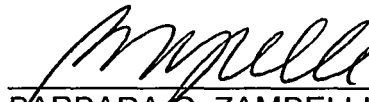
Here, the prosecutor provided the grand jury with inadmissible hearsay testimony not subject to any exception in the form of emails from a purported former customer of defendant, as well as from a person allegedly employed by defendant as a guide in the Philippines, which emails resulted in prejudice to the defendant (see People v. Barabash, 18 A.D.3d 474 (2d Dept. 2005) (dismissing a previous indictment against this defendant and his former partner for the introduction of prejudicial hearsay audio recording to grand jury)). Also, during the presentation, the prosecutor played for the grand jury recordings of conversations between the defendant and the undercover officer. However, the record of the grand jury proceedings indicates that in playing one of the recordings, which have been listened to by this Court and are lengthy, the prosecutor had the recording played “in pertinent part” and failed to indicate on the record what parts of the recording were played. The Court notes that on the recordings, defendant makes arguments which, in effect, dispute that the behavior for which he is being prosecuted constitutes any crime and also disputes whether the activities in the Philippines that he discussed with the undercover officer amount to prostitution and thus are potentially exculpatory and should have been played to the grand jury (see People v. Dlugash, 41 N.Y.2d 725, 736 (1977); People v. Anderson, 256 A.D.2d 413, 414 (2d Dept. 1998); People v. Perez, 299 A.D.2d 197 (1st Dept. 2002), lv. denied, 99 N.Y.2d 618 (2003)). As a result of the People’s failure to note exactly which portions of the recording were played for the grand jury, the Court cannot tell

if such portions were in fact played. Lastly, the Court notes that in the beginning of the presentation, there was a reference to "websites involved in human trafficking", which is prejudicial to defendant, as there are no allegations that defendant was involved in any such human trafficking; such references should be avoided in any future presentation.

In conclusion, upon review of the grand jury minutes, the Court finds that the above incidents so impaired the integrity of the grand jury so that prejudice to the defendant may have resulted. The instant indictment is dismissed without prejudice to the People to re-present this matter to another grand jury in a manner consistent with this Decision and Order. It is further noted that, should such representation occur which results in an indictment, and should defendant move to dismiss that indictment on grounds which include arguments that P.L. §230.25(1) is unconstitutional, the defense must notify the Attorney General in accordance with the dictates of Executive Law §71(1).

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
December 14, 2011


BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

Hon. Janet DiFiore
District Attorney, Westchester County
111 Dr. Martin Luther King Jr. Blvd.
White Plains, New York 10601
Attn: Michael Delohery, Esq.
Assistant District Attorney

John F. Ryan, Esq.
The Legal Aid Society of Westchester County
One North Broadway
White Plains, New York 10601
Attn: Arlene R. Popkin, Esq.