

**People v McCoy**

2013 NY Slip Op 33624(U)

November 6, 2013

Supreme Court, New York County

Docket Number: 0050/08

Judge: Richard D. Carruthers

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

\* 1]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CRIMINAL TERM: PART 81

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

-against-

Ind. No. 0050/08

ROBERT MCCOY,

DECISION  
AND  
ORDER

-----X  
RICHARD D. CARRUTHERS, J.:

The People's application, dated October 4, 2013, seeking leave to re-present the above referenced indictment is granted. By order of the Appellate Division, First Department entered on September 17, 2013, the defendant's burglary and weapons possession convictions were reversed and the indictment dismissed, because the People had re-presented the attempted assault charges to a new grand jury after a prior grand jury adjourned without having taken taking affirmative action on those charges.

Although the Appellate Division originally affirmed defendant's conviction, finding unpreserved, the issue that the People had failed to obtain leave to re-present the case to a new grand jury. The defendant moved to re-argue the appeal after the Appellate Division decided the case of *People v Smith*, 103 A.D.3d 430, 432-433 (1<sup>st</sup> Dept 2013) holding that the jurisdictional nature of the claim of error under CPL 190.75(3) need not be preserved for appellate review. Though re-argument was untimely, the Court entertained the defendant's motion since it was based on an interim change in the law which may be heard if defendant, as here, has

\* 2]

timely sought leave to appeal to the Court of Appeals and the leave application is pending when the motion to re-argue reaches the Appellate Division.

Here, the Appellate Division notes that pursuant to *Smith, supra*, and *People v Credle*, 17 N.Y.3d 556 (2011), the failure of the first grand jury to take affirmative action on the attempted assault charges constituted a dismissal of those charges for CPL §190.75(3) purposes requiring the People to seek leave of court to re-present those charges as well as the burglary and weapon possession charges notwithstanding the fact that the earlier grand jury voted to indict on those charges. *See, People v. Miller* 106 A.D. 3d 670 (1<sup>st</sup> Dept 2013). Accordingly, the indictment was dismissed and the People granted leave to seek an order permitting them to re-present all of the charges to another grand jury.

The defendant objects to the granting of leave on the grounds that the People actions subverted the grand jury's decisional authority. Specifically, defendant argues that after the single count of attempted assault was dismissed, because the grand jury testimony established that defendant had tried to assault two different police officers rather than one, the assigned assistant erred by not seeking leave to re-present.<sup>1</sup> The case was re-presented in November of 2007 with no affirmative action on the

---

<sup>1</sup> The People assert that they moved to re-present at this juncture but withdrew the motion on the authority of *People v. Ramirez*, 46 A.D.3d 290 (1<sup>st</sup> Dept 2007) which held that the People need not seek leave when the first grand jury was unable to reach an affirmative action to either dismiss or indict.

charges of Attempted Assault in the First Degree. According to the People, the presentation ended at 5:00 p.m. on the last day of the grand jury term without any action being taken on those chargers. The defendant asserts that the People should have asked the grand jurors to expand their term rather than allow the term to end without a decision on those counts. In January of 2008, believing she was in compliance with the law as it existed at the time, the assigned assistant presented the case to a third grand jury without seeking prior court authorization. The defendant testified at those proceedings, following which he was indicted.

The defendant, citing *Credle, supra*, now argues that he was cross-examined in an overly aggressive manner before the third grand jury and that the People subverted the second grand jury's authority by re-presenting the case when they were clearly reluctant to indict the defendant on the attempted assault charges.<sup>2</sup> Following this indictment the defendant proceeded to trial, *pro-se*, and was convicted on May 19, 2008. As set forth above that conviction was reversed in light of *Smith* and *Credle, supra*.

The Court has reviewed the defendant's claims and finds them without merit. The record demonstrates that the People, in twice re-presenting the case, acted in accordance with the law at the time and did not subvert the grand jurors' decisional authority.

---

<sup>2</sup> When Judge Scherer reviewed the minutes of these proceedings, according to defendant, she was concerned about the cross-examination but let the indictment stand.

[\* 4]


As set forth in *Credle*, supra at 562, " if the reasons for the withdrawal are legitimate and the underlying circumstances do not provide clear indication that the first grand jury's decisional authority was being subverted, leave to re-present should be granted as a matter of course."

Accordingly the People are given leave to re-present the case to a new grand jury within 45 days.

The foregoing constitutes the order and decision of the Court.

Dated: New York, New York  
November 6, 2013

PT.81 NOV 06 2013

  
\_\_\_\_\_  
Richard D. Carruthers  
A.J.S.C.

**HON. R. CARRUTHERS**