

**People v Diven**

2014 NY Slip Op 33771(U)

January 24, 2014

County Court, Westchester County

Docket Number: 12-1215

Judge: Barbara G. Zambelli

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FILED  
AND  
ENTERED ON  
*Jan. 24* 2014  
WESTCHESTER  
COUNTY CLERK

COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----x  
THE PEOPLE OF THE STATE OF NEW YORK

AMENDED  
DECISION & ORDER<sup>1</sup>

- against -

CHARLES J. DIVEN, JR.

Indictment No.: 12-1215

Defendant.

*F*  
JAN 24 2014

-----x  
ZAMBELLI, J.

CLERK  
COUNTY OF WESTCHESTER

The defendant has been indicted for three counts of grand larceny in the second degree allegedly committed on or about and between February 1, 2005 and April 1, 2010, three counts of criminal possession of a forged instrument in the second degree allegedly committed on or about and between February 1, 2005 and March 1, 2005, criminal possession of a forged instrument in the second degree allegedly committed on or about February 2, 2007, criminal possession of a forged instrument in the second degree allegedly committed on or about and between June 12, 2008 and June 17, 2008, criminal possession of a forged instrument in the second degree allegedly committed on or about and between August 1, 2001 and November 1, 2011, scheme to defraud in the first degree allegedly committed on or about and between May 5, 2004 and December 22, 2011, criminal tax fraud in the third degree on or about October 15, 2009, criminal tax fraud in the third degree on or about October 15, 2010 and criminal tax fraud in the third degree on or

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<sup>1</sup>The Amendment solely relates to a typographical error on p 11 regarding the numbering of the count which was dismissed by the Court based upon legally insufficient evidence. The count which was dismissed, grand larceny in the second degree, was count three, not count two (also grand larceny in the second degree) as in the original Decision and Order

about October 15, 2012, all in the County of Westchester. He now moves by notice of motion with supporting affirmation and memorandum of law for omnibus relief. The People's response consists of an affirmation in opposition and a memorandum of law. Defendant also filed a reply affirmation. Upon consideration of these 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 DISMISS - DEFECTIVE GRAND JURY PROCEEDINGS

Defendant moves to dismiss the indictment on the grounds that it is defective. Defendant (who has been provided with a copy of the grand jury minutes of each witness who testified before the grand jury as a result of a conditional examination of one of the People's witnesses) argues that the minutes reveal "a pattern of persistent failure to comply with the requirements of article one hundred ninety of the criminal procedure law, the cumulative effect of which operated to deny the defendant a fair presentation of the allegations against him to the extent that he was prejudiced in the eyes of the grand jurors." Defendant submits that "pervasive throughout the presentation of the People's case" was the use of leading questions, questions calling for hearsay answers, inadmissible or prejudicial questioning, and questions soliciting answers the witnesses were unqualified to give; he also submits that the People prevented the grand jury from hearing and receiving testimony and evidence favorable to the defendant. Defendant's memorandum of law submitted with his motion details approximately thirty instances of what he submits was improper questioning or evidence involving seven of the ten grand jury witnesses.

The People oppose the motion and argue that the defendant has failed to meet the high burden of demonstrating impairment of the grand jury process. As to hearsay, they

argue that to the extent any hearsay was elicited during the grand jury process, it did not rise to the level of impairing the proceedings. As to defendant's objection to the fact that witnesses referred to having filed complaints against the defendant with the Grievance Committee, the People argue that given the defendant's response to the complaints, this is highly relevant evidence of guilt. As to defendant's allegations regarding the charts created and introduced into evidence which reflect the work of the People's expert, a certified public accountant and fraud examiner, the People submit that these charts were admissible under the voluminous writings exception to the best evidence rule.

The statutory test for defectiveness of the grand jury proceedings is "very precise and very high: 'impairment of integrity' of the grand jury process." (People v. Darby, 75 N.Y.2d 449, 455 (1990)). The remedy of dismissal of an indictment is considered an "exceptional remedy" which should be limited to those instances where "prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the grand jury." (People v. Huston, 88 N.Y.2d 400, 409 (1996)).

The motion to dismiss the indictment as defective is denied. While the court notes that some hearsay evidence was solicited during the presentation, and leading questions were occasionally used, these instances do not rise the level of impairing the grand jury proceedings. For example, as to defendant's objections to the hearsay elicited during the testimony of Regina Nicolo and Marnie DeGregorio, it is noted that the hearsay primarily involved background information explaining how the situation arose. As to the hearsay from Marnie DeGregorio that her attorney told her that the money she and her mother gave defendant was no longer in defendant's bank account, it cannot be said that this evidence prejudiced defendant given that admissible evidence established that the document

defendant allegedly showed the DeGregorios, which purportedly demonstrated that their money was still in his bank account, was fraudulent (Grand Jury Exhibit 22). The People also provided a cautionary instruction to the grand jury which defined hearsay, advised that such evidence was inadmissible unless the People had instructed the grand jurors that it fell within an exception to the hearsay rule, and if not, that such statements could not be used as competent evidence upon which to base a charge against the defendant.

As to the witnesses' references to the grievances they filed, the Court notes that there was no discussion of the grievance process or determinations other than the facts that the grievances were filed and the defendant responded thereto. It is also noted that cautionary instructions were twice given by the People regarding these references, and that the limited references to the grievances were admissible to demonstrate the actions taken subsequent to their being filed. While defendant not surprisingly disputes that his actions taken subsequent to the grievances being filed are evidence of his guilt, this is an issue of factual dispute, and given that the evidence before the grand jury must be viewed in the light most favorable to the People (People v. Gordon, 88 N.Y.2d 92, 92 (1996); People v. Campbell, 69 A.D.2d 645 (2d Dept. 2010)), defendant's objection is without merit. Given this, the references to the grievances do not render the indictment defective.

As to the testimony from Marnie DeGregorio regarding how this incident affected her, while these questions were irrelevant, it cannot be said this testimony rises to the level of impairing the integrity of the grand jury process, especially since it can be expected to be within the ken of the grand jurors that the potential loss of \$243,000 would likely be an upsetting occurrence. As to whether the Nicolo house was ever purchased by her sister, which question was also asked of Regina Nicolo, while defendant objects that this

erroneously implies he is the reason the house has not been purchased, that is another issue of factual dispute, and given that the evidence before the grand jury must be viewed in the light most favorable to the People (People v. Gordon, supra; People v. Campbell, supra), defendant's objection is without merit.

As to defendant's several objections to the testimony of Carlos Primiero, Michael Sperendi and Leon Berg, none of the challenged evidence, taken individually or viewed cumulatively with the other evidence admitted, rose to the level of impairing the integrity of the grand jury process; however, as discussed in Section 4 supra, there is legally insufficient evidence to sustain the counts of the indictment which relate to defendant's dealings with Carlos Primiero.

As to the testimony of the People's expert CPA and fraud examiner, and specifically, the charts she created that were Grand Jury Exhibits 24 and 24a-e and Exhibit 25, given that these charts summarize the underlying bank records also in evidence, these charts were properly admitted under the voluminous writing exception to the best evidence rule (People v. Weinberg, 183 A.D.2d 932, 934 (2d Dept. 1992), lv. denied, 80 N.Y.2d 977 (1992)). It is further noted that the People properly instructed the grand jurors that the charts were offered solely for the purpose of assisting the grand jury in analyzing the bank records which were already in evidence, and that if they discovered a discrepancy between the chart and the bank records, as the finders of fact, it was their recollection of the facts and evidence which controlled (see People v. Shields, 100 A.D.3d 549, 551 (1<sup>st</sup> Dept. 2012)). Defendant's objection to the expert's use of the word "shortfall" to describe the difference between the monies received on behalf of Carlos Primiero and the amount defendant allegedly paid out to him is without merit. While defendant argues that the use

of this term by an expert who is a certified fraud examiner implies that the money is missing and was stolen, this argument is conclusory and speculative. The witness never alleged that the money was stolen but used the term “shortfall” to demonstrate the mathematical difference between what was deposited in the account on Carlos Primiero’s behalf and that which defendant paid out to him; *ie.*, that what was paid out was less than what was put in. Contrary to defendant’s argument, this was a statement of fact based upon the witness’ analysis of the underlying bank records as opposed to impermissible opinion evidence. Given that this was substantiated by the underlying bank records in evidence, it cannot be said that the use of the term “shortfall” was prejudicial.

However, as to the chart which comprises Grand Jury Exhibit 24e, which relates solely to the counts of the indictment involving Carlos Primiero, and the testimony by the expert witness in regard thereto, this chart and the supporting testimony were improperly received into evidence because, as discussed in Section 4 supra, there is no admissible evidence which establishes that the documents contained within Grand Jury Exhibit 20 were actually the invoices provided by the defendant to the Grievance Committee. Thus, as Grand Jury Exhibit 24e refers to “billing to grievance committee”, it was improperly admitted into evidence, as was the expert’s testimony that it was her “understanding” that these were the invoices defendant provided to the grievance committee.

Lastly, defendant’s objections to the testimony of Steve Sassone, the NYS tax auditor, are also without merit. Defendant argues that this testimony was improper because the tax auditor relied upon the fraud examiner’s chart that is Grand Jury Exhibit 25, which as noted above, defendant asserts was improperly admitted as evidence. For the same reasons set forth above, defendant’s arguments are unavailing.

2. MOTION TO DISMISS COUNT THREE OF INDICTMENT AS UNTIMELY

Defendant challenges count three of the indictment, grand larceny in the third degree, which relates to defendant's dealings with Carlos Primiero, as time barred as commenced beyond the five year statute of limitations set forth at CPL §30.10(2)(b). He submits that while this count alleges a continuing crime commencing in February 2005 and ending in April, 2010, that the only funds related to Mr. Primiero received by defendant after June 2008 was a check drawn to defendant's order in July, 2009 in the amount of \$160,000. Defendant submits that this check was authorized by Mr. Primiero and acknowledged by him before a notary public. Because of this, defendant argues that the People improperly elicited testimony from Mr. Primiero that he only consented to having the July 2009 check drawn to the defendant's order because the defendant told him he would give him the money from this check after he received the check. Defendant submits that the People should not have allowed Mr. Primiero to testify in derogation of his written agreement, which he argues "effectively revoke[d] his consent for the sole purpose of saving for prosecution alleged thefts that were beyond the statute of limitations." As without the July, 2009 check, the last check defendant is alleged to have received on behalf of Mr. Primiero is from June 2008 and the indictment was filed on August 7, 2013, defendant submits that count three is untimely.

The People oppose the motion and argue that count three is timely. The People argue that under the facts of this case, grand larceny was properly charged as a continuing crime and that the last disbursement made to Mr. Primiero from defendant's account occurred on March 29, 2010, which left a balance of Mr. Primiero's money of \$710.95 from a total of \$567,222.12 received by defendant on Mr. Primiero's behalf. They therefore

submit that the statute of limitations should be measured from that date and that the count is clearly timely.

Defendant's argument that count three is time-barred is unavailing. Defendant's argument makes clear that he does not dispute that grand larceny in the third degree may be charged as a continuing crime and implies that the count would be timely but for his factual dispute regarding the circumstances under which the July, 2009 check was issued. Indeed, "it is well established that grand larceny may be charged as a series of single larcenies governed by a common fraudulent scheme or plan even though the successive takings extended over a long period of time" (People v. Rosich, 170 A.D.2d 703 (2d Dept. 1991), lv. denied, 77 N.Y.2d 1000 (1991)). Defendant's objection, which takes issue with the fact that Mr. Primiero's testimony is at odds with his written acknowledgment, is really one of legally sufficiency. However, the standard for legally sufficient evidence is proof of competent evidence which, if accepted as true, would establish the elements of the crimes charged and defendant's commission of those crimes; furthermore, the standard requires that the evidence be viewed in the light most favorable to the People (People v. Gordon, supra; People v. Campbell, supra). Thus, despite that fact that defendant takes issue with Mr. Primiero's testimony, it must be accepted as true for the purposes of the grand jury proceeding.

Accordingly, whether measured from July, 2009 or April, 2010, count three was timely commenced within the applicable five year statute of limitations. However, while it was timely, this count must still be dismissed because it was not supported by legally sufficient evidence, as set forth in Section 4, supra.

3. MOTION TO DISMISS COUNTS FOUR THROUGH EIGHT AS UNTIMELY

Defendant moves to dismiss counts four through eight of the indictment, which all charge defendant with criminal possession of a forged instrument in the second degree. Defendant argues that these counts are beyond the five year statute of limitations applicable to felonies set forth at CPL §30.10(2)(b). In response, the People concede that counts four through eight are untimely. Accordingly, the motion is granted upon the People's consent.

4. MOTION TO INSPECT/DISMISS/REDUCE

This application is granted to the extent that the Court has conducted an in camera inspection of the minutes of the grand jury proceedings. Upon review of the evidence presented, this Court finds that count three, grand larceny in the second degree, and count ten, scheme to defraud, must be dismissed for legally insufficient evidence.

Count three relates to the accusation that defendant stole property from Carlos Primiero. In an effort to demonstrate that the money taken was in excess of any attorney's fees charged by the defendant for his legal work on behalf of Mr. Primiero, the People introduced Exhibits 18 and 20. Exhibit 18 was described by Mr. Primiero as a spreadsheet that was given to him by the defendant as an accounting of the defendant's legal services on Mr. Primiero's behalf. The People's expert examined this document and determined that it contained a total charge for attorney's fees of \$134,103.75. Mr. Primiero also testified that after being dissatisfied with the defendant's accounting, he hired another attorney and filed a complaint against defendant with the Grievance Committee. He was asked and applied in the affirmative as to whether the defendant filed a response to the grievance. He was asked if the response included any supporting documents, and

indicated that it included invoices. Mr. Primiero was then shown Grand Jury Exhibit 20 for identification and asked if he recognized it. He indicated that he did and when asked what he recognized it as, answered that his new attorney “showed me this that Charlie had given to the Grievance Committee.” He was then asked if this document was included in Mr. Diven’s response to the Grievance Committee, and indicated yes. He also stated that the exhibit appeared to be an exact copy of what was included in the defendant’s response and did not appear to be altered in any way since he saw it (Primiero Testimony, pp. 108-109). Exhibit 20 was subsequently reviewed by the People’s expert, who determined that it contained a total charge for attorney’s fees of \$328,685. The expert then used Exhibits 18 and 20 and compared them to the monies received by defendant on Mr. Primiero’s behalf to determine that even when the defendant’s claimed charges for attorney’s fees (as reflected in Grand Jury Exhibits 18 and 20) were subtracted from the monies received on Mr. Primiero’s behalf, there was still a shortfall of monies received on Mr. Primiero’s behalf that was unaccounted for.

As demonstrated above, the People failed to lay a proper foundation for the admission of Exhibit 20 into evidence. It is clear from the questioning that Mr. Primiero lacks personal knowledge of Exhibit 20’s origins and instead relates hearsay information from his new attorney that these documents were provided to the Grievance Committee by defendant. The documents themselves, which are what appear to be invoices unaccompanied by any other document such as a cover letter, contain no certification or other indication of their being sent by the defendant to the Grievance Committee. Accordingly, they were impermissibly admitted into evidence. This error was compounded by the fact that throughout the remainder of the presentation, Exhibit 20 was referred to as

the "billing to the grievance committee" when this had not been properly established under the rules of evidence. Without properly admitted invoices, no comparison may be made to determine whether defendant stole property from Carlos Primiero, as alleged in count 3. Accordingly, count 3 is dismissed with leave to represent granted to the People.

Count ten of the indictment, which charges that defendant with scheme to defraud in the first degree, must also be dismissed. In addition to the fact that this count would have to be dismissed for the reasons set forth above as a result of the fact that it references defendant "obtaining property" from Mr. Primiero, it is dismissed because the evidence as presented to the grand jury fails to establish the elements of the crime.

A person is guilty of scheme to defraud in the first degree when he or she engages in a scheme constituting a systemic ongoing course of conduct with intent to defraud more than one person and to obtain property from more than one person by false and fraudulent pretenses, representations and promises, and so obtains property with a value in excess of one thousand dollars from one or more such persons (P.L. §190.65(1)(b)). Count ten of the indictment indicates that the "one or more such persons" in this matter are Marnie DeGregorio, Mary DeGregorio and Carlos Primiero.

"A systemic ongoing scheme to defraud is established by the planned pattern of conduct of the defendant rather than the existence of identifiable multiple victims." (People v. Burks, 254 A.D.2d 738, 739 (4<sup>th</sup> Dept. 1998)). The "scheme" in scheme to defraud has been defined as a "a plan and a pattern as opposed to isolated ad hoc acts" (People v. Kaminsky, 127 Misc.2d 497, 501 (Sup. Ct., N.Y. Co. 1985)). The scheme's existence may be established by the similarity of fraudulent practices used in regard to numerous victims

(Id.). The separate transactions alleged to constitute the scheme do not have to be identical in every way, so long as the transactions share common elements which identify them as having been taken pursuant to an overall fraudulent design (Id.).

While the People fail to specifically oppose defendant's motion to dismiss count ten, in their response to defendant's motion to sever counts, the People allege that defendant's actions involve a common scheme and plan because defendant used his position as an attorney to obtain money through his legal representation of clients and because defendant used a business associate from the Primiero representation as a source of funds from which to borrow money to reimburse the DeGregorios.

Here, the evidence before the grand jury failed to establish a "planned pattern of conduct" on the part of the defendant. As an initial matter, it is noted that the evidence before the grand jury established that the victims herein initially sought out the defendant's services, as opposed to the defendant soliciting them as clients. Ms. Nicolo testified that defendant served as her attorney for her divorce in the early 2000s (for which representation, no fraud is alleged) and that she contacted defendant after her ex-husband refused to comply with a provision in her divorce decree (Nicolo Testimony, pp. 7-8). Mr. Primiero testified that he met defendant when defendant was representing a friend of his on a criminal matter and he accompanied the friend to the defendant's office. While there, he asked his friend to step out of the office, and he told the defendant the issues he had with his father's estate and that he estimated the estate to be worth about three million dollars. As a result of this conversation, defendant agreed to represent him and Mr. Primiero entered into a retainer agreement with him (Primiero Testimony, pp. 58-60). That these victims sought out the defendant's services, as opposed to defendant soliciting their

business, demonstrates a lack of any “plan” on defendant’s behalf, as he could not know that the victims would be approaching him. Also, the “fraudulent practices” alleged as to each set of victims vary greatly. Regarding the Nicolo / DeGregorio matter, it is alleged that defendant represented to Regina Nicolo that she needed to demonstrate to the Court that she had the money to purchase her marital home and to do this, she needed to provide the defendant with the money, which would be held in escrow. To obtain the money, Ms. Nicolo sought the assistance of her mother and sister, to whom the defendant made the same representations and who were the ones who delivered the funds to defendant. The People allege that the defendant converted the funds to his own use and provided Ms. Nicolo and the DeGregorios with a fraudulent document which represented that the money was still in his account. It is alleged that after the DeGregorios hired an attorney and filed a grievance, the defendant returned the money to them. The allegations regarding Carlos Primiero involve defendant allegedly converting funds intended for Mr. Primiero to his own use (by allegedly fraudulently negotiating checks and making other false representations to obtain the funds). However, the evidence established that defendant actually disbursed at least some of Mr. Primiero’s funds to him on several occasions during the course of their dealings and actively represented Mr. Primiero on the sale of his father’s stock, although it is alleged that he also fraudulently converted the proceeds of that sale to his own use. Thus, other than the broad fact that the defendant is alleged to have committed the crimes while acting as the victims’ attorney, the transactions between defendant and Mr. Primiero and defendant and Ms. Nicolo and the DeGregorios involve significant factual differences and lack common elements which identify them as having being taken pursuant to an overall fraudulent design (People v.

Kaminsky, supra). That the defendant used a business associate involved with the Primiero matter to obtain funds to pay back the DeGregorios cannot be evidence of a “planned pattern of conduct” sufficient to sustain the count of scheme to defraud since those actions necessarily took place after the alleged fraud had already occurred. Accordingly, count 10 must be dismissed, with no leave to represent.

The remaining counts of the indictment (counts 1 -2, 9, and 11-13) were supported by sufficient evidence and that the instructions given were appropriate. There was no other infirmity which would warrant a dismissal of the indictment. Accordingly, that branch of the motion which seeks dismissal of the indictment is denied. The Court further finds no facts which would warrant releasing any portion of the minutes of the grand jury proceedings to the defense (CPL §210.30[3]).

5. MOTION TO SEVER COUNTS

Defendant moves to sever the counts relating to the Primiero matter from the counts relating to the DeGregorio / Nicolo matter, alleging that the jury would be unable to consider the proof separately as it related to each offense. He also alleges that he has important testimony to give as to the Primiero matter and a need to refrain from testifying on the Nicolo / DeGregorio matter. The People oppose the motion and argue that it is premature.

Given that the Court has dismissed all of the charges that relate to the Primiero matter, the defendant’s motion is denied as moot.

6. MOTION TO SUPPRESS PRIOR BAD ACTS (SANDOVAL AND VENTIMIGLIA)

Granted on consent of the People to the extent that this Court directs that a hearing


be held immediately prior to trial. Prior to the commencement of jury selection, the People will disclose to defendant all specific instances of his prior uncharged crimes and bad acts they expect to introduce at trial for impeachment purposes (CPL §240.43). Defendant must then sustain his burden of informing the Court of the prior convictions and misconduct which might unfairly affect him as a witness in his own behalf (People v. Matthews, 68 NY2d 118, 121-122). In the event the People seek to introduce defendant's prior bad acts on their direct case, the burden is on the People to seek a Ventimiglia hearing to determine the admissibility of such evidence (People v. Ventimiglia, 52 NY2d 350).

7. REQUEST FOR ADDITIONAL MOTIONS

The defendant's request for permission to make additional pretrial motions is denied. Additional motions will only be considered upon good cause shown pursuant to CPL §255.20(3).

This Decision constitutes the Order of the Court.

Dated: White Plains, New York  
January 24, 2014

  
BARBARA G. ZAMBELLI  
COUNTY COURT JUDGE

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