

**People v Simmons**

2014 NY Slip Op 33959(U)

March 18, 2014

County Court, Westchester County

Docket Number: 13-1218

Judge: Barry E. Warhit

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

FILED  
AND ENTERED  
ON 3/18/2014  
WESTCHESTER  
COUNTY CLERK

-----X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

**DECISION & ORDER**

CARL SIMMONS,

Indictment No.: 13-1218

Defendant.

-----X

WARHIT, J.

*AR*  
**FILED**  
**MAR 18 2014**

Defendant, CARL SIMMONS, was indicted for, on or about September 2, 2013, having committed the crimes of Assault in the first degree and Criminal Possession of a Weapon in the third degree. Through counsel, Defendant previously filed a Demand to Produce and an omnibus motion consisting of a Notice of Motion and an Affirmation in Support thereof. The People responded by Affirmation in Opposition together with a Memorandum of Law. Defendant filed a Reply Affirmation. Upon consideration of these filings, this court rendered a Decision and Order, filed and entered on January 28, 2014. The matter was sent to the Trial Assignment Part.

By Order to Show Cause, dated February 18, 2014, Defendant filed the within Motion to Renew seeking, inter alia, reconsideration of his prior application for dismissal of the indictment, pursuant to CPL § 210.20[1](d), and for Discovery and Inspection. By Affirmation in Opposition and Memorandum of Law filed on February 25, 2014, the People have opposed the relief sought.

New York State Civil Practice Law and Rules ("CPLR") permit the filing of a

motion to renew “based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR § 2221). Primarily, the within motion is borne of Defendant’s concern that, in rendering its January 28, 2014 Decision and Order, this court may have overlooked Defendant’s Reply Affirmation and further, on grounds that, in said Decision and Order, this court failed to specifically deny dismissal of the indictment under CPL § 210.20[1](d). Additionally, Defendant submits that the transcript of Defendant’s testimony before the Grand Jury was not served upon counsel until after the Decision and Order was rendered.

The within motion does not comply with the requirements for a Motion to Renew (see, CPLR § 2221). Defendant has not set forth new facts to support a change in this court’s determination of the prior motion. It is simply irrelevant that the People served Defendant with a copy of his own Grand Jury testimony after this court rendered its Decision and Order. Defendant was present and testified before the Grand Jury in the presence of his counsel. Accordingly, Defendant and his counsel were uniquely aware of the proceedings before the Grand Jury and he has not set forth a justifiable basis for having failed to include all relevant arguments in his omnibus motion.

Consequently, Defendant’s application is properly denied in its entirety upon procedural bars. Nevertheless, in the interests of justice and precision, the following determinations are reached.

As above discussed, this court previously denied Defendant’s application for dismissal of the indictment. There is no legal basis to disturb this finding. Defendant’s contention that the court did not deny the application, under Criminal Procedure Law §

210.20[1](d) is without merit.

According to its express terms, Criminal Procedure Law § 210.20 must be read in conjunction with Criminal Procedure Law §§ 190.40 and 190.45. Criminal Procedure Law § 210.20[1](d) directs that an indictment may be dismissed where “[t]he defendant has immunity with respect to the offense charged, pursuant to section 50.20 or 190.40” (CPL the § 210.20[1](d)).

Criminal Procedure Law § 50.20[5] lacks applicability to grand jury proceedings. CPL § 190.40[2] [a], directs that “[a] witness who gives evidence in a grand jury proceeding receives immunity unless . . . [h]e has effectively waived such immunity pursuant to section 190.45; . . .”. Criminal Procedure Law § 190.45 sets forth the required contents of a written waiver of immunity and the procedure for execution of such a waiver (see, CPL § 190.45[1]; CPL § 190.45[2] and CPL § 190.45[3]).

In its Decision and Order, filed and entered on January 28, 2014, this court explicitly found: “ the waiver presented to Defendant, which he swore to before the Grand Jury, amply meets the requirements of Criminal Procedure Law § 190.45 and does not provide a basis for dismissal of the within indictment (see, People v Stewart, 92 NY2d 965 [1988])”. In light of the above detailed statutory construction, this court’s determination was sufficiently precise, absent reference to Criminal Procedure Law § 210.20[1](d), to impart the meaning and import of the court’s decision.

To be abundantly clear, Defendant is not entitled to dismissal of the within indictment on grounds of immunity (see, CPL § 210.20[1](d)). Defendant was provided with the written “Waiver of Immunity” prior to the Grand Jury proceeding. On October 21, 2013, Defendant signed same in the presence of Matthew Feinberg, who is a

Notary Public as well as the within movant's colleague in the Office of the Westchester County Legal Aid Society. Defendant's signed "Waiver of Immunity" was acknowledged by Defendant during his appearance before the Grand Jury on October 25, 2013 and moved into evidence as Grand Jury Exhibit #1.

This "Waiver of Immunity" specified Defendant as a person who may be prosecuted or subjected to penalty concerning the things about which he may testify before the grand jury and made specific reference to Criminal Procedure Law §§ 190.45 and 190.50. Further, the "Waiver of Immunity" stipulated that, by testifying before the Grand Jury, Defendant was waiving the privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled. In plain language, the waiver stated: "I do further waive any and all privileges which I would otherwise obtain and consent to the use against me of the testimony I give and the evidence I produce before this Grand Jury in any trial, case, investigation, prosecution or proceeding" (Grand Jury Transcript, Exhibit 1, Waiver of Immunity).

Prior to giving any testimony before the Grand Jury, Defendant was presented with Exhibit 1, which is clearly entitled "Waiver of Immunity" (see, CPL § 190.45[1]); see also, Grand Jury Transcript, p. 8). Under oath, Defendant acknowledged he had reached the decision to appear before the Grand Jury and to waive immunity after having an opportunity to speak to attorney Feinberg, who was present with him during his appearance before the Grand Jury (Grand Jury Transcript, p.8; CPL 190.45[3]). Further, Defendant acknowledged he had read the "Waiver of Immunity", that his counsel had explained it to him and that he had signed it "freely and voluntarily" (Grand Jury Transcript, pp. 8-10; see, CPL §§ 190.40 and 190.45[1]).

Also before Defendant was permitted to waive immunity and testify, the assistant district attorney advised Defendant that by signing the waiver and swearing to it before the Grand Jury, he would be giving up immunity that he would otherwise be automatically entitled to receive (Grand Jury Transcript, p. 9). Further, the assistant district attorney advised Defendant "everything you say can and will be used against you in the event of any further trial or proceedings" and that the Grand Jury could charge him based upon the evidence before it, including his testimony (Id. at pp. 9-10).

Defendant then swore to the waiver before the grand jury. The foreperson inquired of Defendant, "Do you swear that you have read this Waiver of Immunity, Grand Jury Exhibit No. 1, and have read and signed the same freely and voluntarily" Defendant responded "Yes" (Grand Jury Transcript, p.11). The assistant district attorney inquired of Defendant, "[d]id you sign this Waiver of Immunity and did you swear to it before this grand jury". Defendant replied "Yes" (Id.).

Defendant's claim that he "exhibited confusion around the same time that he was swearing to the waiver of immunity" is purposely misleading. Defendant indicated confusion solely with respect to being given a choice to swear upon the Bible or affirm (Transcript p. 10). Defendant was given an opportunity to confer with counsel for clarification and, thereafter, he unequivocally responded "swear on the Bible" (Id.).

In People v. Steward, the Court of Appeals held that CPL § 190.45 (2) provides that "[a] waiver of immunity is not effective unless and until it is sworn to before the grand jury conducting the proceeding in which the subscriber has been called as a witness." In this case, there is clear evidence that Defendant signed or subscribed the waiver and then completed the distinct act of swearing to it before the Grand Jury (92

NY2d at 967).

There is no requirement under the law that the assistant district attorney read a waiver of immunity aloud (see, People v. McMillen, 152 Misc.2d 918 [Schoharie Co. County Court 1992])(merely referencing that the assistant district attorney had read the waiver aloud, but not requiring oral recitation); cf., CPL § 190.45[1] (requiring the Waiver of Immunity to be written). Of import, the transcript of the Grand Jury proceeding in the instant case conclusively demonstrates Defendant read and understood the “Waiver of Immunity” (Grand Jury Transcript, pp. 8-9).

Further, there is no requirement under the law that the foreperson subscribe to the waiver of immunity. Accordingly, it is without legal consequence that “[i]t is unknown if the Secretary of the Grand Jury kept a record of whether the foreman signed the waiver after the end of the day or some time after that”. Although an assistant district attorney appears to have followed such a procedure in the matter of People v. Coles, the law does not impose a duty upon the foreperson to sign and date the waiver (see, CPL § 190.45[2])(requiring the waiver of immunity to be sworn to by the subscriber before the grand jury (emphasis added)). Accordingly, the lack of the foreperson’s signature upon the waiver does not invalidate Defendant’s acknowledgment of signature or his clear waiver before the Grand Jury.

Finally, dismissal of the indictment is not required based upon the People’s failure to extract an express waiver from Defendant of his Constitutional privilege against self-incrimination. Defendant herein automatically waived his privilege against self-incrimination.

By waiving the right to immunity, a testifying defendant before the grand jury necessarily gives up the U.S. Const. amend. V privilege against self-incrimination.  
N.Y. Crim. Proc. Law § 190.45

(People v. Smith, 87 NY2d 715, 721 [1996]).

Defendant's suggestion, that under United States v. Washington, Defendant is entitled to Miranda warnings, is incorrect. Washington does not stand for this proposition and, in any event, the facts of that case are wholly inapposite to the within matter.

In Washington, a witness, who was suspected of a theft, was subpoenaed to appear as a witness before a grand jury investigating the crime. The prosecutor did not advise respondent before his appearance that he might be indicted for the theft (431 US 181 [1977]). There are a myriad of distinctions between the within case and Washington.

Defendant herein was not subpoenaed to appear and give testimony before the Grand Jury. Defendant chose to do so after having consulted with counsel and was joined in the Grand Jury by his counsel (Grand Jury Transcript, pp. 8-9). The within Defendant was directly advised the Grand Jury would be considering charges against him and that his statements could be used against him (Grand Jury Transcript, pp. 6-7 and 9). Defendant was informed, in clear terms, of the ramifications of his decision to testify (see, Transcript pp. 9-10). Importantly, Defendant was presented with and did execute a written "Waiver of Immunity" and swear to same before the Grand Jury (see, Grand Jury Exhibit #1).

Defendant's application, pursuant to CPL § 240.20, for an order directing the People to provide discovery and inspection to the defense in the nature of a copy of Grand Jury Exhibit #1, appears moot. Defendant and his counsel were provided with a copy of the "Waiver of Immunity" prior to the Grand Jury proceeding (see, Grand Jury, Exhibit 1, dated October 21, 2013). Defendant concedes he has been provided with a copy of his Grand Jury testimony. To the extent, Defendant mislaid or failed to retain a copy of the Waiver of Immunity, upon Defendant's request, the People shall provide a duplicate copy of same.

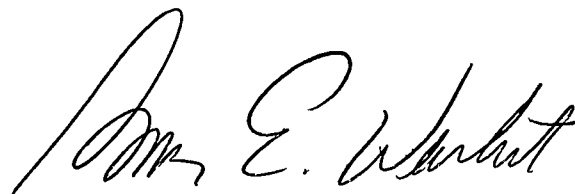
All additional assertions and arguments claimed by Defendant have been considered and each has been deemed to be without merit. As detailed herein and as previously set forth in the Decision and Order, dated January 28, 2014, this court finds no infirmities of the Grand Jury proceeding warranting dismissal of the indictment. There is no basis upon which this court should conclude Defendant was not accorded the opportunity to appear before the Grand Jury or that he did not do so in accord with the proceedings set forth in Article 190 of the Criminal Procedure Law. Further, there is a dearth of evidence to show that the "proceedings failed to conform to the requirements of the article . . . to such degree that the integrity thereof is impaired and prejudice to defendant may result" (CPL § 210.35[4] and [5]).

Accordingly, Defendant's motions, brought pursuant to CPL §§ 255.20,

210.20[1](c) and (d), 190.40, 190.45[1] and [2] and 210.35[4] and [5] are denied.

The foregoing constitutes the opinion, decision and order of this Court. .

Dated: White Plains, New York  
March 18, 2014



---

Honorable Barry E. Warhit  
Westchester County Court

HON. JANET DiFIORE  
District Attorney, Westchester County  
111 Dr. Martin Luther King, Jr. Boulevard  
White Plains, New York 10601  
BY: Susan L. Pollett  
Assistant District Attorney

LAW OFFICES OF JOHN F. RYAN, ESQ.  
Legal Aid Society of Westchester County  
One North Broadway, 9<sup>th</sup> floor  
White Plains, New York 10603  
BY: Eugene T. Traynor, Esq,