

People v Hall

2018 NY Slip Op 33929(U)

September 8, 2018

County Court, Westchester County

Docket Number: 18-0328

Judge: Anne E. Minihan

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FILED
AND ENTERED
ON 9-6-2018
WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

DECISION & ORDER
Indictment No.: 18-0328

RONALD HALL,

FILED To

Defendant.

SEP - 6 2018

MINIHAN, A.J.

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

By felony complaint, defendant was charged with assault in the second degree (Penal Law § 120.05 [12]) and unlawful imprisonment in the first degree (Penal Law § 135.10). On December 4, 2017, defendant appeared personally with counsel, the Legal Aid Society of Westchester, and was arraigned in the Yonkers City Court on the felony complaint. The case was subsequently presented to the grand jury on April 10, 2018 which returned a true bill that was then filed on April 16, 2018. On May 1, 2018, the date of defendant's scheduled arraignment, he appeared personally with counsel in this court at which time the Legal Aid Society of Westchester requested to be relieved. The defendant joined in the application, which was then granted by the Court which substituted Roger Kraminitz as counsel. Defendant was arraigned on the indictment and entered a plea of not guilty.

By notice of motion dated May 7, 2018, defendant moved to dismiss the indictment pursuant to CPL 210.35 and 190.50 on the basis that he was denied his right to appear before the grand jury as a witness on his own behalf. Defendant argued that the proceedings were defective and relied on a notarized letter dated March 30, 2018 addressed to "Mr. Richard Viviano or the representing attorney" requesting, *inter alia*, that he be afforded the opportunity to testify before the grand jury and to proffer emergency medical service workers as witnesses. In his attorney affirmation in support, Mr. Kraminitz asserted that defendant was prepared to testify before the grand jury however he was denied not only that opportunity but also his request for witnesses as set forth in defendant's letter dated March 30, 2018.

The People opposed the motion and although the People argued that Jessica Hugel of the Legal Aid Society, the staff attorney assigned to defendant's case, communicated to the Office of the District Attorney that the defendant did not wish to testify, it was nonetheless unclear to this court whether she or anyone at the Legal Aid Society received the defendant's notarized letter dated March 30, 2018 in which he unambiguously requested to testify before the grand jury. For the reasons set forth in the Court's decision and order on the defendant's motion, dated June 8, 2018, the indictment was dismissed without prejudice to represent.

Thereafter, by order to show cause, the People timely moved pursuant to CPLR 2221(d) to reargue so much of the court's decision dated June 8, 2018 as dismissed the indictment without having granted a CPL 190.50 hearing. The defendant opposed the motion. By decision and order dated July 20, 2018, this court granted the People's motion to reargue so much of the

court's decision dated June 8, 2018 as dismissed the indictment without having granted a hearing and directed that the parties appear for a hearing on August 2, 2018.

On August 14, 2018, the parties appeared for a conference at which time, Mr. Kraminitz made an application to the court to be relieved. The defendant joined in the application, which the Court then granted, and appointed defendant's current counsel, Matthew Montana to represent him. Prior to the commencement of the hearing, the People, by letter brief, requested that this court find that the defendant waived the attorney-client privilege with respect to his communication about his desire to testify before the grand jury with his prior counsel, the Legal Aid Society. By letter briefs in opposition, the Legal Aid Society opposed the People's request. This court found that by claiming his prior attorney was ineffective for having failed to effectuate his express desire to appear and testify before the grand jury on his own behalf, defendant affirmatively placed in issue his communications with prior counsel as to this limited issue (*see Clark v Clark*, 93 AD3d 812 [2d Dept 2012]; *People v Green*, 135 AD2d 565 [2d Dept 1987]; *People v Chris*, 151 AD2d 850, 851 [3d Dept 1989]). The court directed the Legal Aid Society to turn over to the court, for an in camera review, documents, e-mails, notes and memoranda pertaining to the framed CPL 190.50 issue for the hearing. Of the material provided by the Legal Aid Society, the court found nine pages of relevant documents and one partially redacted page which were then handed over to the People and to Mr. Montana in anticipation of the hearing pursuant to CPL 190.50.

On August 31, 2018, the hearing was conducted. The defendant's exhibits in evidence included Exhibit A (his notarized letter dated March 30, 2018); Exhibit B (a notice dated March 22, 2018 for a grand jury hearing on May 3, 2018); Exhibit C (a five page document containing a cover sheet noting that the grand jury notice contained the incorrect date of May 3, 2018, reflecting the correct date of April 3, 2018). The defendant, the sole witness called by the defense, testified that he told each and every one of his attorneys that he wished to testify before the grand jury. He stated he had dealt with several attorneys from the Legal Aid Society during the pendency of its representation of him, among them an unidentified attorney whom the defendant described only as a man in his mid-twenties as well as both Ms. Hugel and Mr. Viviano. Defendant testified that he "emphatically" communicated to his attorneys his desire to testify and followed up with a notarized letter that he submitted via hand delivery and facsimile. Defendant stated that when he consulted with Mr. Viviano, he found counsel to be impulsive and confusing. He claimed that Mr. Viviano gave him different dates for the grand jury's presentation. Defendant stated that Mr. Viviano discussed the potential advantages and disadvantages of testifying and advised him that he needed to make a decision about whether or not he was going to testify before the grand jury. Defendant admitted that Mr. Viviano advised him that during his grand jury testimony he would be subject to cross-examination by a prosecutor, that testifying could very well negatively impact him and that "I could get indicted." Defendant testified that Mr. Viviano advised him not to testify before the grand jury which was scheduled for Tuesday, April 3rd. Defendant recalled that Mr. Viviano left the date on his voice mail and said that if he wanted to testify he had to be at the offices of the Legal Aid Society by 9:00 a.m. on that date, but said that Mr. Viviano gave him two different times, 3:00 p.m. and later 9:00 a.m. Defendant also testified that he spoke with Ms. Hugel and told her that he wanted to testify, that she also advised him that testifying would not be in his best interest and that she

was the last person he communicated with from the Legal Aid Society before his indictment. Defendant testified that he never told anyone that he did not want to testify.

The People called Assistant District Attorney Christine Hatfield, Jessica Hugel and Richard Viviano, both attorneys for the Legal Aid Society of Westchester County. The court found their testimony to be candid, plausible and fully credible. A three page fax, dated March 22, 2018, captioned as the grand jury hearing notice for April 3, 2018 was entered into evidence as People's Exhibit 3 without objection. Assistant District Attorney Christine Hatfield, a veteran Assistant District Attorney of thirteen years, testified that she was assigned to the special prosecutions bureau as the Deputy Bureau Chief of Child Abuse and that she was the prosecuting attorney on the defendant's case. On March 22, 2018, she mailed and faxed out notice and subpoenas and a waiver of immunity to Ms. Hugel of the Legal Aid Society since the presentment of this case to the grand jury was scheduled for April 3, 2018. ADA Hatfield testified that there was a clerical error on the March 22, 2018 notice showing Tuesday May 3rd instead of April 3rd but that the date of the presentment was correctly stated as April 3rd on the fax cover sheet. Ms. Hatfield testified that she followed up and left messages for Ms. Hugel to see whether the defendant intended to testify. On April 2, 2018, when ADA Hatfield received a pink message slip that stated that Ms. Hugel had called to say that the defendant would not testify before the grand jury, she followed up with a call to Ms. Hugel to confirm. Ms. Hugel did confirm this in their conversation and relayed that she had spoken to the defendant and that he was not going to testify. During the conversation, Ms. Hugel pointed out to ADA Hatfield that the notice had the month of the presentation as May and not April and, in response, ADA Hatfield testified that she faxed a new, corrected letter, on April 2, 2018, showing April 3rd as the date of the grand jury presentation.

ADA Hatfield commenced the presentation on April 3, 2018 and completed it on April 10, 2018 where the grand jury voted a true bill. ADA Hatfield testified that she called two medical personnel, one of whom was a paramedic. She also stated that a video recording of a statement made by the defendant to a detective was shown, in its entirety, to the grand jury and that, in this statement, the defendant acknowledged that his grandmother had been on the floor for four days, he claimed to have not assaulted her and stated that he had not called 911 because she had not wanted him to.

Mr. Viviano, a senior attorney who has worked for the Legal Aid Society for 34 years, testified credibly that he was familiar with defendant as he was one of his attorneys on his case. Mr. Viviano testified that Ms. Hugel, who had done the initial interview with the defendant, was assigned as the attorney principally responsible for defendant's representation. Mr. Viviano testified that the Legal Aid Society maintains a file for each of its clients and that the notes made therein by attorneys are made contemporaneously, or nearly contemporaneously, with the occurrence of the events prompting the notation. On March 22, 2018, the Legal Aid Society received grand jury notice on this case, by facsimile which was followed up by a hard copy in the mail. Mr. Viviano testified that as the senior attorney supervising this matter, he reviewed it and discussed with Ms. Hugel the fact that the notice contained a typographical error listing May 3rd instead of April 3rd as the date of the grand jury presentation. Consistent with the practice of the Legal Aid Society after notice has been received to send a written letter to the defendant of the date of the upcoming grand jury presentation, a letter dated March 22, 2018 was mailed to

defendant advising of the impending presentation and instructing him to call the office upon receipt of letter. Mr. Viviano followed up with a call to the defendant on March 29, 2018, the Thursday before the grand jury presentment. Mr. Viviano testified that he told the defendant that his case was going to be presented, that he had a right to testify and that they could discuss it on the phone or in a meeting. Mr. Viviano told the defendant that the presentation could not be adjourned and that if he wanted to testify, he needed to be at the office at 9:00 a.m. on April 3rd to walk over with an attorney. Mr. Viviano recalled that the defendant was not sure about whether or not he was going to testify and that the next day, he received the notarized letter from the defendant indicating that he did want to testify (referring to Defendant's Exhibit A). After reading the defendant's letter, he placed it in the file, gave the file to Ms. Hugel and asked her to handle the presentation, telling her that the defendant knew how to contact them. Mr. Viviano testified that he also told Ms. Hugel to be prepared on Tuesday in case the defendant walked through the door wanting to testify. Although Mr. Viviano did not again speak to the defendant, he testified that he tried to reach the defendant by telephone on the Friday before April 3rd. Mr. Viviano did not know whether the actual notices (Defendant's B and C) were ever shown to the defendant.

Ms. Hugel, a staff attorney who had worked for the Legal Aid Society two years but who has been a practicing defense attorney for two decades, testified that she had been assigned to handle defendant's in-person initial intake interview and was asked by her supervisor Mr. Viviano to contact defendant to determine if he wanted to testify before the grand jury. During the initial interview, she obtained contact information so that she could reach the defendant and, so that he could reach her, she gave him her business card with her direct dial telephone number written on the back. In March 2018, the Legal Aid Society received notice of the grand jury presentment of this case. Ms. Hugel testified that April 3rd was the grand jury presentment and she called ADA Hatfield about the date on the letter that was received and pointed out that it erroneously stated May 3rd. Ms. Hugel recalled that Mr. Viviano had also said that the presentation was to be on April 3rd not May 3rd but her phone call to ADA Hatfield confirmed the date so that when she actually spoke to the defendant, she told defendant April 3rd. On Monday April 2, 2018, Ms. Hugel spoke with the defendant and advised him that if he wanted to testify before the grand jury, he needed to be there the next day by 9:00 a.m. Ms. Hugel testified that she reviewed the process with him on the phone and that she advised him that it would not be in his best interest to testify. She recalled that the defendant responded to her advice by saying that if she thought it was not in his best interest to testify, then he would not testify. Ms. Hugel called ADA Hatfield and advised her that the defendant would not be testifying. On April 3, 2018, Ms. Hugel worked at the Legal Aid Society and recalled that the defendant did not appear that day and that she did not communicate with him any further about the issue.

Defendant's motion to dismiss pursuant to CPL 190.50 is, after a hearing, denied. The Court of Appeals has characterized the defendant's right to testify before the grand jury as a "valued right," which must be "scrupulously protected" (*People v Smith*, 87 NY2d 715, 721-22 [1996]; see *People v Corrigan*, 80 NY2d 326, 332 [1992]; *People v Evans*, 79 NY2d 407, 413-14 [1992]). Pursuant to CPL 190.50(5)(a), a defendant has a right to appear before the grand jury upon serving written notice upon the District Attorney making such a request to appear. In such a case, the statute provides that "the district attorney must notify the defendant or his attorney of

the . . . grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein" (CPL 190.50[5][a]).

Where a defendant has been arraigned in local criminal court on a felony complaint charging an offense which is a subject of a prospective or pending grand jury proceeding, CPL 190.50(5)(a) requires the district attorney to notify the defendant of the grand jury proceeding and to accord the defendant a "reasonable time" to exercise his right to appear as a witness. Criminal Procedure Law Section 190.50(5)(a) does not mandate a specific time period for such notice and reasonable time must be accorded to allow a defendant an opportunity to consult with counsel and decide whether to testify before a grand jury. The concept of reasonableness is flexible and must be applied to the particular facts of a case (*People v Sawyer*, 96 NY2d 815 [2001]). As this court previously held in its decision and order dated June 8, 2018, the People satisfied their obligation to notify the defendant of the grand jury proceeding in a timely manner by their written notice to defendant's attorney approximately two weeks before the presentation, the subsequent phone conversation between ADA Hatfield and Ms. Hugel about the clerical error and the amended notice that was forwarded the day before the presentation (*see People v Alfano*, 75 AD2d 584 [2d Dept 1980]; *People v Malik*, 6 AD3d 313 [1st Dept 2004], *lv denied* 3 NY3d 709 [2004]). The testimony adduced at the hearing demonstrates that both Mr. Viviano and Ms. Hugel communicated with the defendant within a reasonable amount of time and informed him unequivocally that the grand jury was convening on April 3, 2018. The evidence further demonstrates that defendant received timely notice of his right to testify, that he received the advice of counsel and that he thereafter made an informed decision not to testify before the grand jury which he thereafter communicated to defense counsel by word and by action. On April 2, 2018, Ms. Hugel relayed to ADA Hatfield the defendant's expressed decision to not testify before the grand jury. The defendant's claim to the contrary, that he was denied the right to testify is soundly contradicted by the credible record evidence. The defendant's self-serving testimony at the hearing was not credible and was fully rebutted by the consistent and plausible testimony of the People's witnesses.

To the extent defendant's motion to dismiss the indictment can be viewed as alleging a deprivation of the effective assistance of counsel, it is similarly meritless. There is no evidence that the Legal Aid Society, by any act or omission, deprived defendant of a right to testify before the grand jury. To the contrary, the credible hearing evidence shows that on April 2, 2018, defendant told his counsel that he did not wish to testify before the grand jury. Moreover, even assuming *arguendo* that defendant's counsel ignored his desire to testify before the grand jury, a failure to serve the District Attorney with notice of that desire would not, standing alone, constitute ineffective assistance of counsel (*see People v Rogers*, 228 AD2d 623, 623-624 [2d Dept 1996]). A defendant's right to testify before the grand jury is a limited statutory right, not a constitutional right (*People v Hogan*, 26 NY3d 779, 785 [2016]). While a defendant maintains authority to decide the fundamental decisions of his case, strategic decisions, which require expert judgement, are reserved for a defendant's counsel (*People v Hogan*, 26 NY3d at 786).

Defendant's claim that he was deprived the opportunity to call emergency service personnel as witnesses on his behalf is also without merit and contradicted by the evidence

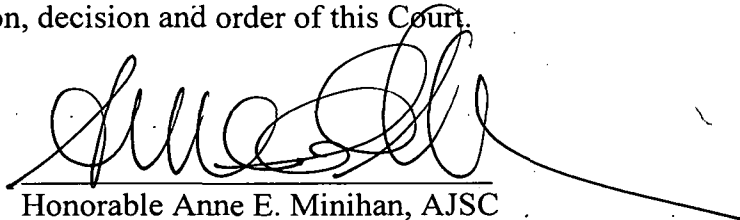
adduced at the hearing through ADA Hatfield who testified that a paramedic witness was called by the People to testify before the grand jury.

Based on the foregoing, defendant was not denied his right under CPL 190.50 to appear and testify before the grand jury, or to have the grand jury consider hearing witnesses presented by defendant. As such, it is hereby ORDERED, that the defendant's motion to dismiss the indictment is denied; and it is further

ORDERED, that the parties are directed to appear on Tuesday September 11, 2018 at 9:30am in courtroom 203.

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

Dated: White Plains, New York
September 8, 2018



Honorable Anne E. Minihan, AJSC

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