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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/10/09
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SHANNON CONNELLY,)
) No. 1 CA-SA 09-0253
)
) Petitioner,) DEPARTMENT C
)
) v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, Arizona Rules
) of Civil Appellate
) Procedure)
)
) THE HONORABLE CHRISTOPHER)
) WHITTEN, Judge of the SUPERIOR)
) COURT OF THE STATE OF ARIZONA,)
) in and for the County of)
) MARICOPA,)
)
) Respondent Judge,)
)
) STATE OF ARIZONA ex rel. ANDREW)
) W. THOMAS, Maricopa County)
) Attorney,)
)
) Real Party in Interest.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-131155-001 DT

The Honorable Christopher T. Whitten, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

Cameron A. Morgan Attorney at Law
By Cameron A. Morgan
Attorneys for Petitioner

Scottsdale

S W A N N, Judge

¶1 Shannon Connely ("Petitioner") brought this special action to challenge: (1) the superior court's denial of his motion to remand the indictment to the grand jury for a new determination of probable cause; (2) the superior court's denial of his motion to dismiss the charges on constitutional grounds; and (3) the superior court's failure to grant hearings on either motion before ruling. We accept jurisdiction and remand the indictment to the grand jury for a redetermination of probable cause.

FACTS AND PROCEDURAL HISTORY

¶2 On May 15, 2009, a grand jury convened to consider evidence regarding the State's allegation that Petitioner committed one count of aggravated assault and one count of disorderly conduct, both dangerous felonies. The State presented the testimony of a detective who was involved in the investigation of the incident underlying the allegations, but was not present at the scene and therefore could not testify from his personal observations.

¶3 The detective testified that on May 7, 2009, a uniformed police officer was standing on the sidewalk in front

of Petitioner's house. According to the detective, the officer was interviewing two individuals in the driveway about an unrelated matter when Petitioner "came out of the house waving a handgun at [the officer] and screaming obscenities at him." In response to the prosecutor's questions, the detective provided a detailed description of Petitioner's behavior:

[PROSECUTOR]: And would you describe in detail what kind of things [Petitioner] was saying to the . . . officer?

[DETECTIVE]: I would quote them directly from his report.

[PROSECUTOR]: Okay.

[DETECTIVE]: (Viewing document.) The subject continued screaming saying, Get the [expletive] off my property, [expletive]. You are [expletive] trespassing. Then after he was given commands to drop the gun, there was some other obscenities such as, It's in a [expletive] holster. The subject then screamed at me saying, You are [expletive] trespassing, [expletive]. Get the [expletive] off my property.

[PROSECUTOR]: And the gun was in a holster at that time apparently?

[DETECTIVE]: That is correct.

[PROSECUTOR]: Is that correct. But it was still raised and pointed toward the officer?

[DETECTIVE]: The gun was in the -- [Petitioner's] right hand. It was raised up in the air, and he brought it down towards the officer.

[PROSECUTOR]: And a gun, even though it's in a holster, is capable of being fired. Is that correct?

[DETECTIVE]: Yes, it is.

[PROSECUTOR]: All right. And this situation continued with [Petitioner] repeatedly cursing at the officer and telling him to get off the property and pointing the gun at him, and the officer continually - the officer at some point pulled his gun on [Petitioner]. Is that correct?

[DETECTIVE]: That is correct.

The detective then testified that after the officer repeatedly ordered Petitioner to drop the gun, Petitioner eventually complied. On the basis of the detective's testimony, the grand jury returned a true bill indicting Petitioner on both counts.

¶14 Petitioner's August 20, 2009 motion requesting that the matter be remanded to the grand jury was denied, and his motion for reconsideration was denied. Petitioner's October 2, 2009 motion for dismissal of the charges on Second Amendment grounds was also denied. Thereafter, Petitioner filed this petition for special action relief. By order filed October 20, 2009, we granted Petitioner's request to stay trial.

JURISDICTION

¶15 The denial of a motion for remand of an indictment to the grand jury is generally reviewable only by special action. *State v. Murray*, 184 Ariz. 9, 32, 906 P.2d 542, 565 (1995). We therefore accept special action jurisdiction on that issue here. Because we grant relief and remand to the grand jury, we decline jurisdiction with respect to the other issues raised by Petitioner.

DISCUSSION

¶16 We review the denial of a motion for remand of an indictment for an abuse of discretion. *Francis v. Sanders*, 222 Ariz. 423, 426, ¶ 10, 215 P.3d 397, 400 (App. 2009). A court may abuse its discretion by committing an error of law in

reaching a discretionary conclusion. *Id.* Petitioner argues that the superior court abused its discretion because at the grand jury proceeding, the prosecutor presented misleading evidence, failed to provide a definition of gun "use" for aggravated assault, and failed to inform the jurors about Petitioner's constitutional rights.

¶17 In grand jury proceedings, an accused is entitled to due process. *E.g., Crimmins v. Superior Court (Collins)*, 137 Ariz. 39, 41, 668 P.2d 882, 884 (1983). Due process requires that the prosecutor's presentation of the evidence be fair and impartial. *Id.*

¶18 Here, the prosecutor presented the testimony of the detective, who was not present during Petitioner's interaction with the officer and did not interview the officer. To describe the incident, the detective referred only to the officer's report. The detective testified that Petitioner had exited his residence "waving a handgun" and the holstered gun "was raised up in the air, and he brought it down towards the officer." But the officer's detailed report nowhere indicated that Petitioner ever waved or raised and brought down the gun. According to the report, Petitioner exited the house screaming and the officer observed the gun in his hand. When the officer commanded Petitioner to drop the gun, Petitioner "turned his hand gun sideways and yelled, 'It's in a [expletive] holster!'" After

more verbal exchanges, Petitioner dropped the gun and was taken into custody.

¶9 Petitioner contends that because of the disparity between the detective's and the report's descriptions of Petitioner's actions, the detective's testimony was misleading. The State contends that the detective's testimony was not misleading for several reasons. First, the State argues that the differences between the descriptions of the testimony and the report are semantic only. We disagree. We have no difficulty concluding that a description of a person waving and then raising and lowering a gun is fundamentally different from a description of the person holding a gun and turning it sideways. Indeed, the misleading description of Petitioner raising and lowering the gun followed a specific question from the prosecutor as to whether the gun was "pointed toward" the officer. Despite the lack of any evidence that the gun was ever pointed toward the officer, the testimony created the (apparently false) impression that it was.

¶10 The State next argues that even if the descriptions differ more than merely semantically, the difference is immaterial because neither aggravated assault nor disorderly conduct require proof that the gun was waved or pointed. Petitioner's manipulation of the gun, however, directly bears on a key element of aggravated assault - the reasonableness of the

officer's apprehension of imminent physical injury. See A.R.S. §§ 13-1203(A)(2) (2001), 13-1204(A) (Supp. 2008). It also bears on the determination whether Petitioner's handling or display of the gun was reckless, as required under one theory of disorderly conduct. See A.R.S. § 13-2904(A)(6).

¶11 The State finally argues that it is "highly likely" that the detective's testimony was accurately based on documents other than the officer's report, which is only a portion of a larger incident report. But the State has not shown that the detective based his testimony on other documents, and has not shown that other documents would support the testimony. Indeed, Petitioner has attached to his reply brief the transcript of a September 22, 2009 interview of the detective at which the detective, after reviewing all the reports in the case, acknowledged that the reports indicated only that the gun was raised.

¶12 We conclude, therefore, that the detective's testimony was misleading. Because the prosecutor failed to correct the detective's misstatements, Petitioner was deprived of his due process right to a fair and impartial presentation of the evidence. See *Maretick v. Jarrett*, 204 Ariz. 194, 198, ¶ 14, 62 P.3d 120, 124 (2003).

¶13 Regarding Petitioner's arguments that the prosecutor failed to inform the grand jurors about the definition of gun

"use" and Petitioner's constitutional rights, we find no error. The grand jurors asked no questions concerning those matters and potential defenses, and we do not find that instruction on them here was essential to avoid a needless prosecution. See *Francis*, 222 Ariz. at 427, ¶ 16, 215 P.3d at 401.

CONCLUSION

¶14 The prosecutor's presentation of evidence at the grand jury proceeding was not fair and impartial. Accordingly, we remand the indictment for a redetermination of probable cause by the grand jury.

/S/

PETER B. SWANN, Presiding Judge

CONCURRING:

/S/

LAWRENCE F. WINTHROP, Judge

/S/

MICHAEL J. BROWN, Judge