

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OLIVER HAYES, JR.,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 165794
Muskegon Circuit Court
LC No. 92-035066 FH

ON REMAND

Before: Hoekstra, P.J., and Corrigan, C.J., and Saad, J.

A jury convicted defendant of conspiracy to accept money contingent on uncertain events, MCL 750.157a; MSA 28.354(1); MCL 750.301; MSA 28.533, and failure to file tax returns required by the Michigan Single Business Tax with intent to defraud or evade payment of tax, MCL 205.27; MSA 7.657(27). Defendant subsequently pleaded guilty to second offender status, MCL 769.10; MSA 28.1082.

Defendant appealed as of right and we affirmed defendant's conspiracy conviction, but vacated his tax evasion conviction and sentence. *People v Oliver Hayes, Jr*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 1996 (Docket No. 165794), slip op at 1. We vacated defendant's tax evasion conviction on the ground that the one-person grand jury lacked subject matter jurisdiction to indict defendant on the charge. We said:

Here, we have carefully reviewed the petition for appointment of a one-person grand jury, and the order for judicial investigation. The language employed in the petition indicates that plaintiff intended the scope of the investigation to cover a conspiracy to violate Michigan gambling laws by engaging in an illegal numbers betting operation and "any offenses related to same." The language employed in the order is not as broad in scope as the petition, as reflected by the order's specific reference to only "a criminal conspiracy by one Oliver Hayes and others to violate the gambling laws" Given that the order makes no reference to an inquiry into related offenses, the "common intent of the scope of the inquiry" evidenced by the petition and the order is that the

scope of the inquiry was intended to be limited to an investigation of violations of the gambling laws.

As a result of the grand juror investigation, defendant was indicted for and charged with conspiracy to accept money contingent on uncertain events, MCL 750.157a; MSA 28.354(1); MCL 750.301; MSA 28.533, and failure to file returns required by the Michigan Single Business Tax Act with intent to defraud or evade payment of tax, MCL 205.27; MSA 7.657(27). The latter charge arises out of Chapter 205 of the Michigan Compiled Laws, 1941 PA 122 as amended by 1980 PA 162, which governs taxation and creates the revenue division of the Michigan Department of Treasury. As such, the tax evasion charge does not constitute a violation of the gambling laws and, therefore, the charge was outside the scope of the grand juror's inquisition. Accordingly, the grand juror lacked jurisdiction to indict defendant on the tax evasion charge, and the resulting tax evasion conviction must be vacated due to lack of jurisdiction to proceed on the charge. [*Hayes, supra*, slip op at 5.]

On November 8, 1996, the prosecutor moved for rehearing on the ground that the May 23, 1990, order for judicial investigation had been amended on September 6, 1990, during the term of the one-person grand jury, to authorize an inquiry into possible personal income and single business tax evasion on the part of defendant and, therefore, that the one-person grand jury had subject matter jurisdiction to indict defendant on the tax evasion charge. We denied rehearing. The prosecutor then filed a delayed application for leave to appeal in the Supreme Court. The Court denied leave, but remanded to this Court for consideration as on rehearing granted. Defendant's tax evasion conviction and sentence are hereby reinstated.

The source of a one person grand jury's jurisdiction is MCL 767.3; MSA 28.943, which provides in pertinent part:

Whenever . . . upon application of the prosecuting attorney . . . any judge of a court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor has been committed within the jurisdiction, and that any such persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry.

MCL 767.3 expressly contemplates the amendment of orders for judicial investigation.

Furthermore, MCL 767.3 does not permit a grand jury to search out criminal conduct generally but, instead, it requires the order authorizing the inquiry, and the complaint upon which such order is based, to be specific to common intent of the scope of the inquiry. *In re Colacasides*, 379 Mich 69, 99; 150 NW2d 1 (1967).

Here, the prosecutor filed his initial petition for appointment of a one-person grand jury on May 18, 1990. On May 23, 1990, Muskegon Circuit Judge Ronald H. Pannucci granted the petition and entered an order for judicial investigation appointing himself as the one-person grand jury and limiting the scope of the inquisition to the violation of Michigan gambling laws. The six-month term of the grand jury began on May 23, 1990. See *People v Weathersby*, 204 Mich App 98, 106; 514 NW2d 493 (1994). Before the expiration of this six-month term, the prosecutor filed a petition to expand the judicial investigation, the text of which is as follows:

NOW COMES Tony Tague, Prosecuting Attorney in and for the County of Muskegon, State of Michigan, who respectfully requests expansion of the judicial investigations currently on-going under File No. 90-Grand Jury-01, stating in support as follows:

1. The Grand Jury proceedings under File No. 90-Grand Jury-01 currently authorize judicial investigation into numerous matters including conspiracy to violate the gambling laws by one . . . Oliver Hayes;
2. That testimony taken in connection with the aforementioned conspiracy investigation under File 90-Grand Jury-01 tends to indicate that . . . Oliver Hayes may . . . be guilty of state law felony offenses of tax evasion as to personal income taxes and single business taxes;
3. That it appears likely that . . . Oliver Hayes [has], in recent years, failed to pay State of Michigan personal income taxes and State of Michigan single business taxes on substantial sums of money which . . . [he] has derived from his involvement in illegal numbers betting in Muskegon County.

WHEREFORE, petitioner requests that the scope of the judicial investigation currently on-going under File No. 90-Grand Jury-01 be expanded to include investigation of tax evasion by . . . Oliver Hayes regarding State of Michigan personal income taxes and State of Michigan single business taxes.

Judge Pannucci entered an order expanding the scope of the investigation consistent with the prosecutor's petition on September 6, 1990, well within the six-month term of the grand jury.

The language employed in the prosecutor's petition clearly indicates that the prosecutor intended the scope of the inquiry to include investigation of tax evasion. The amended order entered by Judge Pannucci unambiguously evinces the intent to expand the scope of the inquiry consistent with the petition. MCL 767.3 authorizes amendments to the order for judicial investigation. The amendment was made in a timely fashion in that the amended order was entered during the six-month grand jury term. Under these circumstances, the "common intent of the scope of the inquiry" evidenced by the petition to expand judicial investigation and by the amended order for judicial investigation is that the scope of the inquiry was intended to include investigation into possible personal income tax and single business tax evasion. Accordingly, such an investigation did not fall outside the scope of the grand

jury's inquisition and, consequently, the grand jury had jurisdiction to indict defendant on tax evasion charges.

We reject defendant's assertion that the September 6, 1990, amended order is not "an investigative order," but instead is simply an order permitting the prosecutor to expand his petition. The text of the order consists solely of these words: "IT IS SO ORDERED." These words appear on the same page as the text of the petition to expand judicial investigation and, thus, is meant to be read in conjunction with the text of the petition. So read, the order amends the original order for judicial investigation and expands the scope of the investigation to include tax evasion.

Defendant also asserts that we should not consider the amended order because the prosecutor failed to disclose it in violation of the discovery order entered in the circuit court proceedings. Assuming *arguendo* that the prosecutor failed to supply defense counsel with the amended order for judicial investigation, any such failure might serve as a ground for imposing some sanction against the prosecutor for violating a discovery order. See *People v Lino (After Remand)*, 213 Mich App 89, 92; 539 NW2d 545 (1995), overruled in part on other grounds, *People v Carson*, 220 Mich App 662; 560 NW2d 657 (1996); *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991). However, any such failure occurred after the grand jury validly obtained jurisdiction (i.e. after entry of the amended order for judicial investigation). See *People v DiPonio*, 20 Mich App 658, 662; 174 NW2d 572 (1969). Because any alleged misconduct on the part of the prosecutor occurred after the grand jury obtained jurisdiction and played no role in inducing Judge Pannucci to issue the amended order, the misconduct does not provide a ground to upset the grand jury's validly obtained jurisdiction.

Defendant asserts that the order is invalid because there is no record evidence that the prosecutor's petition requesting the order was approved "after a vote of the Circuit Judges" as indicated in the order. This assertion must be rejected for two reasons. First, MCL 767.3; MSA 28.943 does not require a petition for judicial investigation to be approved by all the judges of the circuit before an order for judicial investigation may enter. Instead, MCL 767.3 only requires the approval of "any judge of a court of law and of record" before an order for judicial investigation enters. In this case, Judge Pannucci entered the initial order for judicial investigation. It therefore was logical for the prosecutor to return to Judge Pannucci with the request to expand the scope of the grand jury investigation in light of the evidence gathered to that point by the investigation. MCL 767.3 gave the judge the authority to enter the amended order without the approval of the other judges of the Muskegon Circuit Court.¹

Defendant finally asserts that the amended order was invalidly secured because the prosecutor failed to submit a "budget request" with the petition and because there is no evidence that the Muskegon County Board of Commissioners approved funding for the expanded investigation. This assertion also must be rejected. Contrary to defendant's assertion, neither MCL 767.3; MSA 28.943 nor MCL 767.4; MSA 28.944 condition issuance of an order for judicial investigation (and hence jurisdiction), upon the filing of "budget request" with the petition for the judicial order. MCL 767.3 conditions entry of an order for judicial investigation only upon submission of an application by the prosecuting attorney and the existence of probable cause "to suspect that any crime, offense or

misdemeanor has been committed within [the court's] jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense and misdemeanor." See also *People v Birch*, 329 Mich 38, 45-46; 44 NW2d 859 (1950).

Defendant's conviction and sentence for tax evasion (MCL 205.27; MSA 7.657(27)) is hereby reinstated.

/s/ Joel P. Hoekstra

/s/ Maura D. Corrigan

/s/ Henry William Saad

ⁱ A review of the amended order reveals that the phrase "after vote of Judges" penciled in below the signature line was meant to convey that Judge Pannucci had been elected Chief Judge of the circuit by the other judges of the circuit. It was not meant to convey that the prosecutor's petition had been approved by the judges of the circuit.