| **People v Gunther** |
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| 2016 NY Slip Op 32796(U) |
| December 14, 2016 |
| County Court, Westchester County |
| Docket Number: 15-1384 |
| Judge: Anne E. Minihan |
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County Court of the State of New York
County of Westchester

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The People of the State of New York :

: Decision & Order

- against - : Indictment No.
15-1384



MATTHEW GUNTHER,

Defendant.

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Defendant has brought this motion seeking leave to reargue so much of the court's decision and order dated October 25, 2016 as denied that branch of his application which sought dismissal of the indictment on the ground that the evidence presented to the grand jury was legally insufficient.

As a procedural matter, the defendant has failed to comply with CPLR 2221 which requires that an application which seeks to affect a prior order be denominated as either a motion for leave to reargue (CPLR 2221[d]) or as a motion for leave to renew (CPLR 2221[e]). If the motion is brought as a combined motion for leave to reargue and renew, CPLR 2221(f) requires that the movant separately identify and support each item of relief sought in order that the court could decide each part of the application as if it had been separately made (CPLR 2221[f]). Defendant has already brought, and the court has already decided, his motion to inspect and dismiss. The court has also once denied his motion to reargue the denial of that branch of his omnibus motion as sought to inspect the minutes of the grand jury and dismiss the indictment. This motion, while more specific than defendant's prior motion to reargue, is premised upon the same ground, namely that the People failed to lay a proper foundation in the grand jury for admission of reproductions of Chase withdrawal slips.

Pursuant to Criminal Procedure Law CPL 210.20(2), an indictment is defective if "the evidence before the grand jury was not legally sufficient to establish the offense charged ..." (CPL 210.20[2]). Criminal Procedure Law 190.65(1) provides that the grand jury may indict a person for an offense when: "(a) the evidence before it is legally sufficient to establish that such person committed such offense ... and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed the offense" (CPL 190.65[1]). "'Legally sufficient evidence means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof ..." (CPL 70.10[1]); *People v Jennings*, 69 NY2d 103 [1986]). "Reasonable cause to believe that a person has

committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgement and experience that it is reasonably likely that such offense was committed and that such person committed it" (CPL 70.10 [2]).

"[J]udicial review of evidentiary sufficiency is limited to a determination of whether the bare competent evidence establishes the elements of the offense ... and a court has no authority to examine whether the presentation was adequate to establish reasonable cause, because that determination is exclusively the province of the grand jury" (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 190.60). In significant in contrast to trial, where the prosecution must prove a defendant's guilt beyond a reasonable doubt, in the grand jury, the People are merely required to present a *prima facie* case (*People v Bello*, 92 NY2d 523 [1988]; *People v Ackies*, 79 AD3d 1050 [2d Dept 2010]).

While the People "enjoy wide discretion in presenting their case" to a grand jury (*People v Lancaster*, 69 NY2d 20, 25 [1986], *cert denied* 480 US 922 [1987]), they must, in presenting their case, abide by the rules of evidence for criminal proceedings (CPL 190.30[1]; *People v Mitchell*, 82 NY2d 509 [1993]). Prosecutorial discretion is further limited by the "duty not only to secure indictments but also to see that justice is done" (*People v Lancaster*, 69 NY2d at 26). In that regard, a prosecutor presenting a case to a the Grand Jury "owes a duty of fair dealing to the accused" (*People v Pelchat*, 62 NY2d 97, 105 [1984]).

Defendant contends that because the prosecutor who presented the case to the grand jury and who presented evidence at trial on behalf of the People maintained at the trial that the withdrawal slips were admissible as business records under CPLR 4518 and that CPLR 4539(b) was inapplicable, that the reproductions of Chase withdrawal slips, which comprise People's exhibits 2(a)(1) through 2(a)(135) both at the grand jury and at trial were inadmissible at the grand jury. In support of his argument, defendant points to not only the People's argument at trial on this issue but also to the fact that the People had to locate a new witness, who was not on their witness list, during the course of the trial to lay the propr foundation for the admissibility of the reproductions of the withdrawal slips under CPLR 4539(b) to satisfy the court that there was a method or manner at Chase which prevented tampering or degradation of the reproduction is prevented (CPLR 4539[b]). Such, defendant argues, supports the conclusion that the People did not lay a proper foundation for the admissibility of the exhibits at the grand jury. Wanda Dickinson, who testified at trial but did not offer foundational testimony as to the admission of the financial records, including the withdrawal slips, was the witness through whom the reproductions of the Chase withdrawal slips (People's exhibits 2a1 through 2a135) were admitted in the grand jury. Defendant argues that since Ms. Dickinson did not have the ability to lay the proper foundation at trial and thus that she necessarily did not have the ability to do so at the grand jury. As such, the defendant concludes that the reproductions of the Chase withdrawal slips were improperly admitted without the proper foundation at the grand jury and thus that the evidence before the grand jury was not legally sufficient for any of the counts charged in the indictment. To that end, defendant would have the court entertain a second reargument motion, brought on the same ground, and dismiss the indictment in its entirety.

The People oppose the motion on the grounds that it is both untimely and without merit. They maintain that all of the evidence was properly admitted before the grand jury, and particularly that the reproductions of the Chase withdrawal slips that comprise People's exhibits 2a1 through 2a135 were admissible both at trial and at the grand jury pursuant to CPLR 4518 and that there was sufficient admissible evidence before the grand jury to provide reasonable cause to believe that the offenses charged in the indictment occurred and that the defendant committed them. As to the timeliness of the defendant's motion, the People maintain that he was provided with the reproductions of the Chase withdrawal slips as discovery material in August 2016 and that he was given Ms. Dickenson's grand jury testimony on November 30, 2016 and could have brought his motion to reargue then but that he has failed to do so and has also failed to provide good cause to explain why he waited until after the close of evidence (CPL 255.20). The People assert that even if the reproductions of the withdrawal slips were inadmissible at the grand jury, there was nonetheless legally sufficient evidence presented to support each of the charges contained in the indictment.

Dismissal of an indictment pursuant to CPL 210.35(5) "is a drastic, exceptional remedy and should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (*People v Moffitt*, 20 AD3d 687, 688 [3rd Dept 2005], *lv denied* 5 NY3d 854 [2005]; *People v Huston*, 88 NY2d 400, 409 [1996]; *People v Tatro*, 53 AD3d 781, 783 [3rd Dept 2008], *lv denied* 11 NY3d 835, [2008]). "Even where inadmissible evidence is presented to a grand jury, such will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment" (*People v Mujahid*, 45 AD3d 1184, 1185 [3rd Dept 2007], *lv denied* 10 NY3d 814 [2008]; *People v Huston*, 88 NY2d at 409; *People v Kidwell*, 88 AD3d 1060, 1061 [3rd Dept 2011]). Further, the introduction of inadmissible evidence before the grand jury does not, standing alone, vitiate the proceedings or provide grounds for dismissing the indictment so long as there is sufficient competent evidence to support the finding of the indictment (*People v Moffitt*, 20 AD3d 687, 688 [3rd Dept 2005], *lv denied* 5 NY3d 854 [2005]).

Principally, the defendant argues that the court's determination at trial that the foundational predicate for admitting copies of check withdrawal slips as business records required authentication "by competent testimony or affidavit" that includes information about "the manner or method by which tampering or degradation of the reproduction is prevented" (CPLR 4539[a]; CPLR 4539[b]; *People v Kangas*, 28 NY3d 984 [2016]) was not met by the People in admitting these same documents in evidence at the grand jury as business records. To that end, the People have maintained throughout that the reproductions of the Chase withdrawal slips that were created by an electronic or technical process (People's exhibits 2a1 through 2a135) were, both at the grand jury and at trial, admissible as business records under CPLR 4518 and, indeed, the minutes of the grand jury reflect that there was no authenticating testimony that tampering or degradation of the images of the withdrawal slips could not occur, either at all or without leaving some detectable record that alteration such had occurred.

Motivated by pragmatism in its endeavor to reduce the hardship and expenditure of resources involved in requiring record custodians of financial institutions to appear in person before the grand jury, the Legislature, in 2008, expanded CPL 190.30 and, in so doing, relaxed

the foundational requirements related to the admission of records of financial institutions in grand jury proceedings to permit these records to be introduced without testimony of a records custodian when those records are accompanied by a sworn statement attesting to the authenticity of the records (L.2008, c. 279, § 14, eff. Aug. 6, 2008; CPL 190.30[8]). Prior to CPL 190.30(1)(8), the burden on financial institutions was significant particularly when the proper records custodian was either outside the state or outside the United States. To that end, subdivision 8 was added to CPL 190.30 in 2008 as a component part of a comprehensive bill aimed at financial records in an effort to address identity theft in order to facilitate the introduction of business records in the grand jury (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 190.30). Under the 2008 amendment to CPL 190.30, as related to financial transactional records, banks could merely submit such records, together with a certification that described the records that the certificate accompanied, attested that the person making the certification was a duly authorized custodian of the records or was an employee or agent of the business familiar with the records and attested, in substance, that the records were made in the regular course of business and that it was the regular course of such business to make such records at the time of the recorded act, transaction, occurrence or event, or within a reasonable time thereafter (CPL 190.30 [8][a]-[b]).

Under CPL Section 190.30, the rules of evidence with respect to criminal proceedings are, in general are applicable to grand jury proceedings except as is otherwise provided for within CPL 190.30. The foundational requirements for admissibility of financial records are notably provided for under the 2008 amendment (CPL 190.30[8]). Had the Legislature intended for financial records to meet the foundational requirements of CPLR 4539(b) in the grand jury, it could certainly have done so since CPLR 4539(b) had been in place some 12 years before CPL 190.30 was amended to relax the foundational requirement for admission of these records (L.1996, c. 27, § 1, eff. Nov. 1, 1996; CPLR 4539 [b]; CPL 190.30[1]; see People v Rodriguez, 235 AD2d 504 [2d Dept 1997]). Defendant's argument that a proper foundation was not laid at the grand jury under CPLR 4539(b) would be persuasive had CPL 190.30(8) not been enacted. Criminal Procedure Law 190.30(8) cannot reasonably be read to require authentication "by competent testimony or affidavit" that includes information about "the manner or method by which tampering or degradation of the reproduction is prevented" (CPLR 4539[b]). While the reproductions of the withdrawal slips (People's exhibits 2a1 through 2a135) were admitted into evidence at the grand jury through a witness, not with a certification as provided for in CPL 190.30(8), the record of the grand jury's proceeding in this matter reflect that Wanda Dickinson was an employee of Chase who had reviewed the reproductions of the withdrawal slips at issue, was familiar with them, that the reproductions of the withdrawal slips were made in the regular course of business by one who reported the information under a business duty to do so, and that it was the regular course of Chase to make such records at the time of the transaction or within a reasonable period of time thereafter. This is the functional equivalent of a certification document and was sufficient to lay a proper foundation for their admission into evidence at the grand jury (CPL 190.30 [8]; CPLR 4518).

Notwithstanding the court's trial ruling that a proper foundation for admitting the reproductions of the withdrawal slips required authentication "by competent testimony or affidavit" that includes information about "the manner or method by which tampering or

degradation of the reproduction is prevented" when "[a] reproduction [is] created by any process which stores an image of any writing, entry, print or representation" (CPLR 4539[a]; CPLR 4539[b]; *People v Kangas*, 28 NY3d 984 [2016]), the transcript of the grand jury's proceedings demonstrate that these reproductions of Chase withdrawal slips were properly admitted at the grand jury without such additional foundational testimony (CPL 190.30[8]). The Legislature, which could, by inaction, have made CPLR 4539(b) applicable (CPL 190.30[1]) chose instead to affirmatively relax the foundational requirements for admission of records of financial transactions at the grand jury long after CPLR 4539 was amended to add CPLR 4539(b).

Even assuming arguendo that the reproductions of the withdrawal slips were erroneously put in evidence at the grand jury without a proper foundation, a review of the record demonstrates that the indictment is supported by legally sufficient evidence that established that every element of each offense charged was committed and that the defendant committed them (CPL 190.65[1]; CPL 70.10 [1]).

The motion to renew and/or reargue is denied as both procedurally defective and without merit and the court adheres to its initial determination.

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

Dated: White Plains, New York
December 14, 2016

Honorable Anne E. Minihan
Westchester County Court Justice

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