

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/23/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THEODORE PASQUALE LEOMBRONI,) No. 1 CA-SA 10-0179
)
Petitioner,) DEPARTMENT E
)
v.) Maricopa County
) Superior Court
THE HONORABLE ARTHUR T. ANDERSON,) No. CR2010-005519-001 DT
Judge of the SUPERIOR COURT OF)
THE STATE OF ARIZONA, in and for) **DECISION ORDER**
the County of MARICOPA,)
)
Respondent Judge,)
)
STATE OF ARIZONA,)
)
Real Party in Interest,)
)
Respondent.)
_____)

This special action was considered by Presiding Judge Philip Hall and Judges Sheldon H. Weisberg and Peter B. Swann during a regularly scheduled conference held on September 14, 2010. After consideration, and for the reasons that follow,

IT IS ORDERED that the Court of Appeals accepts jurisdiction in this special action but denies relief.

DISCUSSION

Petitioner Theodore Pasquale Leombroni contends that the trial court abused its discretion by denying his motion to remand to the grand jury pursuant to Arizona Rule of Criminal Procedure 12.9. "All challenges to a grand jury's findings of probable cause must be made by motion followed by special action before trial." *State v. Moody*, 208 Ariz. 424, 439-40, ¶ 31, 94 P.3d 1119, 1134-35 (2004). Because Petitioner has no adequate remedy by appeal, we accept special action jurisdiction.

We review the trial court's decision to deny a motion to remand for an abuse of discretion. *Maretick v. Jarrett*, 204 Ariz. 194, 195, ¶ 1, 62 P.3d 120, 121 (2003). Remand to the grand jury is appropriate when the State fails to make a "fair and impartial presentation" to the grand jury. *Crimmins v. Superior Court (Marquardt)*, 137 Ariz. 39, 41, 668 P.2d 882, 884 (1983).

On February 4, 2010, Petitioner was indicted by grand jury on seventeen counts of fraudulent schemes and artifices, theft, tampering with a witness and obstructing criminal investigations.¹ On April 15, 2010, the trial court granted

¹ An August 28, 2009 indictment on nine counts of fraudulent schemes and artifices, theft, and theft of credit card was later dismissed. The February 4, 2010 indictment originally included theft of a credit card, but the grand jury required that it be removed.

Petitioner's motion to remand to the grand jury, finding that testimony concerning counts 9, 10 and 11 had been misleading² and requiring that the grand jury be informed that victim McCarty had "recanted her testimony and has indicated that she was not a victim of any fraud."

On April 20, 2010, Petitioner was indicted on eighteen counts of fraudulent schemes and artifices, theft, theft of a credit card or obtaining credit card by fraudulent means, tampering with a witness and obstructing criminal investigations or prosecutions. On July 14, 2010, the trial court denied Petitioner's motion to remand to the grand jury.

Petitioner first contends that the trial court erred in refusing to grant his motion to remand because the State failed to present credit card billings showing the account listed in the name of James and Catherine Eadie ("Mrs. Eadie") or evidence that Mrs. Eadie had authorized Petitioner's use of her husband's card. We conclude that the evidence was sufficient to support a probable cause determination. Section 13-2102 was provided to the grand jury. Testimony revealed that the card was issued in James's name and that he was deceased at the time the Petitioner possessed it. The testimony also revealed that Mrs. Eadie

² Counts 9 and 10 alleged tampering with a witness; Count 11 alleged obstructing criminal investigation or prosecution.

originally said that she had not given Petitioner authorization to use the card, but that she later recanted her statement.

Petitioner next contends that the State presented evidence of an incorrect source of the \$100,000 Petitioner allegedly converted from Mrs. Eadie. (See Count 4, alleging that Petitioner knowingly converted Mrs. Eadie's money of a value of \$100,000 or more.)³ We conclude that the evidence presented was sufficient to support a probable cause determination regardless of the source of the money. The detective testified concerning Mrs. Eadie's original statement that she gave \$100,000 to the Petitioner for a NASCAR investment. The detective also testified that Mrs. Eadie later recanted her statements.

Finally, Petitioner contends that the State presented the "opinion" of a witness that Petitioner was "manipulating" alleged victims McCarty and Wymore. Evidence was presented regarding the approximately 150 telephone calls that Petitioner made to McCarty after his arrest, and the letters and phone calls to Wymore from the Petitioner and others. The detective clearly stated his opinion of the evidence was based on his

³ Petitioner asserts that he never received \$100,000 from Mrs. Eadie and that she used the proceeds of the home equity loan to pay off her credit cards. But that assertion goes to the weight and sufficiency of the evidence -- not the adequacy of the grand jury presentation. See *Crimmins*, 137 Ariz. at 42-43, 668 P.2d at 885-86 (holding that a trial court cannot consider "an attack on an indictment based on the nature, weight or sufficiency of the evidence presented to the grand jury." (citation omitted)).

knowledge, training and experience. Such evidence was sufficient to support a probable cause determination that Petitioner tampered with witnesses.⁴

Because we find no abuse of discretion, we deny relief.⁵

/s/

Peter B. Swann, Judge

⁴ Two assertions by Petitioner are not supported by the record.

First, Petitioner claims that the grand jury was never told that McCarty gave money to Petitioner as a "gift." But the grand jury transcript demonstrates that the detective did testify that McCarty later claimed that she "never told" him that she had given money for a NASCAR investment and that the money she did give "was just a gift with no strings attached."

Petitioner also asserts that the testifying detective made false statements regarding the age of the victims, and that the law on which the court relied in denying the motion on this point did not support its conclusion. The court's reasoning appears to comport with ours -- the age of the victims was not relevant to any element of the crime charged, and the grand jury's question concerning it was outside the scope of the jury's proper concern. See *State v. Horner*, 112 Ariz. 432, 433, 543 P.2d 118, 119 (1975) (finding no due process violation when prosecutor misstated law in answer to juror's question that was outside the scope of the grand jury's proper concern).

⁵ On September 10, 2010, Petitioner filed a Motion to Stay this special action, asserting that he had newly discovered evidence that another alleged victim had recanted her testimony. Any such evidence should first be presented to the superior court, and our decision is without prejudice to Petitioner's right to seek relief on new grounds in that court.