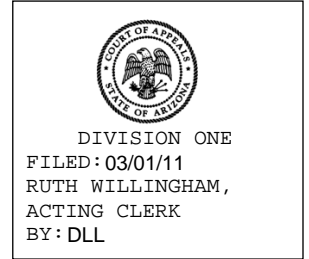


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**



PATRICK DAVIS,)
) Court of Appeals
) Division One
)
) Petitioner,) No. 1 CA-SA 11-0027
)
)
) v.) Maricopa County
) Superior Court
)
) THE HONORABLE SALLY SCHNEIDER) No. CR2010-112386-001
) DUNCAN, Judge of the SUPERIOR)
) COURT OF THE STATE OF ARIZONA,) DEPARTMENT E
)
) in and for the County of)
) Maricopa,)
)
) DECISION ORDER
) Respondent Judge,)
)
) STATE OF ARIZONA,)
)
)
) Real Party in Interest.)
)
)

This special action came on regularly for conference on February 23, 2011, before Presiding Judge Peter B. Swann and Judges Patrick Irvine and Maurice Portley, and the matter was taken under advisement. Patrick Davis petitions this Court to review the trial court's denial of his motion to dismiss the grand jury's indictment and to remand for a new determination of probable cause. For the reasons stated, we accept jurisdiction and grant relief.

FACTS AND PROCEDURAL HISTORY

Davis was involved in a vehicle collision on the freeway in which the driver and passenger of the other vehicle ("the victims") alleged that Davis pointed a gun at them while driving. Before the case was presented to a grand jury, Davis sent the prosecutor a letter outlining evidence he believed was exculpatory. Specifically, he explained that he did not point the gun at the victims but "waved his weapon skyward" because the victims "were driving aggressively," almost colliding with Davis's vehicle several times, and they were "flashing gang signs" at him. In support, Davis offered to present to the grand jury (1) expert testimony that the victims were gang members, attaching two photographs of the victim(s) flashing gang signs, and (2) a "physical reconstruction of the alleged offense through [his] investigator." Davis asked the prosecutor to advise the grand jury of this information and his desire "to testify before the grand jury."

The prosecutor presented the case to the grand jury twice. The first time, the prosecutor neither informed the grand jury of Davis's offer to testify nor of the details of that evidence. The grand jury authorized an indictment on two counts of aggravated assault, class 3 felonies. Davis moved to dismiss the indictment and remand to the grand jury. Before the trial court could enter a ruling, the prosecutor voluntarily presented the case to the

grand jury a second time, informing it only that "the subject of this investigation has made a written request to the - to the office to appear before you and testify." The prosecutor explained to the grand jury, "You may do so if you feel it will assist you in making a determination in this case. If you do decide to hear from Mr. Davis, the case will be reset for a later date for that testimony." The grand jury chose not to hear Davis's testimony and authorized another indictment.

Davis again moved to dismiss the indictment and remand for a new determination of probable cause under *Trebus v. Davis*, 189 Ariz. 621, 944 P.2d 1235 (1997). The trial court denied the motion. Davis timely petitioned this Court for review, and the State has responded.

DISCUSSION

Davis argues that the prosecutor failed to properly inform the grand jury of any detail of the testimony Davis offered. We agree.

We recently resolved the same issue in *Bashir v. Pineda*, 601 Ariz. Adv. Rep. 13, 2011 WL 400509 (Feb. 08, 2011). There, the prosecutor told the jury only that Bashir wished to testify, but chose not to inform it of any further detail, even though Bashir sent the prosecutor a letter outlining the evidence and numerous supporting documents. *Id.* at *1, ¶ 4. We found that this was error, reasoning that "the grand jury is given the choice to hear

from a defendant, not the prosecutor." *Id.* at *3, ¶ 10 (citing *Trebus*, 189 Ariz. at 626, 944 P.2d at 1240). As we explained:

A different situation is presented when a defendant requests to appear before the grand jury. The defendant is not asking the prosecutor to present evidence to the grand jury. The defendant is seeking an opportunity to present evidence herself. Consequently, the issue is not whether the proposed evidence is "clearly exculpatory" or "exculpatory." The issue is what the prosecutor should tell the grand jury about the defendant's request so that it can make an informed decision about the defendant's request to appear. *Trebus* set the standard. If a "defendant's request provides information with some degree of detail . . . as to the subject and outline of the proposed evidence," the prosecutor must "convey[] that information to the grand jury." *Id.* at 626, 944 P.2d at 1240.

. . . .

Therefore, we hold that if a defendant has requested to appear and provided some detail of the proposed testimony and evidence, a prosecutor has a duty to convey that information to the grand jury in a fair and impartial manner so that it may make an informed decision. Failure to do so removes the choice from the grand jury and justifies remanding the indictment.

Id. at *4, ¶¶ 14, 16. Finding that the prosecutor's failure to so inform the grand jury was not harmless error, we reversed and remanded for a new determination of probable cause. *Id.* at *5, ¶ 18.

Here, the prosecutor similarly supplanted the grand jury's judgment with his own by failing to inform the grand jury of any

details about Davis's testimony. Indeed, the prosecutor admitted at the hearing,

[T]he defense states that I made myself a unilateral gatekeeper. And in a way, I agree that I did, because I did not present any evidence that was not supported by a witness who the Grand Jury wanted to hear from and that had any evidence or semblance of reliability to it.

The State maintains on appeal that Davis's "proposed testimony requires no summarization by the State." As we explained in *Bashir*, however, the prosecutor's duty is not to be the gatekeeper by evaluating the quality of the evidence, but to properly inform the grand jury's decision when a defendant has offered to testify and provided sufficient details of that testimony. The prosecutor cannot simply assume that the grand jury would not have wanted to hear from any witnesses.

We cannot say that the error in this case was harmless. The State's position was that Davis pointed the gun at the victims, thereby "[i]ntentionally placing [them] in reasonable apprehension of imminent physical injury." Ariz. Rev. Stat. §§ 13-1203(A)(2) (2010) and -1204(A)(2) (Supp. 2010). Davis's evidence that the victims were criminal gang members who flashed gang signs at him and acted aggressively could show that they were not scared but were the ones who threatened Davis. Under these circumstances, we cannot say "beyond a reasonable doubt" that this information would not have influenced the grand jury's

decision whether to hear Davis testify. See *Bashir*, 601 Ariz. Adv. Rep., 2011 WL 400509 at *5, ¶ 20.

CONCLUSION

For the reasons stated, we conclude that the trial court should have granted the motion to remand. Therefore, we accept jurisdiction and grant relief. We remand for a new determination of probable cause by the grand jury.

/s/

PATRICK IRVINE, Judge