

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL A. GLASS,

Defendant-Appellant.

UNPUBLISHED

March 13, 1998

No. 202235

Ingham Circuit Court

LC No. 96-071141-FH

Before: Saad, P.J., and Holbrook, Jr., and Markman, JJ.

PER CURIAM.

Defendant Glass appeals by leave granted from an Ingham Circuit Court order denying his motion to quash an indictment returned by a multicounty citizens' grand jury. Defendant had been indicted by the multicounty grand jury on August 17, 1995, on a charge of conspiracy to deliver or possess with intent to deliver 650 grams or more of a mixture containing cocaine, contrary to MCL 333.7401(1)(2)(a)(i); MSA 14.15(7401)(1)(2)(a)(i); MCL 750.157a(a); MSA 28.354(1)(a). We affirm.

Defendant first argues that the motion to quash his grand jury indictment should have been granted because of the unauthorized presence of a law enforcement officer during the testimony of a grand jury witness. We do not find this argument to be persuasive. Although Michigan's statutory scheme outlining grand jury proceedings, MCL 767.3-767.25; MSA 28.943-28.965, contains specific provisions allowing access for certain individuals,¹ and maintaining secrecy,² there is no specific provision creating dual categories of authorized and unauthorized participants. Defendant acknowledges the lack of Michigan authority to support his position, but instead asks this Court first to identify a rule analogous to Federal Rule of Criminal Procedure 6(d),³ which bars unauthorized individuals from federal grand jury proceedings, and then to fashion a remedy of dismissal per se when the rule is violated. We decline defendant's invitation to create such a rule and remedy. While we may agree with defendant that limiting access to grand jury proceedings is appropriate, we note that the United States Supreme Court has held that a harmless-error analysis applies to violations of Rule 6(d).

In *United States v Mechanik*, 475 US 66; 106 S Ct 938; 89 L Ed 2d 50 (1986), two government agents appeared together and testified in sequence before a federal grand jury in violation of Rule 6(d), which states that only “the witness under examination” may be present. The Fourth Circuit Court of Appeals held that violation of Rule 6(d) required automatic reversal of the defendants’ convictions which came at the conclusion of a five-month jury trial. However, the Supreme Court reversed, and Chief Justice Rehnquist, writing for a majority, *id.* at 69-70, held:

We assume for the sake of argument that the simultaneous presence and testimony of the two Government witnesses before the grand jury violated Rule 6(d), and that the District Court would have been justified in dismissing portions of the indictment on that basis had there been actual prejudice and had the matter been called to its attention before the commencement of the trial.

* * *

. . . Rule [6(d)] protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty . . . [b]ut the petit jury’s subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury’s verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

Thus, even assuming that an “unauthorized” person was present during the grand jury proceedings in this case, the error was harmless beyond a reasonable doubt, not because defendant Glass was subsequently convicted at trial,⁴ but because he was entitled under Michigan law to a preliminary examination at which the issue of probable cause would be determined by a neutral magistrate. See *People v Moore*, 180 Mich App 301, 309; 446 NW2d 834 (1989); MCL 766.13; MSA 28.931. Accordingly, because defendant has not established the actual prejudice necessary to support his motion to quash, we conclude that the motion was properly denied.

Defendant next argues that his motion to quash should have been granted on the ground that he was provided an improperly edited copy of the grand jury record. We find this issue to be moot because defendant concedes that he was eventually provided with a properly edited copy of the transcript. Moreover, the delay in defendant obtaining a properly edited transcript has not resulted in any prejudice to his case. Defendant does not argue that the probable cause determination at the preliminary examination would have been different if he had been provided with a properly edited transcript, nor cannot it be argued that defendant and his counsel have not been afforded adequate time in which to prepare for trial in this matter. Accordingly, we find this issue to be moot.

Lastly, defendant argues that the order issued by this Court convening the multicounty grand jury was defective on the ground that it failed to specify the scope of the grand jury inquiry. In *People v*

Willie James Morris, ___ Mich App ___; ___ NW2d ___ (Docket No. 202629,

issued 03/03/98), this Court considered this specific issue and found it to be without merit.

Affirmed.

/s/ Henry William Saad
/s/ Donald E. Holbrook, Jr.
/s/ Stephen J. Markman

¹ See MCL 767.16; MSA 28.956 [stenographer], MCL 767.19e; MSA 28.959(5) [legal counsel of witness], and MCL 767.22; MSA 28.962 [prosecuting attorney].

² MCL 767.19f; MSA 28.959(6) provides: “Except as otherwise provided by law, it is unlawful for any person to publish or make known to any other person any testimony or exhibits obtained or used, or any proceeding conducted, in connection with any grand jury inquiry.”

³ Fed R Crim Proc 6(d) provides:

Who may be present [at grand jury proceedings]. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no other person may be present while the grand jury is deliberating or voting.

⁴ According to the lower court record, defendant’s criminal proceeding has been stayed pending the outcome of this appeal.