[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM : PART 14

----------X

In the Matter of the Application of Lloyd Maitland for an :

Order Pursuant to Criminal Procedure Law 160.50 and :

190.25(4)(a) and Judiciary Law 325 Unsealing and : Ind. No. 2312/2011

Allowing Access to Select Grand Jury Minutes Relating :

To the Prosecution of Lloyd Maitland :

----------X

Hon. Dineen A. Riviezzo, J.:

Petitioner moves for an order to unseal grand jury minutes from the above referenced indictment, and to instruct the District Attorney's Office to provide such minutes to him, including any exhibits, for petitioner's use in a pending federal civil rights action.

In October 2012, this Court presided over petitioner's jury trial under Indictment 2312/2011. The prosecution alleged that petitioner was driving while intoxicated with underage children in the vehicle. The People's witnesses – New York City Police Officers – testified that they observed petitioner driving the vehicle, stopped the vehicle for a traffic infraction, and subsequent to the vehicle stop, noticed the indicia of alcohol. Petitioner "blew" a .123% on the breathalyzer. Petitioner's defense was that he was never driving the vehicle, which was supported, in part, by the testimony by a neighbor who stated that she witnessed the relevant events from her apartment window. The jury acquitted petitioner of all charges.

Petitioner has now filed a complaint against the arresting officers in the United States District Court for the Eastern District of New York (Lloyd Maitland v. The City of New York et. al., 13-CV-2807

[WFK][VVP]) alleging violations of New York common law and the federal civil rights statute, 42 U.S.C. 1983. Petitioner's claim in the federal action is that the police officers procured the above-referenced indictment by perjury and fraud, by intentionally lying to the grand jury about the circumstances leading to his arrest. Petitioner now seeks a copy of the grand jury minutes to make out both his Federal and New York State claims.

Federal Law Claims

With regard to petitioner's use of the grand jury minutes to support his federal civil rights claims, the People correctly assert, and the petitioner does not dispute, that the United States Supreme Court definitively resolved this issue in *Rehberg v. Paulk* (132 S.Ct. 1497 [2012]). In *Rehberg*, the Supreme Court held that grand jury witnesses are entitled to the same immunity as a trial witness. (132 S.Ct. at 1509). Specifically, the Court opined that the testimony of witnesses before the grand jury could not provide the basis for, or be used as evidence supporting, a Section 1983 claim, on the ground that allowing such a claim would create a "special problem . . . subversion of grand jury secrecy." (Id. at 1508; *see also*, *People v. Bonelli*, 36 Misc3d 625 [Sup. Ct., Richmond Co. 2012] [Court denied petitioner's application to unseal grand jury minutes in support of a Section 1983 action, citing *Rehberg*].)

The court notes that in the recent case of *Marshall v. Randall* (719 F.3d 113, 2013 U.S. App. LEXIS 11781 [2d Cir. N.Y. 2013]), the Second Circuit held that the use of Grand Jury testimony to impeach police officers in a Section 1983 action was not a violation of *Rehberg*.

New York State Claims

Petitioner's federal action includes a pendant claim for malicious prosecution under New York law. Petitioner asserts that *Rehberg* does not preclude the use of the grand jury minutes in state law claims. Petitioner asserts that *Bonelli*, cited above, is the only state law case which refers to *Rehberg*, and

that it is inapplicable here in that no state law claims were filed in that case. However, the companion decision of the federal magistrate (see Bonelli v. City of New York, 2012 U.S. Dist. LEXIS 63337 [EDNY 2012]) states that in that case, the plaintiff "asserted a variety ofclaims under state and federal law against" the various defendants.

In reading the federal magistrate's decision in *Bonelli* decision, it appears that the magistrate indicates that in his view, the grand jury minutes may not be used to support a pendent New York state malicious prosecution claim, as the court rejected the plaintiff's argument that in order for a plaintiff to succeed in New York State malicious prosecution claim, he or she must establish that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith. (Id. at * 4 – 6.) This decision is not binding on this court. Moreover, there is contrary authority. In *Maldonado v. City of New York* (2012 U.S. Dist. LEXIS 86546 [S.D.N.Y. June 21, 2012]), a 1983 action based in part on alleged false grand jury testimony, plaintiff conceded at oral argument that *Rehberg* barred his 1983 claim based on malicious prosecution, leaving only a New York State malicious prosecution claim. Similar to the present case, plaintiff argued, *inter alia*, that he required the grand jury minutes because the police officers' testimony at the grand jury was itself a part of plaintiff's malicious prosecution claim under state law. The federal court reasoned that the issue of the unsealing under State law was a matter entirely governed by New York State law:

> "However, because the grand jury minutes can only be used to advance a malicious prosecution claim under state law, the applicability of the doctrine of grand jury secrecy is governed by state law. Lego v. Stratos Lightwave, Inc., 224 F.R.D. 576, 578 (S.D.N.Y. 2004) (Kaplan, D.J.) ("To the extent, however, that the discovery requested in this case is relevant only to state claims and defenses, privilege is determined by the applicable state law." (footnote omitted)); accord Guzman v. Mem'l Hermann Hosp. Sys., H-07-3973, 2009 U.S. Dist. LEXIS 13336, 2009 WL 427268 at * 5 (S.D. Tex. Feb. 20, 2009); Freeman v. Fairman, 917 F. Supp. 586, 588 (N.D. Ill. 1996); Evanko v. Elec. Sys. Assoc., Inc., 91 Civ. 2851, 1993

> U.S. Dist. LEXIS 218, 1993 WL 14458 at *1 (S.D.N.Y. Jan. 8, 1993) (Dolinger, M.J.); Platypus Wear, Inc. v. K.D. Co., 905 F. Supp. 808, 811 (S.D. Cal. 1995). Furthermore, following Rehberg, there is no federal interest in the grand jury minutes because they cannot be used as a predicate for a Section 1983 malicious prosecution claim. Thus, no concern is present that state rules may "frustrate the important federal interests . . . in vindicating important federal substantive policy such as that embodied in section 1983." King v. Conde, supra, 121 F.R.D. at 187." *(Maldonado v. City of New York, supra* at * 13 – 14.)

Ultimately, the court denied unsealing only because a prior application had been made for unsealing in Supreme Court, New York County, and had been denied.

Logically, unsealing should be granted in a proper case to permit the civil plaintiff to establish malicious prosecution. The four elements of a cause of action for malicious prosecution under New York State law are that a criminal proceeding was commenced; that it was terminated in favor of the accused; that it lacked probable cause; and that the proceeding was brought out of actual malice. Where an indictment has been obtained, there must be evidence sufficient to overcome the presumption of probable cause which attaches to the indictment. (*see Colon v City of New York*, 60 NY2d 78, 82, 455 N.E.2d 1248, 468 N.Y.S.2d 453, *rearg denied* 61 NY2d 670, 472 N.Y.S.2d 1028; *Santiago v City of Rochester*, 19 AD3d 1061, 1062, 796 N.Y.S.2d 811). "If plaintiff is to succeed in his malicious prosecution action after he has been indicted, he must establish that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith" (*Colon*, 60 NY2d at 83). This continues to be the law in New York. *(Kirchner v. County of Niagara*, 107 A.D.3d 1620, 969 N.Y.S.2d 277 [4th Dep't 2013][denying dismissal of the compliant in a malicious prosecution case where it was alleged that, among other things, medical examiner testified falsely before the Grand Jury].)

Unsealing of Grand Jury minutes in connection with malicious prosecution actions in New York State court proceedings is not novel. In *Matter of Druker* (2012 N.Y. Misc. LEXIS 2342 [Sup. Ct.,

Suffolk Co.]), the court allowed the unsealing of Grand Jury minutes where a proceeding alleging claims under Section 1983 and New York State law were pending in federal court, and it was alleged that indictments were obtained based on false testimony presented to the Grand Jury.

As perjury or false testimony before the Grand Jury must be established in cases such as the present case, it would appear that disclosure of Grand Jury minutes would be warranted in an appropriate case to establish a malicious prosecution claim under New York law. *Rehberg* does not create a substantive, New York state immunity from civil liability for false Grand Jury testimony — it is based on common law concepts with which New York State courts are free to diverge. Moreover, as the Grand Jury proceeding was almost certainly based only on the testimony of police officers, the need for maintaining secrecy is clearly not pronounced, as it would be in cases involving confidential witnesses.

The extent to which disclosure of the Grand Jury minutes should be allowed,and the timing of that disclosure, should be determined by the federal district court following in camera inspection. That Court is in the best position to identify when and how the pendent state claim will be tried in the context of the broader federal action, and that court is in the best posture to determine which witnesses' testimony should be disclosed. (*See Frederick v. New York City*, No. 11 Civ. 469, 2012 U.S. Dist. LEXIS 150223, 2012 WL 4947806, at *15 [S.D.N.Y. Oct. 11, 2012] [directing the District Attorney of Queens County to submit certain grand jury minutes to the Court for *in camera* review, and finding that *Rehberg* applies only to the use of witnesses' own grand jury testimony against them if they subsequently appear as a § 1983 defendant], reconsideration den.,2013 U.S. Dist. LEXIS 11113 [S.D.N.Y. Jan. 24, 2013].) As the court observed in *Matter of Druker* (*supra*, 2012 N.Y. Misc. LEXIS 2342 [Sup. Ct., Suffolk Co.]),

> "...[T]he Court is mindful of the limited record submitted in this special proceeding. The current status of the Eastern District action is not clear, nor

is the Court aware of the progress of discovery in that action. It is clear that the trial court has discretion to control the method and manner of disclosure of grand jury proceedings. In that light, the Court directs that the subject grand jury proceedings be released *in camera* to the Judge and/or Magistrate assigned to the Eastern District action for his or her determination regarding what information contained therein should be released to the parties in that action, and when and how it should be released." (Citations omitted.)

Conclusion

The motion is granted to the extent of directing that the Grand Jury minutes in the underlying action be delivered in camera to the federal district court in which *Lloyd Maitland v. The City of New York et. al.*, 13-CV-2807 [WFK][VVP] is pending, for use in the proceeding now pending in that court.

Settle order.

9-5-2013
Date

HON. DINEEN A. RIVIEZZO J.S.C.