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Court Decisions
First Judicial Department
Supreme Court
Bronx County
Criminal Term, Part DV

Justice **Globerman**

PEOPLE V. CHRISTOPHER NAPOLEAN

The defendant has been indicted for sodomy in the first degree, sexual abuse in the second degree and related counts. In motion papers filed on January 24, 2002, the defendant moved for court inspection and dismissal of the Grand Jury minutes. Specifically, it is the defendant's contention that dismissal is warranted because of the People's failure to introduce into evidence a statement by the complainant recanting her initial charges. The People assert that they were not required to present the recantation evidence and, accordingly, the indictment should stand. For the reasons set forth in this decision, the defendant's motion is denied.

It is necessary first to set forth the relevant facts surrounding the defendant's indictment.

On August 26, 2001, the defendant was arrested and charged with sodomy in the first degree and related counts. The alleged complainant, Daughter Doe [FN1], is the twelve year old step-daughter of the defendant. Daughter Doe appeared in the Complaint Room of Bronx County District Attorney's office with Police Officer McCann, and her mother, Mother Doe. According to the People's uncontroverted assertion, while in the Complaint Room, the complainant's mother appeared more concerned about the defendant's plight than about her daughter's welfare.

Later on that day, before the defendant's criminal court arraignment, Daughter Doe recanted her accusation in a signed, written statement, taken by David Feige, the defendant's attorney. According to the defense attorney, he took Daughter Doe aside and speaking to her outside of the presence of her mother, obtained the recantation. This statement was proffered to the prosecution on the day of the defendant's arraignment. [FN2]

Although Mother Doe was subpoenaed to appear before the Grand Jury with Daughter Doe on August 31, 2001, the CPL Section 180.80 date, she did not appear on that date

and the defendant was released. A full Order of Protection was issued on behalf of Daughter Doe against the defendant, but Mother Doe reunited with the defendant, permitting him to remain in the same household with Daughter Doe. Mother Doe subsequently failed to respond to numerous letters, phone calls and subpoenas issued by the People requesting that she appear in the District Attorney's office with Daughter Doe. As a result of her mother's conduct, Daughter Doe was finally removed from her mother's custody and placed with her paternal grandmother. It was she who brought Daughter Doe to the District Attorney's office on October 5, 2001.

On October 5th, Daughter Doe testified before the Grand Jury. She told the Grand Jury about the alleged abuse perpetrated upon her by the defendant. She also testified that immediately after the incident she went to her best friend's house and told that friend and the friend's mother about what had just occurred. She also told the Grand Jury that she then called her father to tell him what had taken place and that her father instructed her to call the police, which she did. In addition, she informed the Grand Jury that after she had contacted the police, she called her aunt, who then brought another aunt into the telephone conversation. During the course of this conference call between the complainant and her two aunts, the police arrived. During the Grand Jury presentation the People did not ask the complainant anything about the statement she had made recanting her accusations against the defendant.

The inquiry, then, is whether, under the circumstances of this case, the People's failure to present evidence of the recantation impaired the integrity of the Grand Jury.

The traditional function of the Grand Jury is to ensure that, "before an individual may be publicly accused of a crime and put to the onerous task of defending himself from such accusations, the State must convince a Grand Jury composed of the accused's peers that there exists sufficient evidence and legal reason to believe the accused guilty." *People v. Iannone*, 45 N.Y.2d 589, 594, see also, *People v. Curry*, 153 Misc2d 61, (Supreme Court, Queens County, 1992). Accordingly, the Court has long recognized that the Grand Jury has two roles: 1) investigating criminal activity to determine whether sufficient evidence exists to accuse a citizen of a crime, and 2) protecting individuals from needless and unfounded prosecutions. *People v. Lancaster*, 69 N.Y.2d 20, 25.

However, as the Court of Appeals has often pointed out, the People "generally enjoy wide discretion in presenting their case to the Grand Jury and are not obligated to search for evidence favorable to the defense or to present all evidence in their possession that is favorable to the accused even though such information undeniably would allow the Grand Jury to make a more informed determination." *People v. Lancaster*, *supra* at 25-6. (citations omitted.) Moreover, the People are not obligated to present all evidence relevant to the credibility of a witness because, "[c]redibility is a collateral matter that generally does not materially influence a Grand Jury investigation." *People v. Morris*, 204 A.D.2d 973, 974 (Fourth Department, 1994) In *Morris*, the court held that the prosecutor did not have to present evidence to the Grand Jury of a witness's statement claiming responsibility for the conduct in question and exculpating the defendant. The witness, the defendant's companion, had made a statement that he had punched a person with the same name as the victim and that no one else was involved in the altercation. The court found that the statement merely raised a question of fact. Similarly, in *People v. Tolliver*, 217 A.D.2d 978 (Fourth

Department, 1995), the court held that the failure of the prosecutor to tell the Grand Jury that a prosecution witness had made a deal in exchange for favorable treatment did not impair the integrity of the Grand Jury inasmuch as such evidence was relevant only to the credibility of the witness.

In a case specifically dealing with a recantation, it has been held that the People are not obligated to present recantation evidence because such evidence is also only relevant to the credibility of witnesses, and therefore, is a collateral matter. *People v. Dillard*, 214 A.D.2d 1028 (Fourth Department, 1995). In *Dillard*, the court held that the prosecutor's failure to present exculpatory evidence that the surviving victim had not identified the defendant from a photographic array and that a witness to the crime had recanted his earlier statement that the defendant was the perpetrator did not render the Grand Jury proceedings defective because such evidence merely related to the credibility of the witnesses. See also, *State of New Jersey v. Hogan*, 144 N.J. 216 (Supreme Court, New Jersey 1996) (Robbery victim's recantation of accusations against the defendant was not "clearly exculpatory," and thus state was not obligated to inform Grand Jury of recantation.) Contra, *People v. Curry*, 153 Misc2d 61, 65 (Supreme Court, Queens County 1992) (Prosecutor would be required to disclose that the complainant or victim had recanted his or her account that the defendant was the perpetrator.)

Indeed, as courts have repeatedly noted, "[t]here is no form of proof so unreliable as recanting testimony." *People v. Yates*, 2002 WL122387, quoting *People v. Davenport*, 233 A.D.2d 771, 773 lv denied 89 N.Y.2d 1091, quoting *People v. Rodriguez*, 201 A.D.2d 683 lv denied 83 N.Y.2d 914]; *People v. Shilitano*, 218 N.Y. 161, 170. "Partly because recantations are induced by duress or coercion, the sincerity of a recantation is to be viewed with extreme suspicion." *State of New Jersey v. Hogan*, supra.

In view of the generally questionable nature of recantation testimony and the specific circumstances surrounding the complainant's recantation in this case, I am convinced that the failure to present this evidence to the Grand Jury does not render the proceedings defective.

It is necessary to view Daughter Doe's recantation here in the context of all the surrounding factors. First, as she told the Grand Jury, she had immediately outcried to her friend, her friend's mother, her father and two aunts. Further, she testified that on the day of the alleged incident, she had also summoned the police and spoken to them. Moreover, in her Grand Jury testimony, Daughter Doe provided a highly detailed account of the defendant's conduct. Finally, inasmuch as the recantation preceded Daughter Doe's Grand Jury testimony, it is, in effect, merely a prior inconsistent statement and should be weighed as such.

Not only does the nature of the complainant's Grand Jury testimony severely diminish the value of the recantation evidence, but the value of that evidence is further reduced by the circumstances of the behavior of Mother Doe and her relationship with the defendant. From the inception of this case, Mother Doe has appeared to support the defendant at the expense of permitting a hearing of her daughter's charges. Her concern for the defendant was demonstrated by her frustrating the prosecution of this case by failing to appear with her daughter, as directed, on August 31, 2001, the C.P.L. 180.80 day, and by her failing to respond to the District Attorney's office despite the office's many requests that she do so, all without explanation. Finally, the fact that the Mother

Doe allowed the defendant to move back into the home she shared with her daughter, in violation of the Order of Protection that had been issued in favor of her daughter and against the defendant, renders suspect any recantation by Daughter Doe who was then in her mother's custody.

Therefore, I am satisfied that under the circumstances of this case, the recantation evidence was not wholly exculpatory. Rather, the evidence pertained only to the credibility of the witness and accordingly, it did not have to be presented to the Grand Jury.

It is also noteworthy that although the recantation was known to the defense, the defendant failed to exercise his right to bring such evidence to the Grand Jury's attention by his own testimony or that of others testifying on his behalf. See, *People v. Mitchell*, 82 N.Y.2d 509, 515; *People v. Lancaster*, 69 N.Y.2d 20, 26. Nor did the defendant demand that the People bring this evidence to the Grand Jury.

Finally, because of all the facts and circumstances surrounding the recantation in this case, if such recantation evidence had been presented to the Grand Jury, it would have transformed the Grand Jury presentation into an adjudicative proceeding, which it is not meant to be. As the Court of Appeals has recognized, "[a] Grand Jury proceeding is not a 'mini-trial' but a proceeding convened primarily 'to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to a criminal prosecution.'" *People v. Lancaster*, *supra* at 30. (Citations omitted.)

Accordingly, the defendant's motion to dismiss the indictment is denied.

FN1. To protect the privacy of the parties, the names of the child and her mother have been changed to Daughter Doe and Mother Doe respectively.

FN2. The statement has not been made part of the record.

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