

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FILED
2:30 p M

IN AND FOR THE COUNTY OF MOHAVE

OCT 19 2010

HONORABLE STEVEN F. CONN
DIVISION 3
DATE: OCT. 18, 2010

VIRLYNN TINNELL
CLERK SUPERIOR COURT
BY: VIRLYNN TINNELL, CLERK

COURT NOTICE/ORDER/RULING

STATE OF ARIZONA,
Plaintiff,

vs.

CASSLYNN MAE WELCH,
Defendant.

No. CR-2010-00821

STATE OF ARIZONA,
Plaintiff,

vs.

JOHN CHARLES MCCLUSKEY,
Defendant.

No. CR-2010-00823

The Court has reviewed the Defendant McCLUSKEY's Motion to Remand to the Grand Jury, attached to which was a copy of the grand jury transcript which appeared unsealed in the court file up until a few days before October 15, 2010, but which has now been sealed in the court file. The Court has reviewed the State's Response to the above motion. The Court has considered the Defendant WELCH's Motion to Remand to the Grand Jury, which merely joins in the Defendant McCLUSKEY'S motion by reference and does not state any specific grounds for relief. The Court has considered the arguments of counsel presented at the hearing on October 15, 2010.

As a preliminary matter, prior to the above hearing, the State filed both a Notice of Filing Exhibit, which consisted of the grand jury roster, and also an Affidavit of

These were filed only in CR-2010-00823, the case of the Defendant McCLUSKEY, as was the State's Response. Both defense counsel objected at the hearing to the Court's considering the latter Affidavit.

The Court set these matters for "Evidentiary Hearing and/or Oral Argument" on the defense motion to remand because the pleadings suggested a factual issue, specifically whether there was or was not an unauthorized person not a member of the Grand Jury who participated in the deliberations in this case. This seemed to the Court a fairly simple factual issue to resolve. No witnesses on this issue were presented by the State or the defense. The Defendants made no request of the Court to issue a subpoena to any member of the Grand Jury, whose addresses are undoubtedly not accessible to them. Although a sworn affidavit is probably not as persuasive as sworn testimony under oath subject to cross-examination, it is probably more persuasive than no evidence at all. The Court recognizes that maybe offering the exhibit of the supposed grand juror at the hearing on the motion would have been preferable to filing it with the Court like any other pleading, but the Court would have admitted it at the hearing anyway. In ruling on the motion to remand the Court does consider the Affidavit of

Under Rule 12.9(a) the grand jury proceedings may be challenged only by motion for a new finding of probable cause alleging that the defendant was denied a substantial procedural right or that an insufficient number of qualified grand juror concurred in the finding of the indictment. Each count was found by a 16-0 vote, so even with the one suspected grand juror there does not appear to be any suggestion that an insufficient number voted to indict the Defendants.

The Court is familiar with the facts of Maretick v. Jarrett cited by the Defendant. This case is cited in almost all defense challenges to grand jury proceedings but involved a unique set of facts. The grand jury in that case was considering whether to indict the driver of a vehicle whose passenger was killed in a crash. The grand jury was told that the driver had fully recovered from the accident but

had no statement to make regarding the accident, suggesting that he feared incriminating himself, when in fact he had apparently suffered permanent brain damage and had no memory of the accident. The appellate court found that the defendant's right to due process was violated by the manner in which the evidence was presented to the grand jury.

The Defendants argue that they are entitled to relief on 3 separate grounds. First, that the Grand Jury was improperly advised as to their option regarding voting on proposed counts which included multiple defendants. Second, that the Defendants were prejudiced by being identified as boyfriend-girlfriend and first cousins. Third, that the record of the grand jury proceedings reflects that a _____ participated in the proceedings, apparently instead of the duly sworn and impanelled _____.

As to the first argument, the Grand Jury was told that the Indictment given to them was merely a draft indictment which could be changed in any manner desired and could be rejected in its entirety. Perhaps these options could have been explained in more detail. The Court is aware that this Grand Jury had just been impanelled earlier that same day, so this was the very beginning of their 3 month period of service. When this initial admonition was given to them, they had not yet even considered their first case.

When this specific case was presented, the Grand Jury was told by the prosecutor that the investigation involved charges applying to all 4 suspects except for one charge. That is actually incorrect, because only one charge applied to all 4 suspects, 6 charges applied to 3 suspects, and one charge applied to 2 suspects. That, however, is not the error claimed by the Defendants. A grand juror asked if their only option on a count with multiple defendants was to vote for all or none of the defendants. The prosecutor answered that question in the affirmative, but then immediately clarified that the Grand Jury could change the Indictment if they wanted the charges to be found against some defendants and not other defendants. This was not an incorrect statement of the law

or their options, although it may not have been particularly informative about how they would have physically gone about changing the indictment if they had wanted to. Nothing has been presented even suggesting that any one grand juror or the Grand Jury as a whole wanted to indict only some of the proposed defendants but did not understand how to do this. The handling of this question by the prosecutor did not deny either Defendant a substantial procedural right.

As to the second argument regarding the relationship between these 2 Defendants, the witness in response to a question by the State testified that the Defendant WELCH was identified as the girlfriend of the Defendant McCLUSKEY. The prosecutor then asked if they were not in fact first cousins and the witness testified that they were. This strikes the Court as a fairly gratuitous attempt to convey to the Grand Jury information which would have been of absolutely no assistance in deciding whether to indict the Defendants. However, by the end of the presentation the Grand Jury had been told that the Defendant McCLUSKEY was in prison for murder, that he escaped from prison, that he commandeered the vehicle of another at gunpoint, and that he drove to Flagstaff where the Defendant WELCH convinced him and the other defendant not to kill the 2 victims. There was no alternative scenario that was presented to the Grand Jury or has been suggested by the defense. The Court is certain that the Defendants would have still been indicted on all the charges even if the Grand Jury had not learned that they were first cousins who were romantically involved. To the extent that the defense is claiming that they are entitled to relief on the basis that the Defendants are in fact not first cousins or that there is no evidence that they are, this is nothing more than an attack on the sufficiency of the evidence which is not a basis for relief under Rule 12.9(a). The testimony identifying the Defendants as first cousins did not deny either Defendant a substantial procedural right.

As to the third argument regarding the specific grand juror, the Court is convinced as a factual matter that the grand juror identified in the transcript as _____ is the same

listed under "Appearances" on the second page of the transcript. This is confirmed by the Affidavit from that person. Even if the Court were convinced that a person with a remarkably similar name knew to show up on the first day this Grand Jury was impanelled and force from the chambers a grand juror who acquiesced in this process, and then purported to participate in the grand jury proceedings without objection from the other grand jurors, this would not in and of itself require the case to be remanded. A.R.S. 21-414(B) provides that an indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears that 9 or more qualified jurors concurred in returning the indictment. Even as a worst case scenario assuming that _____ and _____ were not the same person, the fact remains that 15 other qualified grand jurors voted to indict the Defendants. Even if these were 2 different people, which the Court has determined they were not, that fact would not have denied either Defendant a substantial procedural right.

IT IS ORDERED denying the Defendant's Motion to Remand to the Grand Jury.

cc:

Mohave County Attorney*

Stephen R. Glazer*
Attorney for Defendant WELCH

Mohave County Public Defender*
John Pecchia
Attorney for Defendant McCLUSKEY

Mohave County Jail*

Honorable Steven F. Conn*
Division 3