

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: PART K-19

P R E S E N T: HON. SEYMOUR ROTKER,
Justice.

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THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: 1812-04

Motion: Omnibus

HECTOR TORRES,

Defendant.

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RUSSELL ROTHBERG, ESQ.
For the Defendant

RICHARD A. BROWN, D.A.

BY: ERIC ROSENBAUM, A.D.A.
Opposed

Upon the foregoing papers, and due deliberation had, the motion to dismiss based upon insufficient evidence before the grand jury (CPL 210.30) is granted with leave to represent.

Kew Gardens, New York
Dated: September 14, 2004

SEYMOUR ROTKER
JUSTICE SUPREME COURT

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-19

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THE PEOPLE OF THE STATE OF NEW YORK

BY: SEYMOUR ROTKER, J.S.C.

- against -

Indictment No. 1812-04

DECISION AND ORDER

HECTOR TORRES,

Defendant.

-----X

Defendant is charged by indictment with the crimes of Rape in the First Degree (PL 130.35(1)), Sexual Abuse in the First Degree (PL 130.65(1)), Burglary in the First Degree (PL 140.30(3)), and Endangering the Welfare of a Child (PL 260.10(1)).

By omnibus motion, dated August 1, 2004, defendant seeks an order dismissing each count of the indictment pursuant to Criminal Procedure Law Section 210.25 and 210.35, inspection and release of the grand jury minutes and charge, reduction of charges, and other relief. Upon a review of the grand jury minutes, the Court grants dismissal of the indictment with leave to represent. Thus, the other branches of defendant's motion can be renewed should a new indictment be obtained by the prosecution.

MOTION TO INSPECT AND DISMISS [CPL 210.30(1)(2)]

The defendant's motion to inspect the grand jury minutes is granted. Inspection is mandatory absent a showing of good cause to deny the requested relief. The People have consented to an *in camera* inspection. The Court has conducted an *in camera* inspection of the grand jury minutes.

MOTION FOR RELEASE OF GRAND JURY MINUTES AND CHARGE [CPL 210 (3)]

Defendant's motion seeking release of the transcripts of the grand jury minutes and of the legal instructions provided by the prosecutor is denied. Grand jury proceedings are secret and should not be disclosed absent a compelling and particularized need for access. CPL 190.25(4); see People v. Robinson, 98 N.Y.2d 755, N.Y.S.2d 843(2002); Matter of the District Attorney of Suffolk County 58 N.Y.2d 436 (1983); Ruggiero v. Fahey, 103 A.D.2d 65, 478 N.Y.S.2d 336(2d Dept. 1984). The defendant has made no factual showing as to demonstrate a compelling and particularized need sufficient to overcome the presumption of confidentiality. The Court finds that the release of the minutes is unnecessary to assist it in making its determination as to the sufficiency of the evidence and legal instructions, CPL 210.30(2) and (3).

The Court's authority to release grand jury testimony is set forth in CPL 210.30(3) which provides that "[i]f the court, after examining the minutes, finds that the release of the minutes, . . . , to the parties is necessary to assist the court in making its determination on the motion, it may release the minutes, or such portions thereof, to the parties." The same section also provides that "such release of shall be limited to that grand jury testimony which is relevant to support a charge or charges" contained in the indictment.

Pursuant to CPL 210.35, the Court can make a determination as to whether the grand jury proceeding failed "to conform to the requirements of article one hundred and ninety to such a degree that the integrity thereof is impaired." As noted, the Court has inspected the minutes with respect to this section and finds no errors that would warrant any relief.

Motion to Dismiss the Indictment or for Reduction of the Charges Contained Therein on the Ground of Insufficient Grand Jury Evidence [CPL 210.20, 210.30]

_____ Defendant has moved pursuant to CPL 210 to dismiss the indictment on the ground of insufficiency of grand jury evidence to support the allegations therein. It is the Court's finding that the evidence presented, is legally insufficient to establish an evidentiary connection between the DNA profile initially introduced and the identity of this defendant as the perpetrator of the crime under the applicable grand jury standards of "reasonable cause to believe" and "legally

sufficient evidence.” In its grand jury presentment, the prosecution failed to establish “reasonable cause to believe” that the accused committed the offenses charged. See People v. Sabo, 179 Misc.2d 396, 687 N.Y.S.2d 513 (N.Y. County 1998).¹

Upon a review of the grand jury minutes, the prosecution establishes a DNA profile of a particular unknown suspect. Nevertheless, the prosecution’s later attempt, upon reopening the case, fails to connect the established profile to the within defendant.²

Here, when presenting the additional evidence to the grand jury³, the prosecution recalled the forensic expert who initially testified and established that the DNA profile obtained from the complainant’s clothing only matched one out of a trillion individuals.⁴ Upon being recalled, the expert testified that he was now in possession of additional information related to lab number FB04099⁵ and that he now knew the name of the individual whose profile he testified about previously. The individual’s name was “Hector Torres AKA Hector Tito,” as testified to in the grand jury.

Moreover, the witness stated that a New York State Identification Number is “attached to this individual” and provided the “NYSID” number to the grand jurors. The witness testified that the information he possessed upon testifying for the second time before the grand jury was obtained in conjunction with “The New York State Forensic Services.” He then opines that

¹“Legally sufficient evidence” means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof. . . . CPL 70.10.

“Reasonable cause to believe that a person has committed an offense” exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Id.

²The People reopened the case after an indictment was found but, before filing the indictment, to present additional evidence.

³The prosecution has provided the Court with a copy of the “slip” from the initial grand jury presentment which indicates that a “true bill” was found.

⁴The witness also testified that the known population is only approximately five billion.

⁵This witness had previously testified that the forensic lab number related to the case under voucher number F530380 was “FB040997.”

“Hector Torres” is the donor of the DNA profile obtained from the victim’s T-shirt.

Fatally absent from the presentation is a nexus between the named defendant and the DNA profile. Here, no testimony was presented to establish that the “NYSID” number testified to was based upon some type of comparison to defendant. Furthermore, there was no evidence presented that a DNA sample was actually taken from the named defendant at a particular time and tested which establishes his identity as the perpetrator. The only connection to the defendant here is the testimony of the expert and he merely testifies in a conclusory fashion that the “NYSID” number of this defendant matches the DNA profile. Therefore, without having established a properly testified to evidentiary link of the DNA from the crime scene to this defendant, it was not reasonably likely for the grand jurors to find that this particular individual committed the established crimes. Thus, the indictment is dismissed with leave to represent.

Defendant may renew his other applications should a new indictment be filed.

Kew Gardens, New York
Dated: September 14, 2004

SEYMOUR ROTKER
JUSTICE SUPREME COURT