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Inspection of Grand Jury Minutes

Diane C. Gaylord

INSPECTION OF GRAND JURY MINUTES

INTRODUCTION

Inspection of grand jury minutes is not a matter of right,[1] nor may it be used as a discovery procedure.[2] It is granted in the non-appealable[3] discretion[4] of the court guided by statutes[5] and case law.[6] In many instances it is possible to predict from stare decisis the direction of this discretion. However, due to the requirements of pertinent case law,[7] and the lack of authority in some areas, speculation will play an important part in determining when that discretion will be exercised to the defendant's advantage.

The purpose of this paper is to inform attorneys of the opportunity (or lack of it) to inspect grand jury minutes. Because of the policy of protecting the secrecy of grand jury proceedings, the area in which inspection is allowed is limited. This policy may be reasonable at the early stages of the proceedings but in the interests of enlightened legal thinking, it should be reconsidered in its application to inspection of the minutes at the trial stage. This matter will be considered later but first we will examine the limited areas in which inspection it permitted.

GENERAL RULE

It has been held by the courts of this state that they will order inspection of grand jury minutes only pursuant to section 952-t of the Code of Criminal Procedure. This section permits inspection by order of the court to enable the defendant to make a motion to set aside the indictment.[8] *(In re Klaw,*[9] subsequently overruled[10] held that defendant might also be granted inspection in order

1. People v. McCann, 166 Misc. 269, 2 N.Y.S.2d 216 (Ct. Gen. Sess. 1938).
2. Matter of Montgomery, 126 App. Div. 72, 110 N.Y. Supp. 793 (1st Dep't 1908), *aff'd* 193 N.Y. 659, 87 N.E. 1123 (1908); In re Martin, 170 Misc. 919, 11 N.Y.S.2d 607 (County Ct. 1939); People v. Greenberg, 37 N.Y.S.2d 274 (County Ct. 1942).
3. People v. Sweeney, 213 N.Y. 37, 106 N.E. 913 (1914); In re Martin, *supra* note.
4. People v. Howell ,19 LAW REP. NEWS No. 22, p. 3 col 1 (N.Y. Ct. App. Feb. 20, 1958); Matter of Montgomery, *supra* note 2; In re Special Report of Grand Jury, 192 Misc. 857, 77 N.Y.S.2d 438 (County Ct. 1948); People v. Kramer, 151 Misc. 210, 270 N.Y. Supp. 902 (Ct. Gen. Sess. 1934).
5. N.Y. CODE CRIM. PROC. §§952-t, 313.
6. Notes 14-20, 22, 23, 25 *infra.*
7. Notes 29-34 *infra.*
8. Matter of Montgomery, *supra* note 2; People v. Nicoll, 133 N.Y.S.2d 807 (Sup. Ct. 1954); People v. Mangan, 139 Misc. 816, 250 N.Y. Supp. 214 (Sup. Ct. 1931); People v. May, 158 Misc. 488, 287 N.Y. Supp. 162 (County Ct. 1936).
9. 53 Misc. 158, 104 N.Y. Supp. 482 (Ct. Gen. Sess. 1907).
10. People v. Keavin, 123 Misc. 56, 204 N.Y. Supp. 193 (Sup. Ct. 1924); Matter of Baldwin, 65 Misc. 153, 121 N.Y. Supp. 86 (County Ct. 1909).

to be more effectively informed of the charges against him and to prepare for trial.) Since inspection will be granted only to effectuate a motion to dismiss the indictment, the defendant must rely on a ground for inspection that is also a ground for dismissal.

Section 313 of the Code of Criminal Procedure informs us of the grounds for a motion to set aside an indictment; (1) if the indictment is not found, endorsed, and presented as set forth in section 268 or section 272 or; (2) when an unauthorized person was present at the grand jury session while the charge embraced in the indictment was under consideration. Section 268 provides that the indictment can be found only with the consent of at least twelve grand jurors and endorsed as a "true bill" and signed by the foreman or acting foreman. Section 272 states that the presentment must be made by the foreman or acting foreman in open court, and filed with a public clerk. (However, omission to file does not avoid the indictment.[11])

Section 313 also states that these are the only grounds for dismissal of an indictment. However, *People v. Glen*[12] declared this part of the statute unconstitutional in its limiting effect:

> But . . . our courts have . . . always asserted and exercised the power to set aside indictments whenever it has been made to appear that they have been found without evidence, or upon illegal and incompetent testimony. (citations omitted). This power is based upon the inherent right and duty of the courts to protect the citizen in his constitutional prerogatives and to prevent oppression or persecution . . . to the extent that [section 313] may destroy, curtail, affect, or ignore the constitutional rights of the defendant, it has no force and is void.

Thus the present state of the law is that the defendant may move to set aside an indictment only for the reasons specified in section 313 or upon constitutional grounds.[13]

The courts have determined that the following are constitutional grounds for the dismissal of an indictment and consequently for inspection.

(1.) The indictment must be found upon sufficient evidence. *To illustrate:* in *People v. Mangan*[14] it appeared that there was not sufficient evidence to establish one of the necessary elements of the crime. In *People v. Stecker*[15] the complainant's and two witnesses failure to positively identify defendant at the

11. Dawson v. People, 25 N.Y. 399 (1862).
12. 173 N.Y. 395 400, 66 N.E. 112, 115 (1903).
13. People v. Sexton, 187 N.Y. 495, 80 N.E. 396 (1907); People v. Glen, *supra* note 12.
14. 139 Misc. 816, 250 N.Y. Supp. 214 (Sup. Ct. 1931).
15. 140 Misc. 684, 252 N.Y. Supp. 185 (Ct. Gen. Sess. 1931).

preliminary hearing was ground for granting the motion to inspect to determine if there was sufficient evidence to establish identity, a necessary element of the crime.

(2.) The indictment must be based on legally competent evidence. If the defendant was compelled to give testimony against himself and he has not waived his constitutional immunity, he will be granted inspection.[16] If he has waived this immunity before the grand jury inspection will be denied.[17] If there is a threatened violation of a federal statute prohibiting the use of testimony given before Congress or any committee thereof as evidence in a criminal proceeding against the defendant, he may have inspection since an indictment based on such evidence would be founded upon illegal evidence.[18] However, the presence of illegal evidence is not in and of itself basis for a dismissal of an indictment and consequently of inspection. As stated in *Matter of Fullington:*[19]

> This motion [for inspection] should not be granted or an indictment dismissed on grounds that incompetent or illegal evidence was given before the grand jury where there was sufficient legal evidence to support the indictment, unless it appears that the admissions of illegal evidence improperly influenced the minds of the jurors.

The case of *People v. Benin*[20] presents a problem as to what is illegal evidence. During the proceedings before the grand jury, the district attorney addressed the grand jury off the record and in the absence of the court stenographer. The court, though condemning this practice and recognizing its prevalence, based its decision on another ground, stating that inspection should be granted because the accused was not allowed to give an uninterrupted and complete version of relevant and material matters and that the sufficiency of evidence to support an indictment was doubtful. It is submitted that the court based its decision on one defect which had not been previously adjudicted in reported cases as a violation of the accused's constitutional rights but did not take the same stand on another defect with the same characteristics, the reason being that the condemned parctice had been carried on for years. But it seems that this reported recognition that the district attorney's comments off the record are a constitutional violation of rights, being consistent with judicial concepts of fairness, may be followed in the future.

SPECIAL RULES

At this point we come to the exceptions to the general rule.

(1.) Pursuant to section 266 of the Code of Criminal Procedure a

16. People v. Seaman, 174 Misc. 792, 21 N.Y.S.2d 917 (Sup. Ct. 1940).
17. People v. Machner, 171 Misc. 720, 13 N.Y.S.2d 451 (Sup. Ct. 1939).
18. Erickson v. Hogan, 198 Misc. 491, 98 N.Y.S.2d 858 (Sup. Ct. 1950).
19. 154 Misc. 375, 376, 277 N.Y. Supp. 830, 831 (County Ct. 1935).
20. 186 Misc. 548, 61 N.Y.S.2d 692 (Ct. Gen. Sess. 1946).

member of the grand jury may be required by any court to disclose the testimony of a witness given before the grand jury to determine whether or not such testimony is consistent with that given before the trial court. The reason given for this exception to the secrecy doctrine is that since the witness's testimony will be disclosed on trial, he can no longer be embarrassed by a disclosure of his testimony before the grand jury.[21] It appears that the courts have relied on this status and the policy behind it as a basis for the following rule. If the district attorney uses the grand jury minutes during the trial,[22] or the court upon inspection finds that the grand jury minutes contain material at variance with the testimony given by a particular witness, the defendant will be granted inspection.[23] The extent of inspection will be determined by the circumstances of each case. For example, under the latter portion of the rule, the defendant will be allowed to examine only the testimony of the witness that he wishes to cross examine.[24]

(2.) The second exception is based upon the authority of *People v. Kresel*[25] which held that a defendant indicted for perjury, for false testimony before the grand jury, may inspect that part of the minutes containing the alleged perjured testimony. The reasons stated for this exception are that it is necessary to insure the defendant a fair trial, and that the reasons for secrecy "the need to avoid embarrassment to witnesses testifying before the grand jury, and the necessity of keeping from the accused opportunities to escape arrest or to prepare false testimony" no longer existed. The court could have found another reason by analogy to the policy of section 266. It is there set forth that grand jurors may be required by the court "to disclose the testimony given before them by any person upon a charge against him of perjury in giving his testimony." If the grand jurors can testify as to this matter it would seem that the grand jury minutes containing defendant's testimony, the most reliable record of his statements, should be open to inspection in this type of perjury action. The court reached this conclusion[26] but on broader grounds the significance of which will be evident later.

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21. 8 WIGMORE, EVIDENCE §§2360-63 (3d ed. 1940).

22. People v. Dales, 309 N.Y. 97, 127 N.E.2d 829 (1955); People v. Nicoll, 3 A.D.2d 64, 158 N.Y.S.2d 279 (4th Dep't 1956).

23. People v. Miller, 257 N.Y. 54, 177 N.E. 306 (1931), citing §266 N.Y. CODE CRIM. PROC.; People v. Boniello, 303 N.Y. 619, 101 N.E. 2d 488 (1951); People v. Dales, *supra* note 22; People v. Kelley, 253 App.Div. 430, 3 N.Y.S.2d 46 (3d Dep't 1938).

24. People v. Dales, *supra* note 22.

25. 142 Misc. 88, 91, 254 N.Y. Supp. 193 197 (Sup. Ct. 1931).

26. This decision in the *Kresel* case was questioned in *People v. Gatti*, 167 Misc. 545, 4 N.Y.S.2d 134 (Ct. Gen. Sess. 1938) and distinguished in *People v. Brown*, 184 Misc. 764, 54 N.Y.S.2d 759 (County Ct. 1945), but neither case was a prosecution for perjury while testifying before the grand jury. There is no reported case that reverses this decision and it is cited with approval in *In re Martin*, *supra* note 2.

PROCEDURE

As previously stated, the defendant can inspect the grand jury minutes only in preparation to dismiss the indictment.[27] Therefore if he presents effectively an objection to the indictment as provided in section 313, or a violation of his constitutional rights, the court will order inspection.[28]

The words "presents effectively" in the preceding sentence were not used inadvertently. The courts require that the motion papers show reasons, substantial reasons, for believing that the minutes would disclose grounds for granting inspection.[29]

The defendant must show in the moving papers that a reasonable effort has been made to learn what was testified to before the grand jury, what information was obtained, what information was not obtained and why, or what defendant surmises was the testimony before the grand jury and reasonable grounds for such surmises and that the motion is made in good faith with the ultimate aim of dismissing the indictment.[30] Stating it more precisely, the court must be satisfied that the dismissal of the indictment is fairly arguable.[31] Thus, if defendant can not aver sufficient facts in his affidavit so as to warrant inspection, the motion should be denied.[32]

These strict requirements are somewhat alleviated by the practice of the courts of inspecting the grand jury minutes on motion of the defendant to determine if grounds exist to grant inspection.[33] As a result of this practice the courts might, instead of granting inspection, dismiss the indictment if from an inspection of the grand jury minutes they find the indictment faulty.[34] Court inspection of grand jury minutes has been criticized on the theory that it bolsters insufficient papers[35] but this criticism is overshadowed by the ultimate justice usually achieved through this method: that is, the dismissal of faulty indictments either by the court initially or upon the defendant's motion to dismiss after inspection was granted. Moreover, the presumption that the indictment is valid must be overcome before it can be dismissed.[36]

27. *Supra* note 8.
28. Matter of Montgomery, *supra* note 2; People v. Moody, 133 N.Y.S.2d 332 (Sup. Ct. 1954); People v. Nicoll, *supra* note 8.
29. People v. McComber, 206 Misc. 465, 133 N.Y.S.2d 407 (Sup. Ct. 1934); People v. Cruise, 71 Misc. 602, 130 N.Y. Supp. 851 (Ct. Gen. Sess. 1911); People v. Woodward, 71 Misc. 604, 130 N.Y. Supp. 854 (Ct. Gen. Sess. 1911).
30. People v. Teal, 60 Misc. 517, 113 N.Y. Supp. 925 (Ct. Gen. Sess. 1908),
31. People v. Mitchell, 140 Misc. 869, 251 N.Y. Supp. 716 (Sup. Ct. 1931).
32. *Supra* note 1.
33. *Supra* note 16.
34. People v. Walsh, 92 Misc. 576, 156 N.Y. Supp. 366 (Sup. Ct. 1915), *aff'd* 172 App.Div. 266, 158 N.Y. Supp. 342 (4th Dep't 1916).
35. People v. Klinger, 165 Misc. 634, 1 N.Y.S. 2d 497 (Ct. Gen. Sess. 1938).
36. People v. Fort, 141 N.Y.S.2d 290 (Sup. Ct. 1950).

Thus it seems that a defendant should set forth on his motion to inspect an averment of an intention to seek ultimately a dismissal of the indictment, the reasons for inspection, a request that the court inspect the minutes, and finally a request that the minutes be turned over to him.

At this point the reader might inquire as to the source available to the defendant from which he may find reason for dismissal of the indictment and whether the source used will satisfy the court. There is very little authority on this matter. The courts have held that information gleaned from the indictment itself,[37] the records of preliminary hearing before a magistrate,[38] and from the defendant himself are sufficient in some instances.[39] We must assume that the grand jurors will not give information as they are bound to secrecy by statute.[40] Generally the witnesses who testified before the grand jury do not want to disclose their testimony.[41] It is evident that the opportunity for the defendant to find out what went on before the grand jury is limited. As a result he is greatly hindered in bearing his burden of production. The basis of this problem is the policy of secrecy that shrouds grand jury proceedings. Whether this policy is justified in the light of possible injustice resulting from an indictment founded illegally is a problem that will be discussed later.

OTHER INDIVIDUALS OR GROUPS PERMITTED TO INSPECT

Grand jury minutes are not available in private litigation but they are available under the following conditions.[42] Where a public officer or body charged with the duty of law enforcement or investigation properly present to the courts facts showing the necessity of inspection of grand jury minutes in the public interest, inspection will be allowed as a proper exercise of the court's discretion.[43] Such inspection is most usually allowed in proceedings against public officers for their removal from such office.[44]

37. People v. Mangan, *supra* note 14.
38. People v. Stecker, *supra* note 15.
39. People v. Seaman, *supra*, note 16.
40. N.Y. CODE CRIM. PROC. §265.
41. People v. Kresel, *supra* note 25.
42. Dworetzky v. Monticello Smoked Fish Co., 256 App. Div. 772, 12 N.Y.S.2d 270 (3d Dep't 1939).
43. In re Attorney General of the United States, 160 Misc. 533, 291 N.Y. Supp. 5 (County Ct. 1939); In re Special Report of Grand Jury, *supra* note 4; The Bar Association of Erie County does not come within this classification. Matter of Bar Association of Erie County, 182 Misc. 529, 47 N.Y.S.2d 213 (County Ct. 1944).
44. In re Guinn, 267 App. Div. 913, 47 N.Y.S.2d 66 (2d Dep't 1944), *aff'd* 293 N.Y. 787, 58 N.E.2d 730 (1944); People *ex rel.* Hirshberg v. Board of Supervisors, 251 N.Y. 156, 167 N.E. 204 (1929); In re Crain, 139 Misc. 799, 250 N.Y. Supp. 249 (Ct. Gen. Sess. 1931).

CRITICISM OF THE NEW YORK RULES

Secrecy of grand jury minutes is obviously the reason for the limited opportunity to inspect grand jury minutes. The question, thus, is whether or not this policy is strong enough to warrant denial to the defendant of inspection of the grand jury minutes in order to more adequately prepare his defense.

The reasons for secrecy can be divided generally into two categories, those reasons applicable during the grand jury proceedings and those which continue when such proceedings cease. In the former category are consideration of obtaining uninhibited testimony from witnesses, encouraging the grand jurors to faithfully and fearlessly perform their duties and loosening the tongues of reluctant witnesses. Undoubtedly these reasons cease when the proceeding terminates and we consider them no further as defendant would necessarily seek inspection only after a true bill had been returned. In the latter category the reasons are to prevent the accused from escaping arrest, or preparing false testimony or alibis, and encouraging witnesses before future grand juries to testify freely, particularly those who would be reluctant to do so if their testimony would be open to public scrutiny. After the defendant is in custody, the first reason in this category vanishes. The opportunity for falsifying testimony or alibis is of minor consequence particularly after the defendant is arrested and informed of the charge against him. As to the third reason, if the witness is called upon to testify at trial, his testimony necessarily becomes public knowledge. There remains but one consequential reason for secrecy; to encourage future witnesses to testify, who will not be required to testify at the trial, by eliminating any embarrassment which would result from public disclosure of their testimony.

In at least one New York decision,[45] which has been subsequently overruled,[46] it was held that the defendant was entitled to inspect the minutes in order that he might be better informed as to the nature of the charge against him and be better prepared for trial. *People v. Kresel*,[47] states that inspection should be allowed in perjury cases based on grand jury testimony in order to insure the defendant a fair trial. This case could have been decided on narrower grounds but was not. Thus there seems to be a definite indication in this state that fairness should play a part in allowing inspection. This fairness is also recognized in the cases that allow defendant to inspect in order to cross examine witnesses.[48]

But the courts still jealously guard the secrecy of grand jury minutes in other areas as is evident from the application of the general rule described above. The

45. People v. Klaw, *supra* note 9.
46. Matter of Baldwin, *supra* note 10.
47. *Supra* note 25.
48. *Supra* notes 22, 23.

courts ignore the ultimate result of their position in favor of secrecy of grand jury minutes over fairness to the defendant. For who is safeguarded by the secrecy policy? It is none other than the guilty defendant who knows the facts concerning the crime and who can prepare his defense from his personal knowledge. The innocent defendant is denied opportunity to prepare his defense to a crime of which he has no personal knowledge. Since a change in the present rule would involve disclosure not to the public but to the defendant only, might not it reasonably be stated that the protection of innocent men is more important than possible embarrassment to a witness or the loss of testimony of a witness afraid to speak if defendant will be allowed to inspect his testimony? Has it not always been the philosophy of Anglo-American jurisprudence that the possible loss of a man's liberty is due the higher consideration?

A long standing legal principle is not necessarily correct merely because of its longevity. The courts have often buried common law concepts which are out of step with more modern thought. Here is an opportunity to ". . . bring the . . . law of this state . . . into accord with justice . . ."[49]

Diane C. Gaylord

49. Woods v. Lancet, 303 N.Y. 349, 351, 102 N.E.2d 691, 692 (1951).