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Right to Counsel, Supreme Court, Queens County: People v. Bell

Burton court held that defendant's request could not be "considered a clear and unequivocal request to represent himself throughout the entire trial".[273]

The *Himko* court found that nothing in the defendant's complaint that suggested he wished to proceed pro se.[274] The court noted that "the right to self representation lacks the force and urgency of the right to counsel and there is no necessity to inform every defendant of his right to conduct his own defense."[275]

Both the Federal and the New York State Constitutions guarantee a criminal defendant the absolute right of counsel. Federal and New York State cases have consistently found that this right includes the right to proceed pro se, however there are limitations to this right. New York State has found one such limitation is that the trial courts are not obligated to inform the defendant of his right to proceed pro se.

SUPREME COURT

QUEENS COUNTY

People v. Bell[276]
(printed June 16, 1997)

Defendant, George Davis Bell, was indicted for numerous crimes including two counts of murder in the first degree; murder in the second degree; attempted robbery in the first degree; burglary in the second degree; and criminal possession of a weapon in the second and third degrees.[277] He moved to dismiss

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[273] *Id.*

[274] People v. Himko, 657 N.Y.S.2d 127, 128 (3d Dep't 1997).

[275] *Id.* (citing People v. McIntyre, 36 N.Y.2d 10, 17, 324 N.E.2d 322, 327, 364 N.Y.S.2d 837, 844 (1974); People v. Burton, 106 A.D.2d 652, 653, 482 N.Y.S.2d 909 (2d Dept 1994)).

[276] N.Y. L.J., June 16, 1997, 32 (Sup. Ct. Queens County 1997).

[277] *See* N.Y. PENAL LAW § 125.27 (first degree murder); § 125.25 (second degree murder); § 110.00 (second degree attempted robbery); § 140.25 (second degree burglary); § 265.02 (second degree criminal possession of a

the indictment pursuant to New York CPL § 210.20 (1)(c)[278] and CPL § 210.35 (4)[279] on the grounds that he was deprived of his constitutional and statutory right to testify before the grand jury in violation of the Sixth Amendment to the United States Constitution,[280] Article I, Section 6 of the New York State Constitution,[281] and New York CPL § 195.50 (5),[282] among others.[283]

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weapon); and § 265.03 (third degree criminal possession of a weapon) (McKinney 1997).

[283] *Bell*, N.Y. L.J., June 16, 1997, 32; N.Y. CRIM. PROC. LAW § 210.20 (1)(c) (McKinney 1997). This section provides in pertinent part: "After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment . . . upon the ground that: [t]he grand jury proceeding was defective, within the meaning of section 210.35." *Id.*

[279] *Bell*, N.Y. L.J., June 16, 1997, at 32; N.Y. CRIM. PROC. LAW § 210.35 (4) (McKinney 1997). This provision states: "A grand jury proceeding is defective within the meaning of paragraph (c) of subdivision one of section 210.20 when . . . [t]he defendant is not accorded an opportunity to appear or testify before the grand jury in accordance with the provisions of section 190.50." *Id.*

[280] *Bell*, N.Y. L.J., June 16, 1997, at 32; U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part that: "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." *Id.*

[281] *Bell*, N.Y. L.J., June 16, 1997, at 32; N.Y. CONST. art. I, § 6. Article I, section 6 provides in pertinent part that:

> No person shall be held to answer to for a capital or otherwise infamous crime . . . unless on indictment of a grand jury, except that a person . . . may waive an indictment by a grand jury and consent to be prosecuted. . . . In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him.

Id.

[282] *Bell*, N.Y. L.J., June 16, 1997, at 32; N.Y. CRIM. PROC. LAW § 190.50(5)(a)(McKinney 1997). This section provides in pertinent part:

> When a criminal charge against a person is . . . submitted to a grand jury, such person has a right to appear before such

Defendant contended that he was deprived of effective assistance of counsel in deciding on whether or not to testify before the grand jury because the People failed to: (1) respond to requests made by him prior to the grand jury presentment for advance notice as to whether the People intended to present all known exculpatory and mitigating statements and charge certain legal instructions to the jury; and (2) disclose whether oral or written statements were going to be used against him and his co-defendants.[284] Jury instructions requested by defendant included intoxication, extreme emotional disturbance, the grand jury's historical mercy function,[285] voluntariness of statements, lesser included offense, and specific prior intent to commit robbery as required elements of the crimes charged.[286] In addition, defendant claimed that since this was a capital case, "heightened due process" entitled him to those instructions.[287] Finally, defendant argued that the District Attorney's disclosure of portions of the grand jury proceeding constituted a waiver of any claim of grand jury secrecy.[288]

> grand jury as a witness in its own behalf . . . and . . . the district attorney must notify the defendant or his attorney of the prospective or pending grand jury proceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein.

Id.

[283] *Bell,* N.Y. L.J., June 16, 1997, at 32. Defendant also moved to dismiss the indictment on the grounds that he was deprived of his constitutional rights under the Fifth, Eighth and Fourteenth Amendments to the Federal Constitution and Article I, sections 2, 5 and 11 of the New York State Constitution. U.S. CONST. amend. V, VIII, XIV; N.Y. CONST. art. I, §§ 2, 5, 11.

[284] *Bell,* N.Y. L.J., June 16, 1997, at 32.

[285] *See* People v. Prater, 170 Misc. 2d 326, 330, 648 N.Y.S.2d 228, 230 (Sup. Ct. Kings County 1996) (citing People v. Sullivan, 68 N.Y.2d 495, 510 N.Y.S.2d 518 (1986) (noting that the grand jury's historical "mercy function" allows the Court to exercise mercy in certain instances by indicting a defendant for manslaughter in the second degree rather than for intentional murder).

[286] *Bell,* N.Y. L.J., June 16, 1997, at 32.

[287] *Id.*

[288] *Id.* at 32.

Rejecting defendant's claims, the court held that while a defendant is entitled to notice of his right to testify and an opportunity to be heard,[289] which he received, there is no statutory or other authority for the pre-indictment requests sought by defendant.[290] In addition, the limited information provided to defendant regarding the crimes for which he would be charged, did not alter the statutory duty to maintain grand jury secrecy, and did not constitute a waiver of grand jury proceedings.[291]

On December 26, 1996, the defendant was arraigned on the felony complaint.[292] Defendant waived release from custody,[293] and both sides agreed that the grand jury would not vote before January 16, 1997.[294] The case was presented to the grand jury on January 17, 1997, twenty two days after the arraignment.[295] The defendant failed to appear and was indicted for the felonies as charged.[296] Subsequently, the defendant contended that he was deprived of his constitutional and statutory right to effective assistance of counsel, because absent pre-indictment "disclosure"

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[289] *Id.* (*See* N.Y. CRIM. PROC. LAW § 190.50 (5); People v. Choi, 210 A.D.2d 495, 496, 620 N.Y.S.2d 131, 132 (2d Dep't 1994) (denying defendant's objection that he was deprived of his right to testify before the grand jury since defense counsel received written notice of additional charges being brought against defendant's son and the People held the case open for approximately two weeks to give defense counsel time to locate defendant); People v. Pugh, 207 A.D.2d 503, 615 N.Y.S.2d 912 (2d Dep't 1994) (holding that four days notice to defense counsel of the People's intention to present the case to Grand Jury accorded defendant reasonable time to exercise his right to testify)).

[290] *Bell*, N.Y. L.J., June 16, 1997, at 32.

[291] *Id.*

[292] *Id.*

[293] *Id.* N.Y. CRIM. PROC. LAW § 180.80. This provision provides for the release of defendant from custody upon the failure of timely disposition of felony complaint. *Id.*

[294] *Bell*, N.Y. L.J., June 16, 1997, at 32.

[295] *Id.*

[296] *Id.* Defendant was indicted on two counts of murder in the first degree; murder in the second degree; attempted robbery in the first degree; burglary in the second degree; and criminal possession of a weapon in the second and third degrees. *Id.* *See* N.Y. PENAL LAW §§ 125.27, 125.25, 110.00, 140.25, 265.02, and 265.03 (McKinney 1997).

by the prosecution, he was unable to come to an informed decision whether he should testify before the grand jury.[297]

In rejecting defendant's claims, the court emphasized the importance of the statutory requirement of grand jury secrecy.[298] Among its important virtues, the court noted, grand jury secrecy safeguards the independence of the grand jury, prevents the flight of the accused and encourages free disclosure of information by those summoned before it.[299] However, the trial court may, in its

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[297] *Bell*, N.Y. L.J., June 16, 1997, at 32.

[298] *Id.* N.Y. CRIM. PROC. LAW § 190.25 (4) (a) (McKinney 1997). This provision provides in pertinent part:

> [N]o grand juror, or other person . . . may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, evidence or any decision, result or other matter attending a grand jury proceeding . . . . Nothing contained herein shall prohibit a witness from disclosing his own testimony.

Id.

[299] *Bell*, N.Y. L.J., June 16, 1997, at 32 (citing People v. DiNapoli, 27 N.Y.2d 229, 265 N.E.2d 449, 316 N.Y.S.2d 622 (1970)). In *DiNapoli*, the Court of Appeals set forth five frequently mentioned considerations for maintaining secrecy of grand jury minutes:

> (1) prevention of flight by a defendant who is about to be indicted; (2) protection of the grand jurors from interference from those under investigation; (3) prevention of subornation of perjury and tampering with prospective witnesses at the trial to be held as a result of any indictment the grand jury returns; (4) protection of an innocent accused from unfounded accusations if in fact no indictment is returned; and (5) assurance to prospective witnesses that their testimony will be kept secret so that they will be willing to testify freely.

Id. at 235, 265 N.E.2d at 452, 316 N.Y.S.2d at 625-26. The *DiNapoli* court then applied these criteria to determine that the court below was justified in using its discretion to make an exception to the grand jury secrecy requirement, by allowing a copy of the minutes of a grand jury proceeding to be furnished to a public commission more than two years after the conclusion of grand jury proceedings, the conviction of the defendants by guilty pleas and the payment of fines. *Id.* Consequently, the court held that such allowance presented no danger of escape by persons

discretion, direct disclosure when the public interest benefit outweighs the public interest in maintaining secrecy.[300] Nevertheless, such disclosure, the court held, does not alter the statutory duty to maintain grand jury secrecy.[301] New York Criminal Procedure Law section 190.25 (4)(a) provides that the "[n]ature or substance of any grand jury testimony, evidence or any decision, result or other matter attending a grand jury proceeding . . . " may not be disclosed by a prosecutor except in the lawful exercise of his duties.[302]

Furthermore, the court held, discovery in a criminal case is entirely covered by statute.[303] In a similar case, *Hynes v. Cirigliano*,[304] it was held that the defendant was not entitled to see his videotaped statements before he was indicted since he was not a person entitled to discovery under New York Criminal Procedure Law section 240.20. [305] The court followed the *Hynes*

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who may be indicted, no interference with the grand jury's freedom to deliberate and no need to protect any innocent accused person. *Id.*

[300] *Bell*, N.Y. L.J., June 16, 1997, at 32 (citing *In re District Attorney of Suffolk County*, 58 N.Y.2d 436, 488 N.E.2d 440, 461 N.Y.S.2d 773(1983)). The *Suffolk County* court held that grand jury secrecy is not absolute, explaining that a disclosure may be directed when a balancing of the public interest favors disclosure over secrecy. In re District Attorney of Suffolk County, 58 N.Y.2d 436, 444, 488 N.E.2d 440, 443-44, 461 N.Y.S.2d 773, 776-77. However, the court noted that "[s]ince disclosure is the 'exception rather than the rule,' one seeking disclosure first must demonstrate a compelling and particularized need for access." *Id.*

[301] N.Y. L.J., June 16, 1997, at 32; N.Y. CRIM. PROC. LAW § 190.25 (4)(a) (McKinney 1997).

[302] N.Y. L.J., June 16, 1997, at 32 (quoting N.Y. CRIM. PROC. LAW § 190.25 (4)(a) (McKinney 1997)).

[303] *Id.* (referring to N.Y. CRIM. PROC. LAW § 240; *See also* People v. Copicotto, 50 N.Y.2d 222, 406 N.E.2d 465, 428 N.Y.S.2d 649 (1980)).

[304] 180 A.D.2d 659, 579 N.Y.S.2d 171 (2d Dep't 1992) (holding that since defendant was not yet indicted, he was not described by section 240.20 of the New York Criminal Procedure Law as a person entitled to discovery).

[305] N.Y. CRIM. PROC. LAW § 240.20. This section provides in pertinent part that:

> [U]pon demand to produce [information] by a defendant . . . against whom and indictment . . . is pending, the prosecutor shall disclose to the defendant and make available for inspection . . . any written, recorded or oral

reasoning in concluding that pre-indictment disclosures requested by the defendant as to the details of matters before the grand jury prior to his indictment would interfere with the body's freedom to deliberate.[306] In addition, permitting such disclosures would convert the investigative nature of the presentment into an adversarial proceeding or mini-trial.[307]

The court here also relied on the Court of Appeals decision, *People v. Valles*,[308] in support of its conclusion that the defendant is not entitled to advanced notice as to whether mitigating defenses such as extreme emotional disturbance will be charged.[309] *Valles* involved a defendant who was indicted for

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> statement of the defendant . . . transcript of testimony . . . written report or document . . . photograph or drawing relating to the criminal action or . . . any tapes or other electronic recordings. . . .

Id.

[306] *Bell*, N.Y. L.J., June 16, 1997, at 32.

[307] *Id.* (citing People v. Lancaster, 69 N.Y.2d 20, 503 N.E.2d 990, 511 N.Y.S.2d 559 (1986). In *Lancaster*, the Court of Appeals relied on Article I, § 6 of the New York State Constitution and relevant precedent. *Id.* at 25, 503 N.E.2d at 992, 51 N.Y.S.2d at 561. The court held that the People had no duty to disclose psychiatric evidence which would have supported possible defenses in a case involving attempted murder and assault charges. *Id.* It noted that while the grand jury is only required to find reasonable cause to believe the accused committed the crime based on the evidence presented, the petit juror must find guilt beyond a reasonable doubt. *Id.* at 26, 503 N.E.2d at 993, 511 N.Y.S.2d at 562. Therefore, the People do not "have the same obligation of disclosure at the grand jury stage as they have at the trial stage." *Id.* Rather, "[t]he extent of the prosecutor's obligation to instruct the Grand Jury on a particular defense depends upon whether that defense has the 'potential for eliminating a needless or unfounded prosecution.'" *Id.* at 27, 502 N.E.2d at 994, 511 N.Y.S.2d at 563. *See also* People v. Suarez, 122 A.D.2d 861, 505 N.Y.S.2d 728 (2d Dep't 1986) (holding that "[t]he Grand Jury proceeding is not intended to be adversarial in nature or a minitrial"). The prosecution is not obligated "to present every piece of evidence which they possess against a suspect in a Grand Jury proceeding." *Id.* at 862, 505 N.Y.S.2d at 729. It is only required not to withhold any information that would have materially influenced its investigation. *Id.*

[308] 62 N.Y.2d 36, 464 N.E.2d 418, 476 N.Y.S.2d 50 (1984).

[309] *Bell*, N.Y. L.J., June 16, 1997, at 32.

second-degree murder.[310] He challenged the indictment on the ground that the prosecutor failed to instruct the grand jury concerning the affirmative defense of extreme emotional disturbance.[311] Although the court in *Valles* noted that in some situations a failure to furnish adequate instructions may result in a defective indictment, it held that the prosecution is not required to provide the grand jury with every potential defense.[312]

Finally, the court rejected defendant's claim that it should deviate from established legal precedent by extending the concept of "heightened due process" to grand jury proceedings in potential capital cases.[313] It noted that all the courts of concurrent jurisdictions have declined to apply a heightened standard at the preliminary stages of a case, including grand jury proceedings.[314] For example, in *People v. Prater*,[315] the court rejected the defendant's contentions that because the case potentially involved the death penalty that he was constitutionally and statutorily entitled to a heightened due process standard.[316] Similar to *Bell*, defendant requested that she be entitled to material to assist her to decide whether to testify before the grand jury and to help her prepare her testimony.[317] The court denied this request, saying that the defendant is not entitled to be forewarned about the potential dangers involved in the event that she does decide to testify before the grand jury.[318] Because the right is statutorily granted, there are no constitutional implications to a defendant's decision to testify at a grand jury proceeding.[319] In effect, a

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[310] *Valles*, 62 N.Y.2d at 37, 464 N.E.2d at 418, 476 N.Y.S.2d at 50.

[311] *Id.* at 36-37, 464 N.E.2d at 418-19, 476 N.Y.S.2d at 50-51.

[312] *Id.*

[313] *Bell*, N.Y. L.J., June 16, 1997, at 32.

[314] *Id.*

[315] People v. Prater, 170 Misc. 2d 327, 648 N.Y.S.2d 228 (Sup. Ct. Kings County 1996).

[316] *Id.*

[317] *Id.* at 329-30, 648 N.Y.S.2d at 229.

[318] *Id.* at 330, 648 N.Y.S.2d at 230.

[324] *Id.* at 329, 648 N.Y.S.2d at 229. However, the court noted that in an effort to avoid unnecessary prosecution for murder in the first degree, that it would depart from the current trend in case law and hold that the grand jury

defendant must be able to anticipate the possibility that cross examination or testimony by others might affect the juror's assessment of her credibility, without additional information provided by the prosecution.[320]

In summary, the applicable New York statutes and case law do not support the defendant's federal and state constitutional claims for a "heightened due process" standard in grand jury proceedings involving capital cases. In adhering to New York precedent, the courts emphasize the importance of maintaining the investigatory and confidential nature of grand jury proceedings. Consequently, unless a court in its discretion determines that such disclosure would be in the public interest, the prosecution is not required to disclose any information that may assist a defendant in deciding whether to testify at the grand jury. In addition, the prosecution is not required to disclose any information to the grand jury regarding affirmative defenses, except that which is necessary to avoid unfounded prosecution. Since discovery is entirely governed by New York's statutory scheme, a defendant's pre-indictment rights in New York are far more limited than those accorded to a defendant during post-indictment proceedings.

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should be made aware of affirmative defenses such as extreme emotional disturbance. *Id.* at 332, 648 N.Y.S.2d at 231.

[320] *Id.* at 330, 648 N.Y.S.2d at 229-30.