IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 20, 2006

STATE OF TENNESSEE v. ANTHONY R. AIKENS, aka TONY AIKENS

Appeal from the Criminal Court for Loudon County
No. 11055 James B. Scott, Jr., Judge by Interchange

No. E2006-00528-CCA-R3-CD - Filed April 16, 2007

The Defendant, Anthony R. Aikens, aka Tony Aikens, was indicted for one count of extortion. The Defendant filed a motion to dismiss the indictment, which the trial court granted. The trial court concluded that the rule prohibiting indictment of any witness for any offense in relation to which he had been "compelled to testify before the grand jury by the district attorney general" required dismissal of the indictment against the Defendant. See Tenn. R. Crim. P. 6(j)(7) (2005).[1] The State appeals from the order of dismissal. Because the indictment was improperly dismissed, we reverse and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which Joseph M. Tipton, P.J., joined. JAMES CURWOOD WITT, JR., J., not participating.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; and Edward Bailey, District Attorney General Pro Tempore, for the appellant, State of Tennessee.

T. Scott Jones, Knoxville, Tennessee, for the appellee, Anthony R. Aikens.

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[1] The Tennessee Rules of Criminal Procedure have recently been revised, said changes becoming effective July 1, 2006. See Compiler's Notes, Tenn. R. Crim. P. (2006). As part of that undertaking, numerous sections and/or subparts of various rules were renumbered. Previously, the section of Rule 6 that addressed immunity of a witness compelled to testify before the grand jury was (j)(7). This immunity provision now appears in section (j)(6). However, the grand jury in this case convened prior to July 1, 2006. Therefore, we will cite to the provision in effect in August of 2005, that is, (j)(7).

OPINION

I. Factual Background

A. Subpoena

On August 2, 2005, the District Attorney General for the Ninth Judicial District of Tennessee sent a letter to the Loudon County Grand Jury requesting "the issuance of subpoena or subpoena duces tecum" to seven individuals enumerated therein, which included the Defendant. The grand jury issued a subpoena to the Defendant, the Chief Deputy of the Loudon County Sheriff's Office, commanding him to appear before the court on Monday, August 8, 2005, and to bring the following:

> The complete investigative file concerning an incident between Billy Hall and Greg Berry which is alleged to have occurred on April 21, 2004 at about 1237 hours in the Loudon County Jail including, but not limited to, video tape showing activity at the location of Loudon County Jail door 500 - 501 on April 21, 2004 at about 1237 hours, pictures of Greg Berry taken by Lt. Investigator John Houston on or about April 21, 2004, floppy disks from the digital camera used by Lt. Investigator John Houston containing images of Greg Berry, any and all written statements or notes from interviews taken by Lt. John Houston concerning the incident to include specifically the statements of Greg Berry and Billy Hall.

The Defendant did appear before the grand jury on August 8 as commanded.

B. Indictment 11055

On August 10, 2005, the grand jury returned indictment 11055 against the Defendant charging him with one count of extortion. The indictment was filed with the court clerk on August 11, 2005. Indictment 11055 read as follows:

> The Grand Jurors of the State of Tennessee, duly summoned, elected[,] impaneled, sworn, and charged to inquire in and for the body of the County aforesaid, in the State aforesaid, upon their oath, present that Anthony R. Aikens aka Tony Aikens, on or about June 21, 2002, in the County and State aforesaid and before the finding of this Indictment, did unlawfully and intentionally obtain property, being $9,649.25 from Eddie W. Witt by coercion, to wit: threatening Eddie W. Witt that unless he agreed to giving up said monies to the Loudon County Sheriff's Office Drug Fund they would seize and keep that sum plus an additional $10,000.00 and his automobile, in violation of T.C.A. 39-14-112, and against the peace and dignity of the State of Tennessee.

The Defendant had been initially charged for the alleged extortion in December of 2004—indictment 10897. Indictment 10897 was dismissed upon motion of the Defendant. The case

was resubmitted to the grand jury in August of 2005, which resulted in indictment 11055. The Defendant was arraigned on the re-indicted extortion charge on August 15.

On September 9, 2005, the Defendant filed a motion to dismiss indictment 11055 "for tainted grand jury proceedings." The Defendant alleged as follows:

> 1) [The Defendant] was indicted by the Loudon County Grand Jury on December 14, 2004, for alleged extortion of Eddie Witt on or about June 21, 2002. The Grand Jury Foreman at that time was H. Bowen Carey.[2]
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> 2) On July 25, 2005, the charge against [the Defendant] was dismissed for an improper and illegal taint of the Grand Jury process, where the presence and interference of private attorney Jess Beard jeopardized the secrecy and impartiality of the Grand Jury to such a degree that dismissal of the indictment was the only proper remedy for this Court.
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> 3) [The Defendant] was re-indicted for the alleged extortion on August 10, 2005. Although the names of the grand jurors remain secret, [the Defendant] understands that the Grand Jurors were from a different term, and thus, are upon information and belief, different grand jurors than those that indicted him the first time. However, H. Bowen Carey again acted as grand jury foreman and signed the re-indictment against [the Defendant]. See Indictment 11055.
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> 4) A criminal defendant has a constitutional right to a fair and impartial grand jury. A grand jury foreman is the ministerial and administrative lead of that body, responsible for guiding the decision-making process of the grand jury. It necessarily follows that a criminal defendant has a constitutional right to a fair and impartial grand jury foreman. To deny an accused a fair and impartial grand jury and foreman effectively denies the accused his constitutionally-protected right to due process of law.
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> 5) It is recognized that a grand jury foreman has a right to vote in grand jury proceedings, with that vote being of equal weight as his grand jury colleagues. At this time, it is unknown whether the grand jury foreman voted in these proceedings. Nonetheless, [the Defendant] states that given the leadership role of Foreman Carey, the taint he brought to the proceedings would naturally spread through the entire jury, poisoning the proceedings.
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> 6) It is not required that a grand juror be free from all opinion as to the guilt of the accused. See State v. Felts, 220 Tenn. 484, 418 S.W.2d 772. The grand jury

[2] The transcript of the hearing reflects the foreman's name as "J. Hammill Carey"; however, on the indictment, his name and signature appears as H. Bowen Carey, Jr.

does not determine the guilt or innocence of an accused beyond a reasonable doubt, but does determine whether probable cause permits indictment. While it is well-settled that the Court may not question the grand jury's vote on the weight of the evidence presented, the Court may review allegations of taint within the grand jury process.

7) When a grand jury foreman is allowed to "repeat" his role, it cannot be said that he is not tainted by the previous proceedings, especially where, as in this case, the foreman previously had the benefit of a private attorney assisting the grand juror to testify before him. A grand jury may issue its own inquisition into allegations of crime. However, the decisions of the body as a whole manifesting into indictment must be rendered with regard for the constitutional rights of the accused.

8) Clearly, the taint of the first grand jury proceedings in this matter was improperly carried over to the subsequent proceedings by the continued rule of the same foreman. Due process does not tolerate such poisoning of the well.

C. Indictment 11076

On August 11, the grand jury returned indictment 11076 A and B against the Defendant and Captain Tony Arden charging them with tampering with evidence for events occurring on August 21, 2004. The Defendant, along with Captain Arden, filed a motion to dismiss indictment 11076 A and B based upon the immunity provided for by Tennessee Rule of Criminal Procedure 6(j)(7) (2005). The Defendant and Captain Arden argued that, based upon the grand jury subpoena to bring the April 21, 2004 file, they had been compelled to testify before the grand jury and were therefore provided immunity under Rule 6(j)(7).

D. Hearing

District attorneys general pro tempore were appointed in both cases to investigate and prosecute the charges. A hearing on the motions was held on November 15, 2005. The court clerk for Loudon County, Lisa Niles, testified that the grand jurors who returned indictment 11055 were a different group than the grand jurors who returned indictment 10897. She further testified that the grand jury foreman was the same for both sessions. Ms. Niles stated that subpoenas were issued to "an unknown defendant" in indictment 11055. Ms. Niles acknowledged that the same grand jury returned indictments 11055 and 11076. According to Ms. Niles, the Loudon County Grand Jury met three times a year.

Assistant District Attorney General Frank Harvey testified that the Defendant and Captain Arden were compelled to appear before the grand jury and, "if questioned, to give testimony." He also testified that only one grand jury was impaneled during August of 2005 and that it was comprised of different members than the December 2004 grand jury. General Harvey stated that Mr. Carey had "been the grand jury foreman for some time now" and that Mr. Carey was the grand jury foreman in 2004 and 2005. General Harvey also stated that he communicated with the grand jury

foreman concerning "instructions about . . . dealing with documents regarding these two defendants . . . ."

H. Bowen Carey, Jr., testified that he had served as foreman of the Loudon County Grand Jury for "about three years" and that he was the foreman for both the December 2004 and August 2005 sessions of the grand jury. Mr. Carey stated that, other than himself, the grand jury was comprised of different members during these two sessions.

Mr. Carey testified that he did not vote on indictment 11055. He further stated that Eddie Witt and Martha Jane Witt testified before the grand jury regarding the extortion charge and that his signature appeared on the indictment endorsing the names of the persons testifying in front of the grand jury in connection with the extortion charge. He testified that, to his recollection, no other witnesses testified before the grand jury.

In regard to the Defendant's appearance before the grand jury on the eighth of August, Mr. Carey acknowledged that the grand jury asked the Defendant "a specific question with regard to the nature" of the investigation in indictment 11076. According to Mr. Carey, the Defendant was never questioned by the grand jury regarding indictment 11055. Mr. Carey related that the Defendant requested to appear before the grand jury in connection with the extortion charge but that the grand jury denied the request. No evidence was presented as to when this request was made.

Mr. Carey testified that he was "not able to divorce [his] mind from" the information he gained in August of 2004 "with regards to the extortion charge . . . that was subsequently dismissed." He also stated that he did not relate to the grand jury any knowledge about the case that he gained prior to the August 2005 term. According to Mr. Carey, he did not "advocate or suggest to the other members of the grand jury, whether or not they should return a bill of indictment in the case against the [D]efendant[.]"

The Defendant filed a post-hearing brief in case 11055, wherein he framed the issue as follows:

> 1. Did the presence and actions of Grand Jury Foreman H. Bowen Carey before the Loudon County Grand Jury taint the Grand Jury proceedings in this cause, where:
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> > i. Carey served as the foreman on a previous term of the Grand Jury;
> >
> > ii. That body returned an indictment against [the Defendant] for the exact same extortion claim as pending under the current indictment, which was later dismissed.

iii. The previous indictment was dismissed on grounds of an improper and illegal taint of the Grand Jury process occurring through the presence and interference of private attorney Jess Beard which jeopardized the secrecy and impartiality of the Grand Jury, to such a degree that dismissal of the indictment was the only proper remedy for this Court.

2. If any taint was created from the presence and/or actions of Grand Jury Foreman H. Bowen Carey before the Loudon County Grand Jury, is dismissal of the indictment a proper remedy available to the Court?

E. Trial Court's Findings

The trial court announced its decision in open court on January 17, 2006, and read its written opinion into the record. The written opinion reflected only the trial court's reasoning for dismissal of indictment 11076 A and B, that is, Tennessee Rule of Criminal Procedure 6(j)(7) provided immunity from indictment because the Defendant and Captain Arden had been compelled to testify before the grand jury in relation to that offense. The trial court referenced case 11055 during the reading of the opinion stating as follows:

> Now the defendants in this case, they contend . . . that the Grand Jury Foreman should have been disqualified for bias because of this other case. Now frankly, I didn't address that question because Grand Jury foremen, they don't have to like somebody. They don't have to really like what the individual did. They can set [sic] on several indictments and endorse them. But basically, I have no proof of bias or prejudice. But I'm not even addressing that, Mr. Carey.

After the trial court announced its decision, the prosecutor addressed the court on case 11055. The prosecutor noted that the Defendant "only addressed one issue" in his motion to dismiss indictment 11055 and "that issue was that the same foreman of the present case was the foreman in the case that was dismissed." The trial court acknowledged that the issue as presented by the Defendant in case number 11055 was not addressed in the court's written opinion. In addressing the dismissal of indictment 11055, the trial judge stated, "[O]ne of the problems I have is I really don't know from what the probable cause was determined by this Grand Jury. If, for instance, Mr. Carey discussed with that Grand Jury what he had heard at that previous, then it is, in fact, tainting it." The trial court further stated that "the problem" was "anything dealing with the April 21st, the compelling of that investigative file, taints the returning of it." Finally, the court explained dismissal of indictment 11055 as follows:

> But I'm not finding Mr. Carey—and I want the record to reflect this—the fact that Mr. Carey may act on one indictment, and another indictment on the same individual would not taint that. It's the aspect of the compelling to duces tecum someone to the Grand Jury. And that is incorporated inherently in the decision. . . .

. . . .

One of the areas of concern that I have as it relates to methods of prosecution. One has to do with establishing probable cause before a neutral, detached Magistrate. And the other is to begin at the Grand Jury level. And there have been no warrants that I know of issued in this case. But I'm surmising that I—any more than I know, and I'm not going to be trying grand jurors' remembrance of what they entertained and what they didn't entertain. My most important concern is asking someone to bring the file. Not just asking, but compelling.

Now there is this aspect that General Bailey has related to me that 6(j)(7) isn't available to those witnesses who voluntarily come before the Grand Jury. They're not protected by it. And he says that the Defendant . . . asked. Now I don't know whether it was before or after the fact. I'm deciding this based upon—and I looked in Mr. Carey's eyes (indiscernible) testifying. And I'm not going into what they entertained in the way of that Grand Jury, because that has to do with secrecy. We don't want to try out here in the courtrooms what they make. That when you're compelled to come and bring a file, and it is a subject of the April 21st, that raises a flag in my mind.

. . . [T]he problem that I have is extracting from a Grand Jury Foreman, even if he didn't vote on it, because you can have twelve votes. The Grand Jury Foreman doesn't have to vote, and quite often doesn't, because he's there administratively, like signing subpoenas and doing other things, like giving an oath.

Basically speaking, it's that compelling aspect that concerned me. And that's the reason I say inherent in the procedure here. If you investigated something that had to do with that file, I don't know what they drew in the way of inference. They may have thrown the whole file out. I have no idea, because I don't have that before me. I don't have a copy of the transcript. . . . But I looked into Mr. Carey's eyes here, and I thought, well this man shouldn't have to remember what they discussed back in the Grand Jury room. That's of no consequence. It's the compelling.

. . . .

And with those things in mind, I really feel that there is some brushing of—if you look at that quote from [McCullom], it says it makes no difference if it doesn't form the probable cause basis from which the Grand Jury returned the indictment. It's the tainting of that which we, as judges, and you as defense attorneys, the State as Attorney General, don't have a right to know what the probable cause was. But procedurally, the method of getting there is tainted.

Thereafter, the trial court entered an order dismissing both indictments. The State filed a timely notice of appeal in case number 11055. The State does not appeal the dismissal of indictment 11076 A and B.

II. Analysis

The State argues that the trial court improperly dismissed indictment 11055, contending that "the trial court erroneously dismissed No. 11055 for the same reasons as it dismissed No. 11076 A and B, even though the cases and the legal issues were completely unrelated." Specifically, the State submits that Mr. Carey's continued service as the grand jury foreman in August of 2005 did not "taint" the process and that Defendant was never "compelled to testify" in case 11055. The Defendant argues that the trial court properly ruled that Rule 6(j)(7) was violated and that Mr. Carey's "tainted participation offends the fundamentals of due process."

First, we note that, in his motion to dismiss indictment 11055, the Defendant contended only that the grand jury proceedings were tainted due to the "presence and actions" of the grand jury foreman. Furthermore, no argument was raised at the hearing on the motion to dismiss regarding Tennessee Rule of Criminal Procedure 6(j)(7) as it related to indictment 11055. The issue was likewise not addressed in the Defendant's post-hearing brief. Nonetheless, the trial court found that "anything dealing with the April 21st, the compelling of that investigative file, taints the returning of it" and dismissed indictment 11055.

Our Rules of Criminal Procedure immunize witnesses compelled to testify before the grand jury, but that rule is not applicable to indictment 11055. Tennessee Criminal Procedure Rule 6(j)(7) provides that "[n]o witness shall be indicted for any offense in relation to which the witness has been compelled to testify before the grand jury by the district attorney general." Our supreme court has held that, "[w]hen a witness ha[s] been compelled to testify by subpoena or court order, . . . such witness cannot be indicted on account of the same." State v. McCollum, 904 S.W.2d 114, 116 (Tenn. 1995) (citing State v. Stone, 29 S.W.2d 250, 251 (Tenn. 1930)). The witness is provided immunity from indictment even if the testimony given is "utterly insufficient to form the basis of a prosecution against the witness." Id. Dismissal of the indictment is the proper remedy only if the testimony given before the grand jury "relate[s] to the offense later charged against" the witness. Id.

Here, the compelled testimony given before the grand jury did not relate to the extortion charge but to the tampering with evidence charge. The tampering with evidence charge related to an incident that occurred on April 21, 2004. The extortion charge concerned events which occurred on June 21, 2002. The subpoena issued by the grand jury commanded the Defendant and Captain Arden to bring before the grand jury the "complete investigative file" concerning the April 21 incident. The Defendant was not compelled to testify in aid of the extortion charge. Thus, we conclude that the Defendant was not entitled to immunity from indictment and that the trial court improperly dismissed indictment 11055 on this ground.

The trial court based dismissal of the indictment on Rule 6(j)(7) and specifically concluded that it found no misconduct on the part of the grand jury foreman. We agree with the trial court that there was no proof of bias or prejudice on the part of the grand jury foreman that would result in dismissal of the indictment.

It is undisputed that the August 2005 grand jury was comprised of different members than the December 2004 grand jury and that the same grand jury foreman, Mr. Carey, presided over both sessions of the grand jury. Mr. Carey testified that he did not convey any information he learned during the December 2004 session of the grand jury to the members of the August 2005 grand jury. Mr. Carey admitted that he was "not able to divorce [his] mind from" the information he gained in August of 2004 "with regards to the extortion charge . . . that was subsequently dismissed." Finally, Mr. Carey stated that he did not vote on indictment 11055.

The record fails to support the Defendant's allegation of bias on the part of the foreman of the grand jury. The only express disqualification of grand jurors by reason of interest is provided for in Rule 6(c) (2005), Tennessee Rules of Criminal Procedure. This prohibition was previously set forth in Tennessee Code Annotated section 40-1613, which was repealed in 1979. Rule 6(c) (2005) provides as follows:

> (1) Disqualification. — No member of the grand jury shall be present during or take part in the consideration of a charge or the deliberation of the other jurors thereon if the member:
>
> (A) is charged with an indictable offense; or
> (B) is a prosecutor; or
> (C) the offense was committed against the member person or property; or
> (D) is related to the person charged or to the victim of the alleged crime by blood or marriage within the sixth degree, computing by the civil law.

The grand jury foreman in this case does not fit any of the Rule 6(c) criteria.

The courts of this state "have never required grand jurors to be free from previous opinions as to the guilt or innocence of a defendant." State v. Robert N. Gann, No. 01-C-019011CR00294, 1992 WL 75845, at *3 (Tenn. Crim. App., Nashville, Apr. 16, 1992) (citing State v. Felts, 418 S.W.2d 772, 774 (1967); State v. Chairs, 68 Tenn. 196, 197 (1877)).

> The reasons assigned in support of this rule are that a grand jury, being an accusatory and not a judicial body, has the right and obligation to act on its own information, however acquired; that the oath required to be taken by grand jurors contemplates that they may be called on to act in the cases of both enemies and friends and requires

> them to inquire diligently into the commission of crimes; and that those who live in the vicinity of the place where the crime was committed know better than others the character of the parties and of the witnesses and are, therefore, particularly proper members of the grand jury. However, there seems no authority which goes so far as to hold that this would be true where the jurors had determined through malice or bribery to violate their oaths.

Rippy v. State, 550 S.W.2d 636, 642 (Tenn. 1977); see also Felts, 418 S.W.2d at 489. Therefore, "in the absence of a statutory prohibition, express malice, bribery or other equally reprehensible conduct, there is no legal objection to a person with bias or prejudice serving as a member of a grand jury." Rippy, 550 S.W.2d at 642.

In Chairs, the grand jury foreman was "one of the magistrates who heard the case upon a preliminary examination, and committed the defendants to answer the charge . . . . " Chairs, 68 Tenn. at 196. Our supreme court concluded that the magistrate was qualified to act as the grand jury foreman. Id. at 197. We disagree with the Defendant that Chairs is inapplicable to this case. In accordance with this long standing precedent, the fact that the grand jury foreman in this case may have had a preconceived opinion about the case did not disqualify him from serving on the grand jury in August of 2005.[3] "[W]e do not understand that our laws require that the grand jurors shall be free from any previous opinion as to the guilt of the accused." Id.

CONCLUSION

Based upon the foregoing reasoning and authorities, the trial court's decision to dismiss indictment 11055 against the Defendant is reversed. The matter is remanded for further proceedings.

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DAVID H. WELLES, JUDGE

[3] The Defendant argues that, because the 2005 revisions to the Rules of Criminal Procedure made the voting power of the foreman explicit and necessary, the role of the foreman is no longer "merely an administrative function." First, he does not explain how this change to the rule is relevant to the analysis of whether the grand jury foreman was biased. Moreover, as previously noted, the revisions were not effective in August of 2005. Finally, this change to the rules does not affect the outcome of this case as the foreman "is the spokesperson for the grand jury and has the same voting power as any other grand jury member. Not only does the foreman not have the power to veto an indictment, his authority, within this context, is no greater than any other member of the grand jury venire." State v. Jefferson, 769 S.W.2d 875, 877 (Tenn. Crim. App. 1988) (citations omitted).