

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 82

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THE PEOPLE OF THE STATE OF NEW YORK, :

-against- :

RICHARD HOVAN, DEFENDANT :

DECISION AND ORDER  
INDICTMENT 2557-13

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CHARLES H. SOLOMON, J.:

In a motion filed October 16, 2013, defendant moves to dismiss the indictment claiming that there has been "outrageous government conduct." Defendant argues that the People are attempting to deny him the right to counsel of his choice. Specifically, defendant claims that the issuance of a subpoena for his attorney, Vinoo Varghese, to testify before a grand jury investigating Marina Bontkowski, defendant's ex-fiancee, is an attempt by the People to deprive him of representation by Varghese. Parenthetically, this represents defendant's second motion to dismiss the indictment based upon improper prosecutorial conduct. The first motion was denied in a decision filed October 16, 2013. The People oppose defendant's instant motion in a response filed November 26, 2013.

Defendant was initially charged in Indictment 1559-12 with two counts of Criminal Sexual Act in the Third Degree [Penal Law §130.40(2)] and Endangering the Welfare of a Child [Penal Law §260.10(1)]. To summarize the facts, the charges in the indictment stem from allegations that between April 22, 2011 and April 24, 2011, and again between May 14, 2011 and May 15, 2011, defendant, a teacher at a private school in Bronx County, engaged in sexual acts with one of his female students who was sixteen years old at the time.<sup>1</sup> The allegations in the indictment are alleged to have occurred in the apartment defendant shared with his fiancee

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The history of this case from 2011 to the present is set forth in great detail in the papers submitted by the parties. They need not be repeated in the Court's decision.

Marina Bontkowski, in Manhattan. The evidence in the case was presented to a grand jury on April 3, 2012 and April 4, 2012. Bontkowski testified in the grand jury that she walked into the apartment unexpectedly on May 15, 2011 and saw defendant and the underage girl engaged in sexual act. When asked in the grand jury if the young girl was wearing a shirt when she walked in, Bontkowski testified that she could not recall. According to the People, prior to the grand jury presentation Bontkowski had reconciled with defendant and her testimony in the grand jury was materially different from the accounts she had previously given the authorities. Rather than testify that the young girl was topless when she walked in, her testimony was that she could not recall. This testimony was obviously more favorable to defendant and the People suspected that Bontkowski had committed perjury. Defendant was arraigned on Indictment 1559-12 on April 16, 2012 and at all times has been represented by Vinoo Varghese. Indictment 1559-12 was pending in Part 82 until June 10, 2013 when it was superseded by Indictment 2557-13. Defendant was arraigned on that indictment on June 11, 2013, and it is that indictment which the defense seeks to have dismissed in the instant motion.

Indictment 2557-13 charges defendant with three counts of Criminal Sexual Act in the Third Degree [Penal Law §130.40(2)], five counts of Rape in the Third Degree [Penal Law §130.25(2)] and Endangering the Welfare of a Child [Penal Law §260.10(1)]. In addition to the same testimony the complainant gave before the initial grand jury, she now testified that she and defendant actually had sexual intercourse during the same periods. She explained that she did not testify that she had sexual intercourse with defendant in the previous grand jury because she still had feelings for defendant and did not want him to get into a lot of trouble. Based primarily on her testimony, the grand jury now indicted defendant for five counts of Rape in the Third

Degree, as well as for the three counts that were in the first indictment, namely, two counts of Criminal Sexual Act in the Third Degree [Penal Law §130.40(2)] and one count of Endangering the Welfare of a Child [Penal Law §260.10(1)]. Defendant was additionally indicted for a third count of Criminal Sexual Act in the Third Degree [Penal Law §130.40(2)]. Marina Bontkowski, did not testify in the second grand jury presentation. The indictment was filed on June 10, 2013, and the next day defendant was arraigned on the indictment and entered a not guilty plea.

During their investigation into the charges against defendant, the People became aware of certain information involving defendant and Bontkowski. The People discovered certain communications between them concerning Bontkowski's prospective grand jury testimony before the first grand jury as well as her cooperation with the authorities. According to the People, these conversations demonstrate that defendant wanted Bontkowski to speak to his attorney, Varghese, about her appearance before the grand jury. After further investigation, the People certainly had reason to suspect that Bontkowski had lied in the grand jury when she testified that she did not recall whether the underage girl was topless. Accordingly, the People opened a grand jury investigation into whether Bontkowski had committed perjury before that grand jury. At all times, Bontkowski has been represented by her own attorney and at no time was she ever represented by defendant's attorney, Varghese.

Pursuant to the grand jury investigation into Bontkowski, on October 11, 2013 Assistant District Attorney (ADA) Evan Krutoy contacted Varghese's office and spoke to his associate Farrel Miller. Krutoy indicated that he would like to meet with Varghese to discuss his conversations with Bontkowski. Miller told Krutoy that he would speak to Varghese and they would get back to him regarding Krutoy's request for a meeting. Krutoy informed Miller that

Varghese would be called as a witness before the grand jury and that Varghese should consider whether or not his status as a witness would affect his continued representation of defendant. On October 16, 2013, in an email exchange between Krutoy and Varghese, Krutoy reiterated his request to meet with Varghese to discuss his conversations with Bontkowski. Varghese immediately replied that assuming *arguendo* he had had conversations with Bontkowski, he would not discuss the nature of those conversations with Krutoy. Later that morning, the People issued a subpoena for Varghese to appear before the grand jury on November 21, 2013 in the matter of *People v. Marina Bontkowski*.

Defendant's case was on the Court's calendar for October 16, 2013 and when defendant appeared that afternoon with Varghese, the defense filed the instant motion to dismiss the indictment. The case was next calendared for the afternoon of November 19, 2013, to have the People's respond to the defense motion to dismiss. That same morning Marina Bontkowski appeared in AR-1, the arraignment part in criminal court. She was represented by private counsel and pleaded guilty to the class A misdemeanor of Perjury in the Third Degree (Penal Law §210.50). During her plea allocution, Bontkowski admitted under oath the following:

On April 4, 2012, I testified before a grand jury in this building about an encounter that I saw between my ex-fiancé, Richard Hovan, and a high school student inside our apartment at 101 West 23<sup>rd</sup> Street, in Manhattan. Although I swore to tell the truth, I failed to tell the truth about one fact. When asked whether the girl was wearing a shirt or not, I replied that I could not remember. That was incorrect. I recalled that the student was topless; but I intentionally lied about the fact to the grand jury, even though I recognized that the grand jury's question regarding how the student was dressed was important to the proceeding.

Immediately after defendant plead guilty and waived her right to appeal, she was sentenced to a conditional discharge by Judge Alexander Tisch. Because of her plea, the grand jury

investigation into Bontkowski ended, and the subpoena served on Varghese was withdrawn by the People. Consequently, Varghese was never required to appear before the grand jury.

In the motion before the Court, defendant argues that the People's attempt to subpoena his attorney to testify before the grand jury constitutes the "latest outrage in the People's campaign to threaten, bully, and browbeat Mr. Hovan into pleading guilty, and punishing him when he does not." Defendant claims that the People's investigation into Bontkowski was "spurious" and characterizes their issuance of a grand jury subpoena to Varghese as "a blatant attempt, as their chances of victory spiral ever-downwards, by the People to have counsel removed from the case in the hope that another, less-vigorous attorney will take over." Defendant also calls the People's action in subpoenaing Varghese "unconstitutional" and "unethical," and argues that the indictment should be dismissed because the People have interfered with defendant's right to counsel of his choice.

Defendant's motion is denied. Defendant claims that the investigation into Marina Bontkowski was simply an attempt by the People to deprive him of the counsel of his choice. That claim, however, is belied by the fact that Bontkowski pleaded guilty to perjury based upon her lying before the first grand jury that indicted defendant in 2012. It cannot seriously be argued that the People's investigation into Bontkowski was, as defendant refers to it "spurious" or "bogus," in light of Bontkowski's admission of guilt.

Moreover, the People have the statutory authority to submit to a grand jury any available evidence concerning the commission of a crime over which they have jurisdiction. CPL 190.55(2)(c). In connection with that authority, the People may summon before that grand jury any witness whom they believe has relevant information concerning the crime under

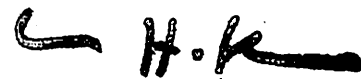
investigation. CPL 190.50(2). Here, based upon the evidence available to them, the People had a sound basis for issuing a subpoena to defendant's attorney to appear before the grand jury investigating whether Bontkowski committed perjury. Therefore, the issuance of that subpoena was far from being "unethical," and was in all respects legal and proper.

The question of whether defendant would have been deprived of the right to counsel of his choice had his attorney actually been required to appear before the grand jury investigating Bontkowski, is a question that need not be answered. Since the grand jury subpoena served on defendant's attorney was withdrawn by the People after Bontkowski's guilty plea, the issue is now moot. And, no serious argument can be made that the mere issuance of a subpoena, by itself, in any way affected defendant's right to counsel of his choice.

Simply put, what defendant has labeled "outrageous government conduct," was quite the opposite. The issuance of the grand jury subpoena to defendant's attorney was in all respects legal, ethical and proper. Therefore, defendant's motion to dismiss the indictment is denied.

This opinion constitutes the decision and order of the Court.

Dated: January 14, 2014  
New York, New York



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CHARLES H. SOLOMON, J.S.C.