

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 2010-1105
[Death Penalty Case]

Appellee,

vs.

GREGORY C. OSIE,

*On Appeal from the
Twelfth District Court of Appeals
CA2010-08-201*

Appellant.

MOTION IN OPPOSITION TO SUPPLEMENTATION OF THE RECORD

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MOTION IN OPPOSITION

COMES NOW, the State of Ohio, by and through Prosecuting Attorney Michael T. Gmoser and Assistant Prosecuting Attorney Michael A. Oster, Jr., and asks that this Honorable Court to DENY the motion to supplement the record in the above captioned appeal. A memorandum of law is herein attached.

Respectfully submitted,
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MEMORANDUM

Appellant has requested this Court to order the Common Pleas Court of Butler County to supplement the record with the grand jury transcripts. However, Appellant has absolutely no information that anything in the grand jury transcripts will be useful to his appeal. Further, Appellant has no information that anything occurred out of the ordinary during the presentation of his case to the grand jury. Rather, Appellant has asked this Court to lift the sacred veil of grand jury secrecy because he wants to speculate about unsubstantiated possible irregularities in the presentation of his case, of which he has no factual underpinnings. As Appellant can demonstrate neither a particularized need nor that the trial court utilized these transcripts in any way, the State asks this court to deny Appellant's request.

A. Particularized Need

Generally, grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and the defense shows that a particularized need for disclosure exists that outweighs the need for secrecy. Crim.R. 6(E); *State v. Greer* (1981), 66 Ohio St.2d 139, paragraph 1 and 2 of the syllabus; *State v. Patterson* (1971), 28 Ohio St.2d 181, paragraph three of the syllabus. Whether the defendant has demonstrated a particularized need for disclosure of grand jury testimony is a question of fact for the trial court's determination. *Greer*, paragraph 3 of the syllabus. This standard holds, no matter the severity of the penalty, including capital murder. *State v. Treesh*, 90 Ohio St.3d 460, 2001-Ohio-4, *State v. Bengel*, 75 Ohio St.3d 136, 1996 -Ohio- 227.

In the present case, Appellant broadly speculates that because the Assistant Prosecutor who signed the indictment in his case is being investigated for possibly have a part in creating irregularities in two subsequent indictments, that are wholly unrelated to his case, that the standard for releasing the grand jury transcripts has been satisfied. However, not only does this argument fail to include any facts from his case, but it also ignores the well established law that particularized need for the release of grand jury testimony cannot be established on the basis of speculative allegations. See, *State v. Godfrey*, 181 Ohio App.3d 75, 907 N.E.2d 1230, 2009-Ohio-547.

What is more, in *United States v. Hardy*, 762 F.Supp. 1403, 1413-1414 (D.Ha.1991) the court instructively stated:

In *United States v. DeTar*, 832 F.2d 1110 (9th Cir.1987), the Ninth Circuit held as insufficient the movant's allegation that an unnamed grand juror told him that a previous grand jury had voted not to indict. DeTar, 832 F.2d at 1113. "It is not sufficient for [movant] to assert that he has no way of knowing whether prosecutorial misconduct occurred." DeTar, 832 F.2d at 1113 (citing *United States v. Bennett*, 702 F.2d 833, 836 (9th Cir.1983)). "Speculation cannot justify th[e] court's intervention into the grand jury's proceedings." *United States v. Claiborne*, 765 F.2d 784, 792 (9th Cir.1985), cert. denied, 475 U.S. 1120, 106 S.Ct. 1636, 90 L.Ed.2d 182 (1986); see also *United States v. Walczak*, 783 F.2d 852, 857 (9th Cir.1986); *United States v. Ferreboeuf*, 632 F.2d 832, 832 (9th Cir.1980) ("Mere 'unsubstantiated, speculative assertions of improprieties in the proceedings' do not supply the 'particular need' required to outweigh the policy of grand jury secrecy." (Emphasis added).

Jurisprudence throughout this country demonstrates that unsubstantiated assertions of improprieties before the grand jury do not even approach the showing necessary to meet the

particularized need standard that would justify infringement of the secrecy surrounding grand jury proceedings. See, *United States v. Tucker*, 526 F.2d 279, (5th Cir.1976), cert den 425 US 958, 48 L Ed 2d 203, 96 S Ct 1738; See also, *United States v. Coffey*, 361 F. Supp. 2d 102 (E.D. N.Y. 2005), *Hamling v. United States*, 418 U.S. 87, 139 n. 23, 94 S.Ct. 2887, 2918 n. 23, 41 L.Ed.2d 590 (1974) (Grand jury proceedings carry a “presumption of regularity.”), *United States v. Naegele*, 474 F.Supp.2d 9, 10, (D.D.C.,2007) (“It is also settled that conclusory or speculative allegations of misconduct do not meet the particularized need standard; a factual basis is required.”)

Specific to speculative allegations of possible prosecutorial misconduct, courts have held that this is likewise insufficient to establish a particularized need. See, *United States v. Donahue*, 574 F.Supp. 1263, 1266 (D.C.Md.1983). In *Donahue*, the Court found “[c]learly insufficient is a defendant's mere assertion that inspection of grand jury minutes might reveal a ground for a motion to dismiss the indictment. *United States v. Harbin*, 585 F.2d 904, 907 (8th Cir.1978). Such “ ‘fishing expeditions’ ” are inadequate, *Thomas v. United States*, 597 F.2d 656, 658 (8th Cir.1979), as is a defendant's bare assertion of prosecutorial misconduct, *United States v. Edelson*, 581 F.2d 1290, 1291-92 (7th Cir.1978), cert. denied, 440 U.S. 908, 99 S.Ct. 1216, 59 L.Ed.2d 456 (1979).” (Emphasis added). The *Edelson* court similarly reasoned that “[t]o begin with, Edelson has not pointed to anything in the record which might suggest that the prosecution engaged in improper conduct before the grand jury. His claims on this point, therefore, amount to nothing more than unsupported speculation, and this is not enough to

constitute a ‘particularized need.’” *Edelson*, 581 F.2d 1290, 1291.

In the present case, Appellant has attempted to argue that the particularized need standard is satisfied by his broad speculation which is solely based on matters outside of the record in his case. Appellant’s argument in its basic form is that since there might be a possible irregularity, that might create an appellate issue, that is based upon potential claims in two other cases, which claims have not been substantiated themselves as involving prosecutorial misconduct, he should be able to violate the secrecy of the grand jury. However, a particularized need has not been shown as there is nothing in the record of Appellant’s case which either factually supports his speculative claims or any existence of an irregularity. Rather, by the finding of guilty on the charges and specifications, the three judge panel demonstrated that not only was there probable cause to indict, but also proof beyond a reasonable doubt that Appellant committed his crimes.

Therefore, as Appellant has demonstrated neither a particularized need nor that the interests of justice would require that the transcript be released¹, the State opposes this motion and asks that said motion be denied.

B. Never Before Trial Court

Appellant also appears to argue that if he were to discover anything in the grand jury transcripts, that this should be allowed before this Honorable Court even though the trial court

¹ It must be noted that Appellant can, and has, raised this issue in post conviction proceedings, which would be the more proper legal vehicle.

was never privy to it. This argument is in direct contravention to App.R. 9(E). App.R. 9(E) provides, in pertinent part:

* * * If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

Therefore, pursuant to App.R. 9(E), a reviewing court should only add material that was inadvertently omitted from the record by accident, but was in fact considered by the trial court in rendering its decision. See *Paillet v. Univ. of Cincinnati Hospital* (June 30, 1983), Franklin App. No. 82AP-952, unreported. As such, "it is axiomatic that an appellate court cannot add material to the record that was not a part of the trial court's proceedings and then decide the appeal on the basis of a new matter." *McGeorge v. McGeorge*, Franklin App. No. 00AP-1151, 2001 WL 537037, citing *State v. Ishmail* (1978), 54 Ohio St.2d 402.

In the present case, the grand jury transcripts were neither utilized by the trial court in reaching a decision nor were they part of the trial court's proceedings. As such, they should not be added to the record now, for the first time on appeal. See, *Ishmail*, 54 Ohio St.2d 402, See, also, *Cornwell v. Bradshaw*, 559 F.3d 398 (6th Cir. 2009) (Ohio law forbids the introduction of evidence that was not part of the trial court's record on appeal). Instead, this type of material fits into the category of items that could be properly litigated in a post-conviction petition pursuant to R.C. § 2953.21.

Further, Appellant's request to supplement the record appears to conflict with this Court's rule regarding supplementation. Specifically, this Court states that "[i]f any part of the record is not transmitted to the Supreme Court but is necessary to the Supreme Court's consideration of the questions presented on appeal, the Supreme Court, on its own initiative or on motion of a party, may direct that a supplemental record be certified and transmitted to the Clerk of the Supreme Court in accordance with S.Ct. Prac. R. 5.3(B)." S.Ct. Prac. R. 5.8. In the present case, as the trial court did not evaluate the grand jury transcripts, there is not even a partially developed, much less a fully developed evidentiary record on this issue. As such, there can be no question presented on appeal that will surround the grand jury transcripts. Thus, Appellant's request should be denied.

CONCLUSION

As Appellant cannot demonstrate a particularized need, cannot satisfy App.R.9(E), and cannot comply with S.Ct. Prac. R. 5.8, the State respectfully requests that this Honorable Court DENY the Motion to Supplement the Record.

Respectfully submitted,
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PROOF OF SERVICE

This is to certify that a copy of the foregoing Motion In Opposition was sent to:
PAMELA PRUDE-SMITHERS, Chief Counsel, Death Penalty Division, 250 E. Broad Street,
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by U.S. ordinary mail this 4th day of May, 2011.



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