

STATE OF NEW MEXICO
COUNTY OF DONA ANA
THIRD JUDICIAL DISTRICT

STATE OF NEW MEXICO
Plaintiff,

v.

Criminal Cause No. CR-2011-560
CR-2011-1046
Judge Leslie C. Smith

MICHAEL MURPHY,
Defendant.

**ORDER ON DEFENDANT'S MOTIONS TO RECONSIDER
ORDERS ON MOTIONS TO DISMISS #1, #2, #3, #4, and #5**

THIS MATTER comes before the Court on Defendant's Motions to Reconsider Orders on Motions to Dismiss #1 (Improper Target Notice), #2 (Presentation of Noncompetent and Irrelevant Evidence), #3 (Failure to Present Exculpatory Information), and #4 (Due to Improper Jury Instructions), all filed on September 2, 2011, and #5 (Due Process) filed on September 19, 2011. The Court finds that the motions on orders #1, #2, #4, and #5 are not well-taken and shall be **DENIED**. The motion on order #3 shall be **GRANTED IN PART AND DENIED IN PART**.

I. Law on Motions to Reconsider

1. "Every presumption favors the correctness of any ruling or decision of the trial court, and a party alleging error must be able to point clearly to it." *State v. Weber*, 76 N.M. 636, 644, 417 P.2d 444, 449 (1966) (citations omitted); *see also State v. Carlos A.*, 122 N.M. 241, 243, 923 P.2d 608, 610 (1996).
2. The Court takes note that during the grand jury process there were numerous hearings with the grand jury judge (Judge Robinson) on virtually all of the issues before the Court

in these motions. Judge Robinson made many rulings on these issues – the transcripts are replete with issues raised, arguments, and rulings. Defendant has had many opportunities to be heard on these matters.

II. Order on Motion to Dismiss #1 (Improper Target Notice)

3. Defendant asserts that because the Third Target Notice was defective, and because the State did not ever file a new Target Notice after the Fourth Target Notice was quashed, the grand jury indictment should be dismissed. (See Mtn to Reconsider Order on Mtn to Dismiss #1.)
4. In its Order on this motion to dismiss, the Court ordered the State to provide Defendant with a declarative factual statement, which the State filed on August 29, 2011. (State's Bill of Particulars (Statement of Facts).) And as the Court stated in its order previously, regardless of whether the State failed to comply with an order to provide Defendant with a declarative factual statement in the pre-indictment phase, the State had provided Defendant with full discovery of the case, including an offense report, a draft of an arrest warrant with the charges and probable cause findings, recordings of witness interviews, witness affidavits and journals, a recording of the target discussing the alleged bribes with another judge, etc. A declarative factual statement would have added nothing to the facts already accessible to the Defendant. Defendant has not established that he was prejudiced by the fact that the State did not provide effective target notice or a declarative factual statement.
5. Further, after the State failed to provide a new target notice or a declarative factual statement after the Fourth Target Notice was quashed, Defendant did not pursue a remedy for any violation of the court order on the matter. (See Order on Mtn to Dismiss #1 at 3.)

6. As discussed previously in the Court's order, the grand jury's investigation led to the identification of additional/different charges, which is appropriate under the grand jury process.
7. Finally, Defendant has not made a sufficient showing of what Defendant would have done differently if an effective target notice had been provided. In *Rogers v. State*, the New Mexico Court of Appeals held that where an indictment is dismissed for an ineffective target notice, on remand the trial court could return the indictment to the previous grand jury so that any errors can be cured. 94 N.M. 218, 222, 608 P.2d 530, 534 (1980) (citation omitted). In this case, Defendant has not demonstrated what errors would be cured with an effective target notice.
8. Because Defendant has not made a clear showing that Defendant was prejudiced by the State's failure to provide a declarative factual statement, and because Defendant had actual notice of the charges, and because Defendant failed to raise the State's failure to comply with the previous court order to the grand jury judge, the motion is not well-taken and should be denied.

III. Order on Motion to Dismiss #2 (Presentation of Noncompetent and Irrelevant evidence)

9. Defendant asserts that the State presented noncompetent and irrelevant evidence to the grand jury, including hearsay and opinion evidence. (Mtn to Dismiss 2 at 2-6.)
10. As discussed in the Court's Order on this motion to dismiss, while "[e]vidence before the grand jury [must be] lawful, competent and relevant, including the oral testimony of witnesses under oath and any documentary or other physical evidence exhibited to the jurors"; NMSA § 36-1-11(A) also directs that "[t]he Rules of Evidence shall not apply to

a grand jury proceeding.”

11. Regardless of Defendant’s arguments in the motion to reconsider, Defendant has provided no persuasive authority to establish that the indictment should be dismissed due to the evidence at issue here. For these reasons, the motion is not well-taken and will be denied.

IV. Order on Motion to Dismiss #3 (Failure to Present Exculpatory Information)

12. Defendant asserts that the indictment should be dismissed for the State’s failure to provide the grand jury with certain pieces of exculpatory evidence. (Mtn to Dismiss 3.) The Court will grant the motion in part.
13. During the oral arguments on this matter on September 19, 2011, it was represented by the State, and the record appears to confirm, that the faxed order from Judge Robinson granting use immunity to Judge Martin arrived after the grand jury was already in deliberations. Judge Robinson’s Order on Witness Use Immunity (approved on May 13, 2011) states: “The Court finds Jim T. Martin’s testimony *may be necessary to the public interest* and Jim T. Martin has refused or is likely to refuse to testify.”
14. The State also represented that the lengthy arguments made now by Defendant were made during the hearing on the 25 page Jones letter (which was cut to 6 pages by Judge Robinson). This issue has already received the attention of the District Court through Judge Robinson.
15. Defendant’s argument regarding Judge Schultz’s testimony being cut off by the State does not rise to the level of exculpatory evidence that warrants a remand for a new grand jury proceeding. This and any other issues raised in the original motion to dismiss #3 and/or the motion to reconsider the order on motion to dismiss #3 are denied.

16. While Defendant should have raised the issues in his motion immediately with Judge Robinson at the time the grand jury was deliberating, in an abundance of caution the Court will grant the motion to reconsider in part and dismiss for a new determination of probable cause for the following three reasons: 1) To recall Judge Martin for testimony with an order of use immunity in place; 2) To give the probable cause determiner the benefit of the Osborne affidavit; and 3) If the prosecution refers to money changing hands, the probable cause determiner shall have the benefit of the disputed bank records.

V. Order on Motion to Dismiss #4 (Due to Improper Jury Instructions)

17. The Defendant rehashes the arguments previously given about proffered defense instructions, the appropriateness of giving accessory instructions, and the definition of solicit.

18. Since Defendant is arguing that it was error for the State not to give Defendant's instructions, it is the Defendant's burden to persuade this Court that it was error for the State not to have offered the instructions to the grand jury. Regardless of Defendant's arguments in the motion to reconsider, Defendant has provided no persuasive authority to establish that this Court should dismiss for the State's failure to provide the proffered instructions. The Defendant has failed to meet its burden, and the motion will be denied as to the defense instructions.

19. Defendant has not provided the Court with persuasive authority about why the State erred in giving an accessory instruction or why the definition of solicit was incorrect.

Consequently, the motion is not well-taken and will be denied.

VI. Order on Motion to Dismiss #5 (Due Process)

20. Defendant argues that the bill of particulars provided by the State is insufficient to satisfy

due process requirements. However, Defendant has not provided the Court with persuasive authority to establish his assertions, and so the motion is not well-taken and will be denied.

WHEREFORE,

IT IS ORDERED that the Motions to Reconsider Orders on Motions to Dismiss #1 (Improper Target Notice), #2 (Presentation of Noncompetent and Irrelevant Evidence), #4 (Due to Improper Jury Instructions), and #5 (Due Process) are **DENIED**.

21. **IT IS FURTHER ORDERED** that the Motions to Reconsider Order on Motion to Dismiss #3 (Failure to Present Exculpatory Information) is **GRANTED IN PART**. The indictment will be dismissed for a new determination of probable cause for the following three reasons: 1) To recall Judge Martin for testimony with an order of use immunity in place; 2) To give the probable cause determiner the benefit of the Osborne affidavit; and 3) If the prosecution refers to money changing hands, the probable cause determiner shall have the benefit of the disputed bank records.

IT IS SO ORDERED.

LESLIE C. SMITH
DISTRICT JUDGE PRO TEMPORE