

STATE OF NEW YORK  
COUNTY COURT

COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

-VS-

Ind. No. 2011/0358

ERIC ALLEN MAGIN

11-5446

APPEARANCES: MICHAEL J. HARRIGAN, ESQ.  
Assistant District Attorney  
for the People

TIMOTHY DONAHER  
Monroe County Public Defender  
JON GRIFFIN, ESQ., of Counsel  
Defense Attorney  
for the Defendant

2011 MAY 23 PM 5:00  
MONROE COUNTY CLERK

FILED

**DECISION & ORDER**

**VINCENT M. DINOLFO, J.**

Defendant has moved for an order pursuant to CPL §§190.50(5)(c) and 210.20 dismissing the indictment.

It is uncontroverted that on or about May 3, 2011 or May 4, 2011, the subject Indictment was filed charging Defendant with one count of Assault in the Second Degree under subdivision 3, that being the causing of an injury to a police officer who was acting in performance of his or her lawful duty. It is equally uncontroverted that Defendant had been arraigned on a felony complaint alleging this crime on or

about April 14, 2011. Moreover, it is not in dispute that at his arraignment on this assault charge, Defendant was served with a Grand Jury Notice that the assault charges were scheduled to be presented to a Monroe County Grand Jury on April 18, 2011 and that if he intended to appear before the Grand Jury, he was to inform the People of that intention no later than 9:00 am on April 18, 2011. While the Grand Jury Notice also indicates that there was a charge of Grand Larceny in the 4<sup>th</sup> Degree, the subject felony complaint did not contain such a charge, nor did the CPL §180.80 Certification indicate that any charges other than Assault in the 2<sup>nd</sup> Degree had been heard by the Grand jury. Further, it is also undisputed that Defendant did not specifically notify the People of his intention to testify before the Grand Jury with respect to the Assault in the 2d Degree felony complaint.

Despite the foregoing, there is a related charge of Grand Larceny in the Third Degree, Unauthorized Use of a Motor Vehicle and Resisting Arrest which arises from the same date and same general events as the Assault in the Second Degree allegation. Law enforcement personnel consider the two incidents so similar that they share a Crime Report Number. The evidence demonstrates that in the course of the Resisting Arrest aspect of the Grand Larceny/UUMV case, the arresting Officer was injured. Subsequent examinations revealed an alleged broken bone in the Officer's wrist, which led to the subject felony complaint alleging Assault in the Second Degree. At the time that Defendant was arraigned on the Grand Larceny, et al., charges, his counsel notified the District Attorney's Office that, "Magin wishes to testify before the GJ." While it is clear that the charges relating to the theft of the

vehicle and its unauthorized use have never been presented to a Grand Jury, [the injury caused to the Officer while effectuating the arrest for that alleged criminality has.]

It is a well settled that the District Attorney is obligated to inform a defendant who has been arraigned in a local criminal court on a felony complaint of the prospective or pending grand jury proceeding and afford him or her a reasonable time to exercise the right to appear as a witness. *See, CPL §190.50 (5)(a) ; People v. Sawyer*, 96 N.Y.2d 815 (2001). When a defendant timely requests his right to appear, the District Attorney is obligated to give notice and enable the defendant to appear. *People v. Lindahl*, 33 N.Y.3d 1125 (3<sup>rd</sup> Dept. 2006), *citing to, People v. Evans*, 79 N.Y.2d 407 (1992). Here, it is rather clear that Defendant gave notice of his desire to testify with respect to the events surrounding charges of Grand Larceny, UUMV and Resisting Arrest. While the Assault in the Second Degree is a separate offense, it directly arises from the facts and circumstances of the larceny event. While it is difficult to find fault with the District Attorney's Office for filing this Assault 2d charge as a distinct crime, with its own notice of grand jury presentation, and Defendant should have reaffirmed his desire to testify, it is difficult to conclude that Defendant had not affirmatively stated his desire to testify with respect to the Grand Larceny/UUMV/Resisting Arrest charges and the events of April 3, 2011.

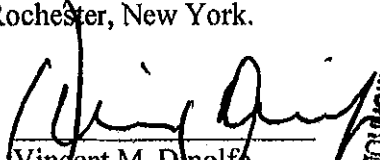
Ultimately, were the Court to proceed, it would be left with the unanswered question as to whether the notice of Defendant's intention to testify situations arising from the events of April 3, 2011. Discretion, and the Court's duty to protect the

rights of Defendant, lead to the conclusion that this Indictment should be dismissed, without prejudice to re-present, in light of the mandates of CPL §190.50. In making this decision and order, the Court is mindful that the charges from the other felony complaint have not been presented and that all charges stemming from the events of April 3, 2011 may be presented to the same Grand Jury.

Therefore, Defendant's motion to dismiss the Indictment based upon his perceived inability to testify before the Grand Jury is granted, without prejudice. The People should give Defendant notice of any Grand Jury presentation with respect to any alleged criminal acts from April 3, 2011. Defendant will be required at that time to officially notify the People of a renewed desire to testify before the Grand Jury. If he does so affirmatively, then the People are directed to schedule appropriate time for his testimony. In the event that Defendant fails to provide notice of his intention to testify, or fails to appear at the appropriate time to testify, the Court will consider that as a full waiver of his right to testify before the Grand Jury.

This constitutes the Decision and Order of the Court.

Dated this 19<sup>th</sup> day of May 2011 at Rochester, New York.

  
Vincent M. D'Amolfo  
County Court Judge

Enter:

2011 MAY 23 PM 5:00  
MONROE COUNTY CLERK

FILED