

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2005 CA 52
v.	:	T.C. NO. 2003 CR 403
PAUL M. WEBB	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

.....

OPINION

Rendered on the 10th day of March, 2006.

.....

ELIZABETH A. ELLIS, Atty. Reg. No. 0074332, Assistant Prosecutor, 61 Greene Street, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

DWIGHT D. BRANNON, Atty. Reg. No. 0021657 and ANDREA G. OSTROWSKI, Atty. Reg. No. 0075318, 130 West Second Street, Suite 900, Dayton, Ohio 45402
Attorneys for Defendant-Appellant

.....

WOLFF, J.

{¶ 1} Paul Webb appeals from a judgment of the Greene County Court of Common Pleas, which denied his petition for the release of grand jury testimony.

{¶ 2} The facts, as gleaned from the briefs and the record, are as follows.

{¶ 3} On December 31, 2002, Frances Wiggins took her car to Paul’s Garage on North Detroit Street in Xenia for servicing. Her license plates were on the car when she

delivered it to Paul's Garage. She retrieved the car on January 4, 2003. On January 12, Wiggins noticed that both license plates on her car were missing, and she reported this fact to the sheriff's department, which entered the plates into its computer system as stolen plates.

{¶ 4} On March 12, 2003, Richard Smith was arrested in Dayton for having Wiggins' license plates on his car. Smith gave somewhat different information during different interviews. In one interview, he claimed to have received the plates from Mike Smith, a mechanic who lived on Edgewood. Later, however, he told Detective Kirk Keller of the Greene County Sheriff's Department that he had taken his car to Paul's Garage on Detroit Street, where someone had offered to "rent" him a set of license plates for \$50. Smith told the detective that the person's name had been Paul Webb.

{¶ 5} About two months later, Detective Keller and another deputy interviewed Paul Webb, who had an auto repair shop on Douglas Street in Xenia. Webb denied knowing anything about stolen plates. After Webb refused to go to the sheriff's department to answer questions, Detective Keller swore out a complaint to have Webb arrested for receiving stolen property and theft. Webb was arrested on May 22, 2003, and was subsequently released on bond. He was indicted on the same charges on June 5, 2003. Webb pled not guilty and was ordered to check in with the probation department weekly while the matter was pending.

{¶ 6} When Detective Keller was reviewing his notes on the case in preparation for a court appearance, he apparently came to believe that Paul's Garage on North Detroit Street had been confused with Paul Webb's garage on Douglas Street. Accordingly, on July 3, 2003, the state filed a motion to dismiss the indictment against Webb, and the court

granted the motion.

{¶ 7} Unfortunately, the probation department apparently was not informed of the dismissal of the indictment against Webb. As such, after he had failed to report for a few weeks as ordered, the probation department filed a Violation of Bond notice with the trial court on July 29, 2003. In response, the court issued a *capias* for Webb's arrest, and he was arrested for the second time on August 27, 2003. Realizing its mistake, the court released Webb on August 28, 2003.

{¶ 8} On May 5, 2004, Webb filed a civil suit against the Greene County Sheriff's Department in the Greene County Court of Common Pleas. The case was later removed to the United States District Court. However, Webb filed a petition in the court of common pleas for the release of the grand jury testimony that had resulted in his indictment, claiming that "failure to disclose the testimony would deprive [him] of a fair adjudication of the allegations pled in his civil complaint." Webb claimed that he had been a victim of malicious prosecution and that "the grand jury proceeding played a critical role." The court denied the petition, finding that Webb had not demonstrated "a particularized need *** which would outweigh the need for secrecy based on public policy."

{¶ 9} Webb raises one assignment of error on appeal from the common pleas court's judgment refusing to release the grand jury testimony.

{¶ 10} "THE TRIAL COURT ERRED BY OVERRULING PAUL WEBB'S MOTION FOR DISCOVERY OF GRAND JURY TESTIMONY."

{¶ 11} Webb argues that the trial court erred in refusing to release the grand jury testimony that led to his indictment because he had demonstrated a particularized need that outweighed the government's interest in keeping the testimony secret.

{¶ 12} There is a long history of secrecy attendant to grand jury proceedings. However, the Supreme Court of Ohio has held that, where justice requires, a court that supervised a grand jury may disclose evidence presented to that grand jury in civil as well as criminal matters. *Petition for Disclosure of Evidence*, 63 Ohio St.2d 212, 218, 407 N.E.2d 513. Such disclosure can be ordered only after the court carefully weighs the need to maintain the secrecy of the grand jury proceedings against the petitioner’s need for the information and determines that justice can only be done if disclosure is made. *Id.* The party requesting the testimony must show that a particularized need for disclosure exists which outweighs the need for secrecy. *State v. Greer* (1981), 66 Ohio St.2d 139, 148, 420 N.E.2d 982. This analysis is satisfied when, from a consideration of the surrounding circumstances, it is probable that the failure to disclose the testimony will deprive the petitioner of a fair adjudication of a pending action. See *id.* at paragraph three of the syllabus. The trial court, in its discretion, determines whether the petitioner has shown a particularized need for the production of grand jury proceedings. *Id.* at 148.

{¶ 13} Webb’s suit against the Greene County Sheriff’s Department includes claims of false arrest, malicious prosecution, abuse of process, and infliction of emotional distress, among others. In his petition for the grand jury testimony, Webb suggests that his claims cannot be fairly adjudicated without access to the grand jury testimony in his criminal case because “the information contained in the grand jury testimony is direct evidence needed to show the Defendants[’] wrongdoing.” However, much of the deputies’ behavior about which Webb complains occurred prior to their grand jury testimony.¹ For example, Webb

¹For the sake of argument, we presume, as Webb does, that both deputies testified before the grand jury.

asserted that the deputies “aggressively interrogated him and threatened him with criminal prosecution *** without probable cause” prior to his arrest. He also claimed that they “provided false and misleading information to obtain a warrant for the arrest.” Because Webb was arrested on a complaint before the grand jury considered his case, Webb’s claim that the grand jury testimony was essential to the proof of these facts was tenuous. With respect to the grand jury proceedings in particular, Webb simply stated that “the Defendants provided false and misleading testimony to the grand jury in order to have an indictment handed down.” This statement is very conclusory and does not establish a particularized need for the testimony. Webb clearly presumes that the deputies lied or embellished the evidence against him before the grand jury. However, there is nothing to suggest that their testimony before the grand jury differed in any significant respect from the evidence presented in support of their request for an arrest warrant, and Webb presumably has access to the affidavit(s) filed in support of the warrant. In sum, Webb did not present a compelling argument that the only way for him to substantiate his claims against the deputies was through the use of the grand jury testimony. As such, the trial court did not abuse its discretion in finding that he had not shown a particularized need for the testimony and in denying his request.

{¶ 14} The assignment of error is overruled.

{¶ 15} The judgment of the trial court will be affirmed.

.....

DONOVAN, J., concurs.

GRADY, P.J., dissenting:

{¶ 16} I respectfully dissent from the decision of the majority, and would reverse

the order of the trial court denying Appellant Webb's petition and remand the case for further proceedings on his request.

{¶ 17} In denying Webb's petition, the trial court applied the "particularized need" standard announced in *State v. Patterson* (1971), 28 Ohio St.2d 181, finding that Webb failed to demonstrate a particularized need for disclosure of the deputies' grand jury testimony that led to Webb's criminal indictment. The majority cites the same standard, relying on the more recent decision in *State v. Greer* (1981), 66 Ohio St.2d 139, which held:

{¶ 18} "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 there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy. (Paragraph three of the syllabus in *State v. Patterson*, 28 Ohio St.2d 181, 277 N.E.2d 201. Approved and followed.)" *Id.*, Syllabus by the Court, paragraph 2.

{¶ 19} *Patterson*, *Greer* and the earlier cases such as *State v. Lasky* (1970), 21 Ohio St.2d 187, in which the particularized need standard was applied, were criminal cases in which an accused sought discovery of grand jury minutes from the court in which the criminal charges were pending, to use for exculpatory purposes. In *Greer*, the court held:

{¶ 20} "Whether particularized need for disclosure of grand jury testimony is shown is a question of fact; but, generally, it is shown where from a consideration of all the surrounding circumstances it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness' trial testimony." *Id.*, Syllabus by the Court, paragraph 3.

{¶ 21} In criminal cases, an accused's request for disclosure of the grand jury testimony of a state's witnesses is essentially reactive, one weighed in relation to trial testimony a state's witness has given or which is anticipated. Civ.R. 16(B)(1)(g) governs the first circumstance. The "particularized need" test there employed has been extended to pretrial discovery requests in criminal cases. *Greer*.

{¶ 22} One year prior to its holding in *Greer*, the Supreme Court decided *Petition For Disclosure Of Evidence Presented To Franklin County Grand Juries In 1970* (1980), 63 Ohio St.2d 212. In that case, the request for disclosure of grand jury testimony was made by a defendant, but not in a criminal case pending before the court in which the request was made. Rather, the request was made in connection with a civil case brought in U.S. District Court. The subject of the request was testimony that had led to the defendant's criminal indictment in state court arising from the conduct at issue in the federal civil case. The criminal charges had either been dismissed or were terminated by an acquittal.

{¶ 23} In *Petition For Disclosure*, the common pleas court denied the disclosure request and the court of appeals affirmed. The Supreme Court reversed, finding that the lower courts had failed to consider the efficacy of a protective order to limit unwarranted disclosures. In so finding, the Supreme Court wrote:

{¶ 24} "We hold that R.C. 2329.11 allows the court which supervises a grand jury to disclose evidence presented to the grand jury, where justice requires, in civil as well as criminal actions. Such disclosure can be ordered only after the court carefully weighs the need to maintain the secrecy of the grand jury proceedings against petitioner's need for the information and determines that justice can only be done if disclosure is made." *Id.* at 218.

{¶ 25} The Supreme court further noted in *Petition For Disclosure* that "a petition

to the court which supervised a grand jury is the proper means of obtaining release of grand jury minutes," because "[t]he supervisory court is in the best position to assess the need to preserve secrecy over the proceedings." The Supreme Court cautioned, however: "We also recognize that the supervisory court may not be in the best position to decide the extent of need for the information." *Id.*, at 218-219.

{¶ 26} This last observation reflects the context in which the request was made. In *Petition For Disclosure*, unlike in *Patterson, Greer, and Lasky*, the information was sought not for use in a criminal case pending before the supervisory court or another court in its division, but for use in different proceeding, a civil proceeding, commenced in a wholly separate court. Therefore, the usual criteria on which a "particularized need" test is resolved, relevance and probative value, are more difficult for the supervisory court to weigh and determine. For that reason, perhaps, the Supreme Court stated that "[t]he supervisory court's ability to make such a decision must be resolved in a case-by-case manner. Initially, this decision should be made by the trial court, subject to review." *Id.*, at 219.

{¶ 27} It is significant that the "particularized need" standard that figures so prominently in *Patterson, Lasky, and Greer* was not likewise applied in *Petition For Disclosure*. Instead, the court applied the broader and more general standard of what "justice requires," perhaps reflecting the Supreme Court's expressed reservations about the supervisory court's difficulty in finding that a "particularized need," that is at least an actual and palpable need, is shown when the case for which disclosure is sought is not one which is before that court. The difference of forums compounds the problem of anticipation, which is at least subject to a later modification when the court that denies a

petition for disclosure also tries the case.

{¶ 28} As against the need for the information which is presented, the court must weigh the need to maintain the secrecy of the grand jury proceedings. In that connection, the *Petition For Disclosure* decision expressly approved the following criteria in *United States v. Rose* (C.A. 3, 1934), 215 F2d 617:

{¶ 29} "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." *Id.* At 628-629.

{¶ 30} In order to prove his claims for false arrest, abuse of process, and infliction of emotional distress, Webb will have the burden to prove that the deputy or deputies acted recklessly or with a malicious purpose. I agree that what the deputies may have told the grand jury is not necessarily conclusive of their purposes in their prior conduct. However, their testimony may corroborate such a purpose. Further, their testimony may prove Webb's claim for malicious prosecution if it is consistent with their prior conduct and if, when the deputies testified, they knew or should have known the true facts were otherwise.

{¶ 31} Applying the *Rose* criteria, there is little if any reason to maintain the secrecy of the testimony the deputies gave before the grand jury. As in *Petition For Disclosure*, the

indictment charging Webb with criminal offenses was dismissed. No criminal case is pending, and none will be brought against Webb. Except in the most general sense, which exists in any case, there is no basis to find that the need for secrecy outweighs Webb's need for the information he seeks in order to prove his claims for relief in his federal civil case.

{¶ 32} As a final matter, we should not lose sight of the fact that Webb's claims for relief in his federal civil case present a potential basis for liability for Greene County and its Sheriff's Department, as well as one or more Greene County deputy sheriffs individually. In that circumstance, the court should avoid an appearance of partiality, proceeding instead with caution to "carefully weigh" the needs presented. *Greer*. Webb has sought only the testimony of the deputies which led to his mistaken indictment. He has not sought a wide variety of grand jury minutes. As the Supreme Court pointed out in *Greer*, any collateral needs of secrecy, if there are any, may be adequately met through narrow protective orders.

{¶ 33} I believe that the trial court erred when it applied the "particularized need" test to deny Webb's petition. The court should have applied the broader ends of "justice" standard in *Petition For Disclosure*. Applying that standard, and the *Rose* criteria, I would find that Webb's petition should instead have been granted, and on that finding reverse and remand the case for further proceedings.

.....

Copies mailed to:

- Elizabeth A. Ellis
- Dwight D. Brannon
- Andrea G. Ostrowski
- Hon. J. Timothy Campbell