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Split Panel Says D.A. Needs Court Approval to Re-present Charge

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Editors' Note: *This article has been changed to reflect a Correction.*

Manhattan prosecutors should have secured court permission before re-presenting a case to a grand jury even though the defendant was not identified by the prosecution as a subject of the initial proceeding and, in fact, had yet to be apprehended when the first presentation began, a sharply divided appeals panel in Manhattan ruled yesterday.

The Appellate Division, First Department, upset a 9 1/2 year prison term given to Makeda Davis, who had been convicted of slashing the face of a woman in a fight at a nightclub over a man whom Ms. Davis claimed was her husband.

As a result of the ruling, if prosecutors want to pursue the matter, they now will be required to present the case to a third grand jury.

Three women were involved in the 2006 nightclub brawl. At the time of the initial presentation, Ms. Davis had not been arrested, and the grand jury was considering evidence against a codefendant, Fayola McIntosh.

Writing for the three-judge majority in *People v. Davis*, 6148/06, Justice Dianne T. Renwick (See Profile) ruled that judicial permission was required to present before a second grand jury because the evidence before the first grand jury was "legally sufficient" to sustain charges of first and second degree assault.

The First Department decision appears on page 34 of the print edition of today's Law Journal.

A court's permission was necessary, Justice Renwick wrote, to insure the prosecution does not withdraw a case in order to get another "opportunity to persuade a different, and perhaps more amenable, grand jury, that it should indict." Justices John W. Sweeny Jr. (See Profile) and Helen E. Freedman (See Profile) joined the majority.

In dissent, Justice James M. Catterson (See Profile) wrote that determination as to when a grand jury presentation is complete should be left to the prosecution. Justice David Friedman (See Profile) joined the dissent.

The only witness to testify at the first presentation was Lynn Walker, who had been slashed with a razor blade on the left side of her head, requiring 40 stitches.

Ms. Walker, in her grand jury testimony against Ms. McIntosh, described the role played by Ms. Davis, but did not refer to her by name.

Ms. Walker testified that Ms. Davis had cut Ms. Walker's head, and, in response to a question from a grand juror, testified Ms. Davis appeared to be holding something in her hand.

Ms. Walker also displayed her cuts to the grand jurors, and photographs of them were placed in evidence.

Three days after Ms. Walker testified before the grand jury, Ms. Davis voluntarily surrendered to the police. A week later, the prosecutor, Hilary Puskar, withdrew the case from the grand jury, citing "witness unavailability."

Four months later Ms. Puskar, without court permission, re-presented the case to a second grand jury, seeking assault indictments against both Ms. Davis and Ms. McIntosh. Ms. McIntosh, whose case was subsequently severed, was convicted by a jury of assault and sentenced to five years in prison.

Acting Justice Michael J. Obus (See Profile) ruled, before separate trials were ordered for the two defendants, that the prosecution had not needed to get judicial authorization to re-present the case to a second grand jury.

In reversing, Justice Renwick concluded that the New York Court of Appeals' leading decision in the area required that Ms. Puskar obtain judicial permission before submitting the previously withdrawn case to a second grand jury, *People v. Wilkins*, 68 NY2d 269 (1986).

Sufficient Evidence Presented

The arguments of the majority and minority in the case turned on the distinction between dismissing a charge in a grand jury and merely withdrawing one.

The Penal Law (PL) requires that prosecutors get permission before re-presenting a case to a second grand jury after a first grand jury has dismissed a charge, PL §190.75[3].

Under *Wilkins*, Justice Renwick wrote, a prosecutor's withdrawal of a case is tantamount to a dismissal when "near the end of the case" the grand jury has heard enough evidence to sustain all the elements of the charge.

Justice Renwick found support in the Court of Appeals' conclusion in *People v. Aarons*, 2 NY3d 547 (2004), as well as the practice commentary to PL §190.75, that permission is required when "sufficient evidence has been presented for the prosecutor to ask for a vote."

Justice Catterson, citing *Wilkins*, begged to differ.

He rejected the majority's conclusion that judicial permission is required whenever prosecutors "have presented sufficient evidence on which to indict any one defendant."

Instead, he concluded that a withdrawal is the equivalent of a dismissal only if the prosecutors "have presented all the witnesses and evidence they deem necessary to secure an indictment."

In reaching that conclusion, he relied on language in *Wilkins* stating that a withdrawal could be equated with a dismissal when "as far as the prosecutor was concerned, all the witness had testified, and all that was left was to instruct the grand jury on the law."

Acting Justice Edward J. McLaughlin (See Profile) presided over the four-day trial of Ms. Davis and her sentencing.

Ms. Davis was represented by Mark L. Freyberg and Joel G. Kosman.

On appeal, Manhattan Assistant District Attorney Susan Gliner handled the case for the prosecution. The office said yesterday it was planning to appeal to the Court of Appeals.

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