

IN THE
INDIANA SUPREME COURT

CAUSE No.: 22A-CR-01196

OSCAR MARTINEZ, Jr.,	)	Appeal from the Lake Superior Court,
	)	Criminal Room III
<i>Appellant,</i>	)	
	)	
v.	)	Trial Court Cause No.:
	)	45G03-2201-F6-00024
STATE OF INDIANA,	)	
	)	
<i>Appellee.</i>	)	The Honorable Jeryl F. Leach, Special Judge

APPELLANT OSCAR MARTINEZ, JR.'S

PETITION TO TRANSFER

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QUESTION PRESENTED ON TRANSFER

I. Does opinion testimony on legal issues and the ultimate issue of probable cause violate a grand jury target's due process right to a neutral and detached atmosphere as embodied by Indiana Code § 35-34-2-4?

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APPELLANT'S PETITION TO TRANSFER

A Court of Appeals panel affirmed the trial court's denial of Martinez' motion to dismiss because it found the lead detective's testimony as to what criminal statutes applied, their elements, and how those elements fit the evidence presented, was proper opinion testimony by a police witness before a grand jury. Martinez v. State, No. 22A-CR-1196, 2023 WL 408973, at *4-5 (Ind. Ct. App. Jan. 26, 2023). Such opinion testimony, however, is improper under this Court's precedent in State v. Henderson, 90 Ind. 406 (1883) and violates a grand jury target's due process right to a neutral and detached atmosphere as protected by Indiana Code § 35-34-2-4.

The grand jury in this case returned indictments for resisting law enforcement as a Level 6 felony and reckless driving as a Class C misdemeanor against Lake County Sheriff Oscar Martinez. Martinez, slip op. at *1. In obtaining those indictments, the lead detective testified as to his opinion of the lawfulness of the conduct alleged in the evidence. Id., slip op. at *1-3 App. He described what crimes were applicable in this case based on his lengthy and wide-ranging experience as a police officer. Id. He described how he believed the facts fit with those crimes, often element by element. Id. He offered opinions as to the *mens rea* of those offenses and how it should be inferred from the evidence. Id.; App. Vol. III p. 41-43. Martinez moved to dismiss the indictments based on this testimony, Id. slip op. *3. The trial court denied the motion without findings. Id.; App. Vol. II p. 19.

The Court of Appeals affirmed, finding that the detective's testimony was neither legal advice given in violation of Indiana Code § 35-34-2-4(k) nor an imposition on the grand jury's role as "exclusive judge of the facts" in violation of Indiana Code § 35-34-2-4(j). Id., slip op. at *4. Instead, the panel found his "testimony [was] limited to his personal experience as a police officer or *his interpretation of whether, given the specific facts of this case, he would have charged Martinez.*" Id. (emphasis added). The court concluded these statements to be merely opinion testimony "meant to assist the grand jury in reaching a decision[.]" Id. However, in Henderson, this Court stated that "it is not competent for the grand jury to take the opinion of a witness under oath as to the legal effect of facts about which he is required to testify." 90 Ind. at 408. Henderson is still valid today, and this Court should grant transfer to reverse the trial court below and provide clarity on how Indiana Code § 35-34-2-4 applies to opinion testimony given to a grand jury.

BACKGROUND AND PRIOR TREATMENT OF THE ISSUE

On September 27, 2021, the Lake County Prosecutor petitioned for, and the court ordered, appointment of a special prosecuting attorney "regarding information presented by the Lake County Board of Commissioners requesting an investigation by the Indiana State Police regarding possible criminal charges arising out of the use of a county owned vehicle[.]" App. Vol. III p. 153-155. Accepting the appointment, Special Prosecutor Stanley Levco subsequently petitioned the Lake Superior Court to convene a

grand jury. Martinez, slip op. at *1; App. Vol. III p. 157. The court granted the petition, and a grand jury was convened January 5, 2022. App. Vol. III p. 158.

Evidence was presented to the grand jury that Crown Point police officers observed a Jeep Trackhawk, purported to be operated by Sheriff Martinez, travelling more than double the posted speed limit and that as these officers caught up to the Jeep, it activated rear emergency lights, at which point the officers discontinued their pursuit. Id., slip op. at 1; App. Vol. II p. 118-124, 133. During presentation of evidence, Special Prosecutor Levco admonished the grand jury that “[he] would be embarrassed to go in front of a jury with simply a speeding charge,” App. Vol. II p. 192, with one grand juror ultimately concluding that Levco was indicating he wanted “to bring something of substance to the Judge,” App. Vol. III p. 28. Prior to these exchanges, Levco had called Indiana State Police Commander Kevin Smith, the lead investigator for the case, to testify. During his testimony, Smith opined that speeding, reckless driving, and resisting law enforcement with a vehicle were appropriate charges based on “discussions with the prosecutor’s office” and his experience. Martinez, slip op. at *1; App. Vol. II p. 189-190.

After Prosecutor Levco’s discussions with the grand jury regarding the charge of speeding, he recalled Commander Smith. App. Vol. III p. 32. Smith read portions of the statutes for reckless driving as a Class C misdemeanor and resisting law enforcement as a Level 6 felony. App. Vol. III p. 35-36. In each instance, Smith either volunteered his

opinion as to which portion applied, App. Vol. III p. 35, or was prompted to read the portion he believed applied, App. Vol. III p. 36. Prosecutor Levco then asked for, and Commander Smith gave, his opinion on what constituted reckless driving, offering “I’ve never worked in a county where 51 miles an hour over the speed limit was not reckless driving [...] [a]nd in that situation, we would incarcerate on-site [...] [w]e would stop the vehicle, put the person in handcuffs, put him in jail.” Martinez, slip op. at *2; App. Vol. III p. 39. On the issue of resisting law enforcement, Smith testified that if Martinez knew the officers were trying to stop him, he would be guilty of resisting law enforcement, and offered his opinion that it “would be virtually impossible not to know.” App. Vol. III p. 39, 41-42. This prompted questioning from a grand juror about reckless driving, in response to which, Commander Smith elaborated on his opinion that “the speed is the speed,” regardless of law enforcement training on highspeed driving. Id. The grand jury subsequently indicted Sheriff Martinez on resisting law enforcement as a Level 6 felony and reckless driving as a Class C misdemeanor.

Sheriff Martinez moved to dismiss the indictments pursuant to Indiana Code § 35-34-1-7 as “conducted in violation of Ind. Code § 35-34-2 and the Due Process clause of the 14th Amendment.” App. Vol. II p. 72, 73-79. Specifically, Martinez argued that Commander Smith’s testimony constituted legal advice to the grand jury in violation of Indiana Code § 35-34-2-4(k) and was a flagrant imposition of the grand jurors’ will and role as exclusive judge of the facts. App. Vol. II p. 73-79. In response, the State

contended that Levco's qualification of his desire to not indict for speeding and his request that the grand jury apply a higher burden of proof militated against any imposition on the grand jury. App. Vol. III p. 106-111. Furthermore, the State argued that Commander Smith's testimony was not legal advice, but rather permissible opinion testimony, and that even if it was legal advice, it was permissible because the prosecutor had "elicited and directed" it. App. Vol. III p. 111-112. Following a hearing, the trial court denied the motion without findings. App. Vol. II p. 19.

On appeal, Martinez argued that the trial court abused its discretion because the testimony was legal advice prohibited by Indiana Code § 35-34-2-4(k) and opinion on the ultimate issue, invading the province of the grand jury in violation of Indiana Code 35-34-2-4(j). Appellant's Br. at 19-28. Martinez argued the testimony ultimately robbed the proceedings of their neutral and detached atmosphere. Appellant's Br. at 28.¹ The Court of Appeals disagreed. The court found that the testimony did not constitute legal advice under Indiana Code § 35-34-2-4(k), but rather was "limited to [Smith's] personal experience as a police officer or his interpretation of whether, given the specific facts of this case, he would have charged Martinez" and was "merely his function as a testifying police witness." Martinez, slip op. at *4. Furthermore, the court found that testimony on the ultimate issue did not "[usurp] the role reserved for the grand jury,"

¹ The parties also argued whether a dismissal on these grounds should be with prejudice, but the Court of Appeals did not reach that issue. Appellant's Br. p. 30-36; Appellee's Br. p. 27-31; Martinez, slip op. at *4 n. 3.

but was opinion testimony “meant to assist the grand jury in reaching a decision.” Id.

ARGUMENT

I. Opinion testimony as to the lawfulness of a target’s alleged conduct should not be allowed in grand jury proceedings.

This Court should grant transfer because even if Smith’s testimony is properly characterized as “his interpretation of whether, given the specific facts of this case, he would have charged Martinez,” that is ultimately an opinion as to lawfulness of the alleged conduct and impermissible under prior precedent of this Court. Furthermore, though this Court has not had occasion to directly interpret Indiana Code § 35-34-2-4 subsections (j) and (k), courts working under substantially similar statutes have found testimony like this to be legal advice from an impermissible source and opinion that imposes on the role of the grand jury as exclusive judge of the facts.

A prosecutor is not required to use a grand jury. His power to do so, and the benefits it brings, are “subject only to the procedural checks built into [that] process.” Wurster v. State, 715 N.E.2d 341, 344 (Ind. 1999). If using a grand jury “the prosecutor must abide by both constitutional restrictions and the statutory requirements imposed by the General Assembly in the interest of both fairness to the defendant and accountability and reviewability of the process,” Id. at 344–45. The process due the target of grand jury proceedings is codified in Indiana Code § 35-34-2-4. In pertinent part, subsection (j) of the statute reserves to the grand jury the role of “the exclusive

judge of the facts with respect to any matter before it.” Ind. Code § 35-34-2-4. Subsection (k) prohibits the grand jury from receiving legal advice from any source other than the prosecutor and the court. Id. Though “[t]he functions of a grand jury in Indiana are purely statutory,... [i]f an issue arises that is not expressly governed by statute, a grand jury's statutory functions may be interpreted with reference to common law principles,” Wurster, 715 N.E.2d at 345 (internal citations omitted). While this Court has not addressed these sections head on, the Court has addressed the propriety of opinion testimony as to lawfulness before a grand jury.

In Henderson, the State challenged quashing of an indictment for perjury resulting from the defendant’s grand jury testimony that others had not “*unlawfully* sold or given to him any intoxicating liquors whatsoever.” Henderson, 90 Ind. at 407 (emphasis added). Affirming, the Court noted that the defendant “swore that they had not *unlawfully* sold or given him such liquors.” Id. (emphasis in original). The Court concluded “that it is not competent for the grand jury to take the opinion of a witness under oath as to the legal effect of facts about which he is required to testify.” Id. at 408. Instead, the Court noted that he may have been properly asked whether liquor was sold or given to him, but that “it was then for the grand jury to say whether, from the facts stated, the sales and gifts, if any were testified to, were unlawful.” Id. The Court then unequivocally stated:

Witnesses before the grand jury may be required to testify as to facts, and if they swear falsely as to these, they may be guilty of perjury. *But their*

opinion of the law growing out of the facts, or their opinion whether a certain act was lawful or unlawful, should not be called for, and if called for and given, or offered voluntarily, a charge of perjury cannot be predicated upon it.

Id. (emphasis added).²

Though no statute was addressed in that case, the grand jury statute in effect at the time was similar in part to today's Indiana Code § 35-34-2-4(k). Then, the Legislature had provided that:

The Prosecuting Attorney or his deputy shall be allowed, at all times, to appear before the grand jury, for the purpose of giving information relative to any matter cognizable by it or advice upon any legal matter when required; and he may interrogate witnesses before the grand jury, when the jury or he deem it necessary [...]

1881 Ind. Rev. Stat. Vol. 1, ch. 4, art. 7 §1668.

Indiana Code § 35-34-2-4 is more restrictive. Subsection (k) *prohibits* legal advice from any source but the prosecutor and the court. Subsection (j) *explicitly* reserves the power to judge the facts to the grand jury. Courts in other states making more frequent use of the grand jury have interpreted statutes substantially similar to Indiana Code § 35-34-2-4 in a manner consistent with Henderson. For example, New York Criminal Procedure Law § 190.25 governs the conduct of grand jury proceedings and is substantially similar to Indiana Code § 35-34-2-4 in both structure and substance. In

² This Court has previously relied on such perjury cases in addressing the conduct of modern grand jury proceedings. See Wurster, 715 N.E.2d at 346 (Citing State v. Turley, 55 N.E. 30, 30 (Ind. 1899), a perjury case arising from grand jury proceedings, for the proposition that “our decisional law has recognized the importance of allowing questioning for at least a century.”).

particular, subsection 5 states, “The grand jury is the exclusive judge of the facts with respect to any matter before it.” N.Y. Crim. Proc. Law § 190.25. Subsection 6 states in pertinent part, “The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source.” Id. New York courts operating under this framework have generally held that witnesses’ opinion testimony about the law of the case or the legal effect of facts about which they testify are impermissible legal advice. *See Matter of Oct. 1989 Grand Jury of Supreme Ct. of Ulster Cnty.*, 563 N.Y.S.2d 889, 889–90 (N.Y. App. Div. 1990) (Instructing grand jury as to law through use of expert testimony impermissible.); *Matter of Rep. of Special Grand Jury of Monroe Cnty.*, 433 N.Y.S.2d 300, 303 (N.Y. App. Div. 1980) (“District Attorney did not provide understandable instructions to the Grand Jury on the several legal matters for their consideration before a report was issued and she compounded the error by advising them that they might direct their legal questions to various witnesses appearing before them.”); *People v. Richard*, 561 N.Y.S.2d 351, 353–54 (Co. Ct. 1990) (Perjury indictment dismissed where law professor witness testified about ‘materiality’ and applied proffered definition to facts of case despite prosecutor giving similar instructions.); *People v. Darcy*, 449 N.Y.S.2d 626, 629 (Co. Ct. 1982) (Indictment dismissed because grand jury testimony of social welfare worker as to what federal regulations required of defendant when reporting income constituted impermissible legal advice.); *Cf. People v. Dean*, 68 N.Y.S.3d 808, 811–12 (Co. Ct. 2017)

(Testimony by officer about whether act was a conspiracy and whether item was contraband was improper opinion testimony on legal issues reserved for grand jury.).³ Though none of these cases are controlling, they are instructive in that they apply nearly identical statutory language, and no Indiana cases address this issue relative to Indiana Code § 35-34-2-4, subsections (j) and (k). See DiMaggio v. Rosario, 950 N.E.2d 1272, 1275 (Ind. Ct. App. 2011) (“[W]here no Indiana cases adequately address the issues involved in a case, decisions of other jurisdictions may be instructive.”) (internal quotations omitted). They also have the benefit of consistency with this Court’s opinion in Henderson.

Nevertheless, the opinion below summarily disconnects Commander Smith’s opinions from Indiana Code § 35-34-2-4 by labeling them as “merely his function as a testifying police witness,” without any indication of what subsections (j) and (k) address. Martinez, slip op. *4. For example, rejecting Martinez’ argument that Smith’s testimony was “legal advice,” the court below instead identified Smith’s testimony as “his interpretation of whether, given the specific facts of this case, he would have

³ An Appellate Division of the New Jersey Superior Court reached a similar conclusion that opinion testimony elicited from officer that target intended to distribute controlled substance “improperly encroached on the independence of the grand jury and improperly influenced its determination.” State v. Tucker, 280 A.3d 824, 836 (App. Div. 2022), *leave to appeal denied*, 252 N.J. 481, 286 A.3d 1176 (2023); Compare Williams v. State, 43 N.E.3d 578, 580 (Ind. 2015) (Holding testimony that “there’s zero doubt in my mind that that was a transaction for cocaine” was an “outright opinion of guilt—rendering it inadmissible under Evidence Rule 704(b).”); *But see* N.J. Stat. Ann. § 2B:21, *et seq.* (Regulating conduct of grand jury proceedings in substantially dissimilar manner from Indiana Code § 35-34-2-4.).

charged Martinez.” Id. Martinez does not dispute this precise characterization of the testimony. In fact it is Martinez’ point that Smith’s opinions were his interpretation of the relevant laws, applied to the specific facts of the case in detail, to reach the conclusion that he (and a hypothetical prosecutor) would charge Martinez on these facts. *See, e.g.,* App. Vol. II p. 190 (“And then beyond that, once a vehicle fails to stop for a police officer that’s got lights and sirens activated and continues on at that rate of speed not stopping, *that would be in our indication, the prosecutor’s indication, fleeing in a vehicle, which is a Level 6 felony, I believe, in Indiana.*”)(emphasis added).

It is unclear is how the Court of Appeals’ description meaningfully differs from what this Court has previously described as “legal advice.” In State ex rel. Disciplinary Comm'n of Supreme Ct. of Indiana v. Owen, the Court found the respondent gave legal advice when he “proceeded to examine the case and gave [the client] advice as to what legal steps [the client] should pursue,” 486 N.E.2d 1012, 1013 (Ind. 1986). In In re Hill, this Court found the respondent gave legal advice when he admitted “that his letter advised the couple on the legality and effectiveness of the documents he had reviewed.” 969 N.E.2d 11, 11 (Ind. 2012). What Commander Smith testified to is no different. He reviewed the alleged facts of the case, explained the legal effect of them, and advised the grand jury of what he and “the prosecutor” would do in the same situation. Fairness and due process are not served by making the artificial distinction that he only described what ‘prosecutors’ and he – a long serving, high ranking State

Police Commander – would do, instead of explicitly telling the grand jury to do it.⁴

Commander Smith’s opinion testimony was undoubtedly legal advice.

Furthermore, Commander Smith’s testimony clearly imposed on the grand jury’s role as exclusive judge of the facts, especially with regards to the indictment for resisting law enforcement. Smith agreed that the critical question was whether Sheriff Martinez “knew the officers were behind him trying to stop him.” Martinez, slip op. *2; App. Vol. III p. 39. Smith agreed that if he did not know, he was not guilty. Id. Smith then agreed that if Martinez did know, *he would be “guilty.”* App. Vol III p. 39.⁵ Levco then specifically asked Smith if he had an opinion as to whether Martinez knew. Id. at 41. Smith then testified to his opinion that Martinez *did know* and that “[i]t would be nearly impossible” to not know. Id. at 41-42. Beyond even mere legal advice, Smith unequivocally set the condition by which Martinez would be “guilty” of resisting law enforcement and then proceeded to testify in detail to his opinion that the condition had

⁴ Special Prosecutor Levco laid an extensive foundation for Smith’s experience and qualifications, including: 34 years with the Indiana State Police; Commander for the northeastern part of the state; supervision of all detectives, troopers, and most operations in that part of the state; and 10 years as a detective including three as a Detective Commander. App. Vol. II p. 139. While this foundation is relevant to Commander Smith’s credibility and his ability to offer opinions on a number of factual observations, none of it qualifies him to give an opinion as to what crimes he thinks Martinez committed and whether probable cause exists for those crimes.

⁵ Specifically, Levco asked: “But arguably, if he did know, he would be guilty?” to which Smith replied, “Yes.” App. Vol. III at p. 39. The Court of Appeals inexplicably **omitted** these two lines from the recitation of Smith’s testimony in its opinion below, Martinez, slip op. at *2, but the explicit confirmation of “he would be guilty” is undoubtedly relevant to the analysis.

been met. This did not merely imply guilt. It stated explicitly and conclusively Smith's opinion that Martinez was guilty of resisting law enforcement.

It is the sole province of the grand jury to determine whether the facts establish probable cause. Ajabu v. State, 677 N.E.2d 1035, 1039 (Ind. Ct. App. 1997) (citing Ind. Code § 35-34-2-4(j)). And while "[p]robable cause may exist in the absence of guilt," Lytton v. Baird, 95 Ind. 349, 352 (1884), probable cause is *presumed* if guilt is established, *See* Roddel v. Town of Flora, 580 N.E.2d 255, 259 (Ind. Ct. App. 1991) ("Because the facts Roddel alleged in his complaints conclusively established he was guilty of resisting arrest, there was probable cause for his arrest and his imprisonment was lawful."). Opinion testimony as to guilt is prohibited by Indiana Evidence Rule 704(b) because it "usurps the [*petit*] jury's 'right to determine the law and the facts,'" Williams, 43 N.E.3d at 581 (citing Ind. Const. Art. I, § 19). Such testimony inflicts no less harm because it usurps the role of a *grand* jury, or because that grand jury's standard is probable cause, or because the exclusive role of that jury is reserved by statute instead of our Constitution, particularly where that statute *acts as part of the due process* constitutionally guaranteed to a target.

The panel below rejected this analogy as "a roundabout attempt to apply Indiana Rules of Evidence to a grand jury proceeding," because "the grand jury serves a different function and has a different relationship with witnesses than a petit jury." Martinez, slip op. at *4 n. 2. Martinez has conceded that the grand jury serves a different

purpose to which the Rules of Evidence do not strictly apply. Appellant's Br. at 27. But, that different purpose does not, and has never, made proceedings before a grand jury limitless. Though prosecutors have immense power in grand jury proceedings, this Court has rejected the ability of the prosecutor to urge return of an indictment "not only before, but at the time of finding the indictment, and upon the testimony before the grand jury." Williams v. State, 123 N.E. 209, 216 (Ind. 1919). The Court has approved analogy to a petit jury in this regard, stating neither a court nor a prosecutor "could say to the jury that the facts were sufficient to authorize them to find a bill, no more than the judge should say to the petit jury, upon the trial, that they should return a verdict of guilty," Shattuck v. State, 11 Ind. 473, 476 (1858). Furthermore, this Court has previously rejected the Court of Appeals' heavy reliance on the differing nature of grand juries, stating:

We note that the Court of Appeals observed that grand jury proceedings are merely inquisitorial in nature and are cloaked in secrecy for the benefit of the state, rather than the subject. While those observations are accurate, it cannot be doubted that an indictment carries with it significant import for the indicted's life, liberty, and reputation.

That is not to say that the subject of a grand jury investigation should be accorded the full panoply of constitutional rights due a criminal defendant, but rather to emphasize that violations of the letter of statutes governing grand jury machinations are viewed by this Court with a jaundiced eye.

State v. Bowman, 423 N.E.2d 605, 608 (Ind. 1981).

The Court concluded that "where the minimum protection afforded by statute that an

indictment will follow only from impartial consideration in a neutral and detached atmosphere is violated, the indictment must fall.” Id.

Here, Commander Smith’s testimony constituted “legal advice” to the grand jury by any recognizable definition of that term. It extended to his explicit opinion that Sheriff Martinez was “guilty” of resisting law enforcement and imposed on the role of the grand jury as exclusive judge of the facts and probable cause. The dismissal of Smith’s testimony as “merely his function as a testifying police witness” is inconsistent with the letter of Indiana Code § 35-34-2-4 and allows the State to strip the grand jury proceedings of their neutral and detached atmosphere with impunity.

CONCLUSION

This Court should grant transfer to vacate that opinion, reverse the trial court, and clarify the application of Indiana Code § 35-34-2-4 in light of its prior precedent.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 4,200 words and actually contains 4,150 words, excluding those portions enumerated in Appellate Rule 44(C), as reported by the word processing software used in its preparation.

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Petition to Transfer
Oscar Martinez, Jr.

CERTIFICATE OF SERVICE

I certify that on March 10, 2023 I electronically filed the foregoing document using the Indiana E-filing System (IEFS). I also certify that on March 10, 2023, the following parties were served with the foregoing document through the Indiana E-filing System (IEFS), addressed as follow:

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