

STATE OF NEW YORK
COUNTY COURT : COUNTY OF TOMPKINS

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

DECISION and ORDER

vs.

Ind. # 11-0060

JAMES MARSHALL,

Defendant.

Defendant is charged by indictment with Attempted Gang Assault 1st, Burglary 2nd, and Conspiracy 4th. By Notice of Motion dated June 26, 2011, defendant by his attorney Stephen Getman, Esq., seeks various relief including review of the Grand Jury minutes for legal sufficiency. By Response dated July 5, 2011, the People, by Assistant District Attorney Andrew Bonavia, consent to review of the Grand Jury minutes and request leave to re-submit any charges found to be insufficient.

Upon review of the Grand Jury minutes, the Court finds that the indictment must be dismissed in its entirety on two related grounds: the evidence was legally insufficient to support the crimes charged and the prosecutor violated his duty of "fair dealing to the accused."

Assistant District Attorney David Wade handled the Grand Jury presentation on behalf of the prosecution. Mr. Marshall is allegedly the fourth co-defendant involved in the May 14, 2010 crimes. The three co-defendants were charged immediately after the event and all three have now been convicted. Defendant Marshall was not charged until February of 2011, purportedly due to difficulties establishing his identity as the fourth actor. During the Grand Jury proceeding, the prosecutor did not present any eye-witness identification evidence. In fact, the only evidence offered to show that the defendant was the fourth co-defendant came from a police officer witness who had conducted a video-taped interrogation of the defendant. The prosecutor did not show the video-tape to the Grand Jury. Rather, Mr. Wade questioned the police officer about a single admission defendant allegedly made to the officer amidst a cascade of denials from the defendant that he was the fourth actor. This presentation created the false impression that the police had convincing proof that the defendant had admitted his involvement in these crimes and deprived the Grand Jury of the opportunity to review the equivocal statements themselves.

Legally sufficient evidence before a Grand Jury is defined as "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof..." CPL §70.10(1). The evidence here failed to meet that minimal standard regarding defendant's identification as the fourth co-defendant. In addition, the prosecutor's decision not to present the direct evidence of defendant's alleged

admission but instead to ask skewed questions of the investigator violated his duty of fair dealing. "...[A]t a Grand Jury proceeding, the prosecutor performs the dual role of advocate and public officer, charged with the duty not only to secure indictments but also to see that justice is done; as a public officer he owes a duty of fair dealing to the accused and candor to the courts (citation omitted). People v. Lancaster, 69 N.Y.2d 20, 511 N.Y.S.2d 559 N.Y. (1986).

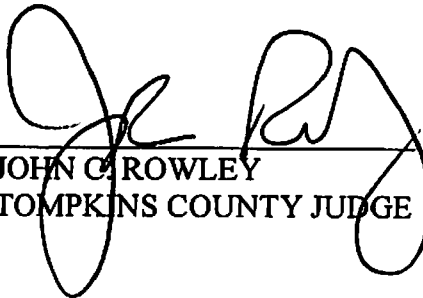
In light of these defects, the indictment must be dismissed. People's motion for leave to re-submit the case to a new Grand Jury is granted.

The securing order regarding the defendant shall remain in place pursuant to CPL §210.45(9).

This constitutes the Judgment and Order of the Court entered upon notice to all parties.

ENTER

Dated: July 13, 2011



JOHN C. ROWLEY
TOMPKINS COUNTY JUDGE