

50 Misc.3d 1225(A)  
Unreported Disposition  
(The decision is referenced in  
the New York Supplement.)

County Court, Monroe County, New York.

PEOPLE of the State of New York, Respondent,

v.

Lawrence FRUMUSA, Defendant–Appellant.

No. 12/002571.

|

Nov. 22, 2015.

### Attorneys and Law Firms

Sandra Doorley, Monroe County District Attorney, by Scott Miles, Esq., Assistant District Attorney, Rochester, for Respondent.

Timothy P. Donaher, Esq., Monroe County Public Defender, by Jane I. Yoon, Esq., Assistant Public Defender, Rochester, for Appellant.

### Opinion

JOHN L. DeMARCO, J.

\*1 Appeal from a judgment of the Webster Town Court (DiSalvo, J.), Monroe County, entered December 7, 2011. The judgment convicted defendant, following a jury trial, of petit larceny (Penal Law [PL] § 155.25) and criminal tampering in the second degree (PL § 145.15).

On appeal, defendant argues three main points: (1) that his trial counsel was ineffective; (2) that the trial court erred in admitting at trial his grand jury testimony regarding unrelated felony charges previously dismissed in Superior Court (Monroe County Court); and that the jury's verdict convicting him of petit larceny and criminal tampering in the second degree were against the weight of the evidence.

Defendant argues that his trial counsel was ineffective for failing to move to vacate a written Order of the Monroe County Court granting the trial prosecutor's *ex parte* application to unseal his grand jury testimony in a prior unrelated matter. The Court disagrees.<sup>1</sup> “It is well settled that a showing that [defense] counsel failed to make a particular pretrial motion generally does not, by itself, establish ineffective assistance of counsel” (*People v.*

*Patterson*, 115 AD3d 1174, 1175 [4th Dept 2014], *lv denied* 23 NY3d 1066 [2014] [citations and internal quotation marks omitted] ). It is equally well settled that “there can be no denial of effective assistance of trial counsel arising from counsel's failure to make a motion or argument that has little to no chance of success” (*People v. Caban*, 5 NY3d 143, 152 [2005] [citation and internal quotations omitted] ). Inasmuch as defendant's ineffective assistance of counsel claim rests solely on his trial counsel's failure to move to vacate the County Court's unsealing Order, the Court notes that “[a] single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial” (*id.*).

With respect to unsealing, “[t]he Criminal Procedure Law provides for disclosure of sealed materials to prosecutors, and law enforcement agencies, and the purposes for which their applications will be granted” (*People v. Lester*, 135 Misc.2d 205, 206 [Sup Ct, Bronx County 1987], citing Criminal Procedure Law §§ 160.50(1)(d), 170.56, and 210.46). Courts may order unsealing “only upon a compelling demonstration” (*Lester* at 206 [citation and internal quotation marks omitted] ) that “the interests of justice so dictate” (*Matter of Hynes v. Karassik*, 47 N.Y.2d 659, 664 [1979] ) and where “the public interest in disclosure [outweighs] the one favoring secrecy” (*Matter of District Attorney of Suffolk County*, 58 N.Y.2d 436, 444 [1983] ). In addition, unsealing is not a proper remedy unless the proponent has demonstrated that “the ... information [sought] [is] ... both relevant to the investigation and not otherwise available by conventional investigative means [;] [c]onvenience alone will not justify an unsealing” (*Matter of Dondi*, 63 N.Y.2d 331, 339 [1984]; *see also Karassik* at 665; *Matter of Attorney–General of State of NY*, 101 Misc.2d 36, 40 [Sup Ct, Suffolk County 1979] ).

\*2 Here, the People's case was circumstantial, and, as such, defendant's unsealed grand jury testimony ostensibly critical in shoring up the People's proof at trial. The Court has reviewed the pertinent portions of the trial transcript, as well as counsels' briefs, to include the exhibits attached to defendant's brief. Exhibit H is the trial prosecutor's affirmation setting forth his basis for the unsealing of defendant's grand jury testimony at issue. In reviewing exhibit H in view of the People's evidence at trial, the Court finds, contrary to defendant's contention, that defendant's trial counsel

was not ineffective for failing to file a motion with the County Court seeking to vacate its unsealing Order. The Court acknowledges that the trial prosecutor's affirmation in support of unsealing was attenuated inasmuch as it failed to set forth that the relevant information sought was not otherwise available through more commonly used discovery devices—such as, for example, a subpoena duces tecum to the Rochester Institute of Technology to obtain proof of defendant's Electrical Engineering degree or undergraduate transcripts in an attempt to suggest he may possess specialized knowledge probative of his commission of the crimes charged. Significantly, though, defendant's unsealed grand jury testimony included admissions that defendant developed “electronic skills” during the course of his employment at Xerox, that his “experience acquired at Xerox was transferred to other industries[,]” and that he was “always ... a technology guy ...” (brief for defendant-appellant at 3). The Court fails to discern from where else—i.e., other than from the grand jury testimony at issue—the People could have procured such information. Nor, in this Court's view, could the jury have drawn any such inference(s) from defendant's higher education and experience at Xerox, alone, without speculating. While the Court could never know what weight, if any, the jury imputed to the excerpt of defendant's grand jury testimony at issue, it would not have been unreasonable for them to extrapolate therefrom that defendant's self-proclaimed “electronic skills” and reference to himself as a “technology guy,” when coupled with his electrical engineering degree and 25 years experience at Xerox, equipped him with sufficient specialized knowledge to dismantle the Rochester Gas and Electric's disabling mechanisms and regenerate power to his residence illegally. Consequently, the Court finds that the evidence obtained through the People's unsealing application accorded with the ends of justice, as defendant's grand jury testimony provided an additional circumstantial link for the jury to weigh in determining whether defendant engaged in the criminal conduct charged against him.

While, as noted above (see n 1, *supra*), the legal propriety of another County Court's decision-making is not for this Court of equal jurisdiction to determine, the above analysis is essential to address the question whether defendant's trial counsel (trial counsel) was ineffective for failing to move in County Court to vacate the unsealing Order. The Court finds that he was not. Regardless of whether trial counsel was unable to defend against the

prosecutor's unsealing application due to its *ex parte* nature, defendant has failed to demonstrate that trial counsel's failure to move to vacate the unsealing Order in County Court after becoming aware of it, rather than seeking preclusion of its fruits in limine before the trial court (as trial counsel did), was without legitimate or strategical explanation. For example, trial counsel may have reasonably presumed that moving to preclude the testimony in limine<sup>2</sup> was a better strategy than moving to vacate the unsealing Order before the same County Court judge who already found the prosecutor's position/affirmation in support of unsealing meritorious. Moreover, given that dynamic, it would also have been reasonable for trial counsel to presume that his arguments seeking to vacate the unsealing Order may have had little to no chance of success (*see Caban*, 5 NY3d at 152). Thus, in this Court's view, trial counsel's failure to move in County Court to vacate the unsealing Order is an inadequate ground on which to deem him ineffective.

\*3 In any event, even assuming, arguendo, that defendant's unsealed grand jury testimony was the lynchpin to the People's case, it cannot be fairly stated that its admission-over trial counsel's objection-deprived defendant of meaningful representation. Not only did trial counsel make an oral application in limine seeking preclusion of defendant's grand jury testimony at trial, the record also reveals that trial counsel appropriately conducted jury voir dire, effectively cross-examined the People's witnesses, made articulate opening and closing statements, and called two witnesses in defendant's defense. Additionally, it bears mentioning, as acknowledged by the People in their reply brief, that trial counsel's efforts resulted in an acquittal on one of the charges. Considering the totality of the representation, the Court “discern[s] no single, nor cumulative, error sufficient to [conclude that defendant was] deprive[d] ... of his right to the effective assistance of counsel” (*People v. Lapi*, 105 AD3d 1084, 1088 [3rd Dept 2013], *lv denied* 21 NY3d 1043 [2013] [string citations and internal quotations marks omitted]). The Court finds that “the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [trial counsel] provided meaningful representation[ ] ...” (*People v. Baldi*, 54 N.Y.2d 137 [1981]; *see People v. Patterson*, 115 AD3d 1174, 1176 [4th Dept 2014, *lv denied* 23 NY3d 1066 [2014]]).

Defendant next contends that the trial court erred in admitting defendant's grand jury testimony in the People's case in chief. Although the trial court was bound by the County Court's unsealing Order, it was still within the trial court's discretion whether to admit defendant's grand jury testimony at trial. The trial court allowed the testimony under *People v. Singleton* (138 A.D.2d 544 [2nd Dept 1988], *appeal denied* 71 N.Y.2d 1033 [1988]) and *People v. Castillo* (3 A.D.2d 963 [3rd Dept 1957]). While both cases appear to be distinguishable from the instant case because, as defendant correctly points out in his brief, neither involved the use of a defendant's grand jury testimony at a subsequent trial as direct evidence in the People's case in chief, the Court finds, for the reasons that follow, that the trial court's admission of defendant's grand jury testimony was not error.

Both *Singleton* and *Castillo* set forth the same rule on this issue—namely, that a “defendant's waiver of immunity before ... the Grand Jury contemplate[s] the utilization of his testimony in any later proceeding in which it became material” (*Singleton*, 138 A.D.2d at 545, citing *Castillo*, *supra*). While it seems fair to infer that *any* later proceeding includes any pre-trial hearings and the trial of the same indictment, as well as subsequent proceedings regarding unrelated charges, the Court acknowledges that it is unclear whether these cases sanction the use of a defendant's unsealed grand jury testimony in the People's *direct case* in a subsequent unrelated proceeding, as the case was here. Notably, *People v. Smith* (87 N.Y.2d 715 [1996]), which is cited by both parties in their respective briefs (albeit with differing interpretations) has been interpreted by at least one commentator to stand for the general proposition that a defendant's “waiver of immunity, which waives defendant's privilege against self-incrimination, does not extend to unrelated charges that may be pending, which would impinge on the defendant's right against self-incrimination” (Muldoon, *Handling a Criminal Case in New York* § 6:53 [2014]). Defendant espouses this interpretation of *Smith* (see brief for defendant-appellant at 25–26, quoting *Smith*, 87 N.Y.2d at 718 [“a testifying defendant does not automatically waive the privilege against self-incrimination as to questions concerning pending criminal charges unrelated to the case on trial”]), and he concludes, accordingly, that admitting the testimony at trial was error.

\*4 The People respond that *Smith* does not prohibit the use of a defendant's grand jury testimony in an unrelated proceeding where, as here, the defendant offered the incriminating testimony to the grand jury without being prompted by a question designed to elicit an incriminating response regarding the specific unrelated charges at issue.<sup>3</sup> In support of this contention, the People quote in their responding brief a portion of *Smith* where the Court of Appeals observed that “cross-examination of a defendant at trial, for credibility purposes, with respect to an unrelated pending charge is prohibited, except where the defendant's own assertions open the door' to such questioning” (*Smith*, 87 N.Y.2d at 718–719 [citations omitted]; see brief for respondent at 10). Thus, say the People, because the defendant “opened the door,” and because his waiver of immunity contemplated his grand jury testimony being used at any later proceeding in which it becomes material, it was properly admitted on the People's direct case at trial. The Court agrees, although for reasons somewhat distinct from those offered by the People. The Court finds that defendant's application of *Smith* to the instant case is misplaced. That is, *Smith* concerned the propriety of cross-examining a defendant before the grand jury “where the prosecutor's admitted intention was to acquire sworn testimony for future use in an unrelated proceeding” (*Smith*, 87 N.Y.2d at 721). The *Smith* Court denounced that practice because it would “requir[e] a prospective defendant wishing to testify to forego the Fifth Amendment protection and suffer incrimination as to unrelated pending charges” (*Smith*, 87 N.Y.2d at 720). Based upon the record here, the Court is without basis to find that defendant's grand jury testimony was elicited through cross-examination or otherwise by design for the purpose of incriminating him, and defendant essentially concedes as much in his brief (see brief for defendant-appellant at 25). Defendant here offered the grand jury testimony at issue of his own accord in exercising his right to testify—and, distinguishable from *Smith*, without being steered or manipulated by the presenting prosecutor with an ulterior motive to incriminate him in mind. While the People may be generally correct in their interpretation of that portion of *Smith* cited in their reply brief that a defendant may not be cross-examined before the grand jury regarding pending, unrelated charges, unless his own assertions open the door, that is not the issue here. Rather, the issue is the legality of the People's use of defendant's grand jury testimony which was not elicited through cross-examination nor otherwise for the purpose of

incriminating him on unrelated charges, but rather as the result of defendant's voluntary narrative to the grand jury in exercising his right to testify, subsequent to executing a waiver of immunity. Under those circumstances, the Court concludes that “defendant's waiver of immunity before his appearance in the grand jury contemplated the utilization of his testimony *in any later proceeding in which it became material* (*People v. Thomas*, 300 A.D.2d 1034, 1034 [4th Dept 2002], *lv denied* 99 N.Y.2d 633 [2003] [citation and internal quotation marks omitted] [emphasis added] ). For these reasons, given the demonstrated materiality of defendant's grand jury testimony, the trial court's decision to admit the testimony for use in the People's direct case was proper.

\*5 Defendant also contends that his convictions for petit larceny and criminal tampering in the second degree were against the weight of the evidence. “[B]ased on all the credible evidence [, this Court concludes that] a different [verdict] would not have been unreasonable, and [it will] therefore conduct an independent review of the trial evidence (*People v. Howard*, —AD3d —, 2015 N.Y. Slip Op 07100 [4th Dept 2015, October 2] [citation and internal quotation marks omitted] ). In reviewing the weight of the evidence, the Court of Appeals has instructed that an intermediate appellate court must “affirmatively review the record; independently assess all of the proof; substitute its own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if the court is not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt” (*People v. Delamota*, 18 NY3d 107, 116–117 [2011] [citations omitted]; *see Howard*, *supra*; *People v. Oberlander*, 94 AD3d 1459, 1459 [4th Dept 2012] ).

#### Footnotes

- 1 Notably, the question whether the motion to unseal was properly granted is not squarely before this Court. While that consideration may be tethered to one of the issues before the Court—namely, whether trial counsel was ineffective for not moving in County Court to vacate the unsealing order—this opinion should in no way be construed to either endorse or impugn County Court's Order granting the unsealing of defendant's grand jury testimony.
- 2 The trial court was naturally bound by the County Court's unsealing Order. Thus, defendant's trial counsel availed himself of the only available remedy before that court, namely, motioning the trial judge for preclusion.
- 3 Although the People do not actually say as much in their responding brief, the Court believes, within the context of the People's argument, their reference to the Court of Appeals' decision in *Smith*, and the Court's own review of *Smith*, that its paraphrase of the People's argument on this point fairly represents their position.

Here, having conducted that review, the Court concludes that the verdict was not against the weight of the evidence. As defendant acknowledges in his brief, the people called several RGE employees at trial, all of whom testified, among other things, that defendant's residence continued to receive power even after it was shut down due to defendant's non-payment. While defendant correctly notes that the People's proof included no witnesses who actually observed him manipulating or otherwise handling his power meter or transformer during the time frame his power was turned off and, in fact, directly established that RGE employees handled the power meter responsible for generating power to his residence during that time frame, the jury's consideration of this evidence and the excerpted portion of defendant's grand jury testimony resulted in a finding of guilt on the charges of criminal tampering in the second degree and petit larceny. The Court, in exercising its factual review power, having weighed the conflicting testimony and conflicting inferences in light of the elements charged at trial (*see People v. Danielson*, 9 NY3d 342, 349–350), and having accorded appropriate deference to the jury's credibility determinations (*Bleakley*, 69 N.Y.2d at 495), concludes that the jury properly weighed the evidence. Thus, the verdict was not against the weight of the evidence.

It is hereby ORDERED that the judgment so appealed from is AFFIRMED in all respects.

#### All Citations

50 Misc.3d 1225(A), 36 N.Y.S.3d 409 (Table), 2015 WL 10436855, 2015 N.Y. Slip Op. 51982(U)

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