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Lynn Isaacson

THE USE OF AN INFORMATION FOLLOWING THE RETURN OF A GRAND JURY NO BILL: *STATE v. JOE NESTOR CHAVEZ*

The New Mexico Constitution provides that a felony may be prosecuted either on indictment of a grand jury or by an information filed by a district attorney or the attorney general.[1] In *State v. Joe Nestor Chavez*[2] the New Mexico Court of Appeals held that a district attorney's authority to charge a defendant by information[3] is unaffected by a grand jury no bill in the same matter.[4] The holding creates a potential source of prosecutorial abuse by allowing a district attorney to circumvent the grand jury's final determination as to probable cause and continue prosecution through the use of an information.

STATUTORY FRAMEWORK

In 1969 the New Mexico Legislature enacted the current Grand Jury Act.[5] The prior Grand Jury Act contained a provision, section 41-5-27, which dealt with resubmission of matters to the grand jury. This provision, repealed by the 1969 Act, had provided that "the dismissal of the charge [by the grand jury] does not however prevent its being again submitted to the grand jury as often as the court may direct."[6]

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1. No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment of indictment of a grand jury or information filed by a district attorney or attorney general or their deputies .... No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.

N.M. Const. art. 2, §14. *See* N.M.R. Crim. P. 5(C) (1978); State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App. 1971); Flores v. State, 79 N.M. 420, 444 P.2d 605 (Ct. App. 1968).

2. ____N.M. ____, 599 P.2d 1067 (Ct. App. 1979).

3. An information is an accusation signed by the district attorney and filed in the district court, which must set out the essential facts, name the offense charged and name those witnesses whose testimony provides a basis for the information. Prosecution by information requires that the defendant be given a preliminary hearing to determine whether there is probable cause to bind him over for trial. N.M.R. Crim. P. 5(C) (1978); N.M.R. Crim. P. 20(C) (1978).

4. ____N.M. at ____, 599 P.2d at 1071. A no bill is the method used to indicate that the grand jury is not satisfied "that an offense against the laws has been committed and that there is probable cause to accuse by indictment the person named ...." N.M. Stat. Ann. §31-6-10 (Supp. 1979).

5. N.M. Stat. Ann. §§31-6-1 through -13 (1978) (amended 1979).

6. N.M. Stat. Ann. §41-5-27 (Repl. 1964) (repealed 1969). This provision was first enacted in New Mexico Laws 1853-1854.

In 1979 the New Mexico Legislature reconsidered the value of a resubmission provision and enacted section 31-6-11.1, which provides that "[a]fter a grand jury acts on the merits of evidence presented to it and returns a no-bill, the same matter shall not be presented again to that jury or another grand jury on the same evidence."[7] This provision is designed to prevent a resubmission of a charge to the grand jury where that body has previously found insufficient evidence to return an indictment. In *State v. Joe Nestor Chavez* the court of appeals considered the effect of those two resubmission provisions on the district attorney's authority to proceed in the same matter by information after a grand jury no bill had been returned.

THE CHAVEZ DECISION

In 1978 the Bernalillo County Grand Jury conducted an investigation into alleged improprieties in the Bernalillo County Road Department.[8] The investigation concerned possible criminal action by the defendant in purchasing gravel for certain county roads.[9] After considering the evidence presented to it, the grand jury returned a no bill against the defendant.[10] The defendant was thereafter charged by information with filing a false public voucher.[11] He challenged the information on the ground that the grand jury had already considered the matter and returned a no bill.[12] The trial court concluded that, absent new or additional evidence which had not been presented to the grand jury, the district attorney was without authority to file an information after the return of a no bill by the grand jury.[13] The court of appeals reversed, holding that the district attorney's authority to file the information was unaffected by the actions of the grand jury.[14]

The defendant argued that the repeal of the resubmission provision in 1969[15] showed legislative intent to limit the authority of the

7. N.M. Stat. Ann. §31-6-11.1 (Supp. 1979).

8. Defendant-Appellee's Answer Brief, at 10, State v. Joe Nestor Chavez, ____ N.M. ____, 599 P.2d 1067 (Ct. App. 1979).

9. ____N.M. at ____, 599 P.2d at 1067.

10. There was some question as to whether the grand jury had in fact returned a no bill. Plaintiff-Appellant's Brief in Chief, at 17-21; Defendant-Appellee's Answer Brief, at 10-16. The court of appeals concluded that, based upon the grand jury's final report, there was substantial evidence supporting the trial court's finding that a no bill had been returned as to defendant and that such finding was therefore not subject to appellate review. ____N.M. at ____, 599 P.2d at 1068.

11. This is a violation of N.M. Stat. Ann. §30-23-3 (1978).

12. Plaintiff-Appellant's Brief in Chief, at 3.

13. ____N.M. at ____, 599 P.2d at 1068-69.

14. *Id.* at ____, 599 P.2d at 1071.

15. *See* note 6 *supra.*

district attorney to resubmit a matter to a grand jury or to proceed by information in a case where a grand jury had returned a no bill.[16] The court of appeals rejected defendant's argument for two reasons. First, since the resubmission provision had been enacted prior to the amendment of the New Mexico Constitution which first created the use of the information in New Mexico,[17] it could only have been intended to apply to resubmission of matters to the grand jury.[18] Second, since no explicit constitutional or statutory provisions exist which restrain the district attorney's authority to proceed by information after a grand jury no bill, the court refused to read such a limitation into the repeal of section 41-5-27.[19]

The court also rejected the defendant's contention that the newly enacted resubmission provision, section 31-6-11.1, would prohibit the district attorney from filing an information following the return of a grand jury no bill. The court found this provision to be limited "only to grand jury matters."[20] In addition, the court found that section 31-6-11.1, if applied in *Chavez*, would have a retroactive effect.[21] Because neither resubmission provision limited the district attorney's authority to file an information after a grand jury returns a no bill, the court held, in the absence of any other restraints, that the district attorney could charge the defendant by information even though the grand jury had refused to indict him.

EFFECT OF CHAVEZ

The *Chavez* decision goes beyond affirming prior New Mexico case law which gave a district attorney absolute discretion in selecting the method of prosecution by which to initiate a criminal proceeding.[22] Such discretion is not disputed.[23] Nor is there a dispute as to the

16. Defendant-Appellee's Answer Brief, at 6-7.

17. N.M. Const. art. 2, §14. *See* note 1 *supra.*

18. ____N.M. at ____, 599 P.2d at 1069. Prior to 1925 a felony could be prosecuted only on indictment of the grand jury.

19. *Id.* at ____, 599 P.2d at 1070. The court looked to the grants of power in both the constitution and in the statutes and found no express limitations on the authority to resubmit matters to the grand jury or to file an information after the return of a grand jury no bill. *See* N.M. Const. art. 4, §24; N.M. Const. art. 2, §14; N.M. Stat. Ann. §36-1-18 (1978); N.M. Stat. Ann. §31-6-7 (1978) (amended 1979).

20. ____N.M. at ____, 599 P.2d at 1071.

21. *Id.*

22. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App. 1971); State v. Vaughn, 82 N.M. 310, 481 P.2d 98 (1971), *cert. denied,* 403 U.S. 933 (1971); State v. Mosley, 79 N.M. 514, 445 P.2d 391 (Ct. App. 1968); Flores v. State, 79 N.M. 420, 444 P.2d 605 (Ct. App. 1968).

23. The district attorney is in the best position to decide which method, the indictment or the information, will be most efficient in a particular case. For a discussion of the prosecutor's role in the grand jury proceeding and in prosecution by information see Scigliano, *The Grand Jury, The Information and The Judicial Inquiry,* 38 Or. L. Rev. 303, 308-11 (1959).

merits of using either the grand jury or the information in bringing criminal prosecutions.[24] What is in doubt is the wisdom of allowing the district attorney to ignore a grand jury no bill and to continue a prosecution by filing an information.

Chavez is the only case in New Mexico which has dealt with the filing of an information by a district attorney after a grand jury has refused to indict in the same matter. The court of appeals looked to an earlier New Mexico Supreme Court opinion, *State v. Peavler,*[25] to support its decision in *Chavez.* In *Chavez* the grand jury determined that no probable cause existed and returned a no bill before the information was filed in the district court.[26] In *Peavler,* however, there was no determination of probable cause prior to the initiation of the second prosecution.[27] Therefore, given the holding in *Chavez,* probable cause will be determined twice.

Concurrent authority of the district attorney and the grand jury has been found by some state courts to justify allowing a district attorney to file an information after the return of a no bill.[28] Grand jury resubmission provisions have also been read to impose no limitation on the district attorney's authority to file a subsequent information.[29] Where other state courts have limited the authority to so file an information, the notion of fairness has been an important consideration. The Indiana Supreme Court refused to allow the filing of an information where the grand jury had failed to indict.

> To hold otherwise would be, in effect, to permit the prosecutor to sit in judgment on the proceedings of the grand jury, to substitute his opinion for theirs, and to make his will the sole arbiter of the question whether a man whom the grand jury had failed to indict should or should not be forced to final trial.[30]

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24. *See e.g.,* Alexander & Portmen, *Grand Jury Indictment Versus Prosecution by Information–An Equal Protection–Due Process Issue,* 25 Hastings L.J. 997 (1974); Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?,* 2 N.M.L. Rev. 141 (1972); Scigliano, *The Grand Jury, The Information and The Judicial Inquiry,* 38 Ore. L. Rev. 303 (1959).

25. 88 N.M. 125, 537 P.2d 1387 (1975).

26. In *Peavler,* the criminal complaint was dismissed by the magistrate conducting the preliminary hearing because the district attorney failed to appear at the hearing. Thus, the issue of probable cause was never considered. The district attorney subsequently obtained an indictment against the defendant. In upholding the district attorney's authority to obtain the grand jury indictment, the New Mexico Supreme Court stated that the magistrate had been without jurisdiction to find probable cause in the prosecution of a felony. Because no jurisdiction had existed, the court stated that even if the magistrate had considered the issue of probable cause, a subsequent indictment would not have been barred. 88 N.M. at 126, 537 P.2d at 1388.

27. ____N.M. at ____, ____, 599 P.2d at 1067, 1068.

28. Ex parte Moan, 65 Cal. 216, 3 P. 644 (1884); Hardy v. Blount, 261 So. 2d 172 (Fla. 1972); Latour v. Stone, 185 So. 729 (Fla. 1939).

29. Rea v. State, 3 Okla. Crim. 269, 105 P. 381 (1909).

30. State v. Boswell, 104 Ind. 541, ____, 4 N.E. 675, 679 (1886).

In *People v. Pack*[31] a New York trial court considered a grand jury provision similar to New Mexico's original resubmission statute.[32] The provision dealt only with the resubmission of a charge to the grand jury.[33] The court nevertheless applied the New York provision to the filing of an information. The court noted that limiting the application of the provision exclusively to resubmission of matters to the grand jury would "destroy its spirit."[34] The court then discharged the defendants, who had been charged by information after the grand jury had failed to indict, saying that "the decision of the Grand Jury is justly entitled to great weight and should not be brushed aside or ignored."[35] That reasoning should be dispositive in *Chavez*. To allow a district attorney to file an information where the grand jury has refused to indict may not only tempt a district attorney to abuse his prosecutorial discretion, but may also undermine the validity of the grand jury no bill.

NEED FOR "RESTRAINT"

In *Chavez*, the New Mexico Court of Appeals reached its holding "in the absence of [any constitutional or statutory] limitation upon the district attorney's authority as prosecutor."[36] The court declined to impose such a limitation on its own initiative, but indicated that limitations imposed by the legislature would be favorably received.[37] The decision in *Chavez* thus calls for legislative clarification of the limitations, if any, that are to be imposed on a district attorney who files an information following a grand jury no bill.

The Idaho Constitution contains an example of a limitation on the authority of a district attorney to prosecute in such cases:

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31. 179 Misc. 316, 39 N.Y.S.2d 302 (Ct. Spec. Sess. 1942).

32. *See* text accompanying note 6 *supra.*

33. The New York Code of Criminal Procedure § 270 provides: "The dismissal of the charge does not, however, prevent its being again submitted to a grand jury, as often as the court may so direct. But without such direction, it cannot be again submitted." 179 Misc. at ____, 39 N.Y.S.2d at 308.

34. 179 Misc. at ____, 39 N.Y.S.2d at 308. The court said:

> A literal reading . . . would require the construction that is applicable only to a resubmission of the charge to a second Grand Jury and that it has no application to a submission of the same charge to another tribunal such as a Magistrate. This Court, however, is not inclined to follow the letter of the law, where a narrow technical construction would destroy its spirit.

35. *Id.* at ____, 39 N.Y.S.2d at 309. *See also* Richards v. State, 22 Neb. 145, 34 N.W. 346 (1887).

36. ____N.M. at ____, 599 P.2d at 1071.

37. *Id.* The Court stated:

> The existence or nonexistence of such restraints is a policy matter. Absent a constitutional violation, such policy is for the Legislature to decide. We do not hold there can be no restraints; our holding is that there were no restraints applicable to this case.

> No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor . . . provided . . . that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of the public prosecutor.[38]

The Idaho provision might be modified to allow for the use of an information where new evidence is available which was not available to the grand jury.[39] Such a modified provision would prohibit a district attorney from prosecuting a defendant a second time by information where no new evidence is available. The district attorney's powers would otherwise remain unchanged.[40] He would still have absolute discretion to use either the indictment or the information to initiate prosecution. Only the possibility of abuse would be removed.

CONCLUSION

The holding in *State v. Joe Nestor Chavez* may demonstrate that the possibility of prosecutorial abuse of discretion increases where limits of authority are not clearly defined. Efficient prosecution does not require that a district attorney have the authority to prosecute by information after a grand jury has returned a no bill. A statutory limitation of that authority will remove from the district attorney the temptation to abuse the discretion entrusted in him and affirm the finality of decisions reached by the grand jury.

LYNN ISAACSON

38. Idaho Const. art. I, § 8.

39. This would make it similar to § 31-6-11.1. *See* note 7 *supra.*

40. The district attorney's role as the official prosecutor for his district would not change, nor would his constitutional or statutorily based powers. Only the court approved rule that a district attorney is not barred from filing an information by the return of a grand jury no bill would be affected. *See* note 19 and text accompanying notes 16-19 *supra.*