Court of Appeals, State of Michigan

ORDER

In the Matter of a Petition for a Multi-County Citizens' Grand Jury for Genesee, Grand Traverse, Livingston, and Macomb Counties

Docket No. 315393

LC No.

William B. Murphy, C.J.
Presiding Judge

David H. Sawyer

Douglas B. Shapiro
Judges

The Attorney General having filed a petition requesting this Court to convene a Grand Jury pursuant to MCL 767.7b(1), and this Court having found that the petition satisfies the requirements of MCL 767.7b(3), having found that probable cause exists to believe that a crime, or a portion of such crime has been committed in two or more of the counties named in the petition, and having found that the petition establishes reason to believe that a Grand Jury with jurisdiction over two or more of the counties named in the petition could more effectively address the criminal activity referred to in the petition than could a Grand Jury with jurisdiction over one of the counties,

It is ORDERED that the petition is GRANTED pursuant to the following terms. 44th Circuit Judge David J. Reader is designated to preside over the Grand Jury Proceedings. The Grand Jury shall have jurisdiction over the counties of Genesee, Grand Traverse, Livingston, and Macomb. The Grand Jury shall consist of 13 jurors, selected as follows: 3 jurors from Genesee County, 3 jurors from Grand Traverse County, 3 jurors from Macomb County, and 4 jurors from Livingston County. The term of the Grand Jury shall be six months, unless extended by order of this Court. The location of the Grand Jury proceedings shall be in Livingston County, or at a location within the four counties over which the Grand Jury has jurisdiction otherwise designated by the presiding judge.

It is further ORDERED that the chief judges and clerks of the counties over which the Grand Jury has jurisdiction shall comply with the orders of the designated presiding judge that relate to the Grand Jury proceedings.

Respectfully, we are compelled to respond to our dissenting colleague's arguments in favor of denying the Attorney General's petition. Pursuant to MCL 767.7b(3)(c), a petition to this Court to convene a grand jury must include "[a] statement setting forth probable cause to believe that a crime, or a portion of that crime, has been committed in 2 or more of the counties named in the petition." And in order for this Court to grant the petition, we must find, in part, that "[t]he petition establishe[d] probable cause to believe that a crime, or a portion of that crime, has been committed in 2 or more of the counties named in the petition." MCL 767.7d(a). While the Attorney General's petition makes a brief reference to the crime of conspiracy, MCL 750.157a, the focus of the petition is on the crime set forth in MCL 333.17764(2), which provides that a "person shall not knowingly or recklessly . . . (b) [s]ell, offer for sale, possess for sale, cause to be sold, or manufacture for sale an adulterated or misbranded drug." The criminal penalties for a violation escalate depending upon whether a personal injury, serious impairment of a body function, or death results from the violation. MCL 333.17764(3)-(6).

As indicated above, MCL 767.7b(3)(c) requires the petition to contain a "*statement* setting forth probable cause," (emphasis added), and in the Attorney General's petition, the following *statements* are

made: New England Compounding Center (NECC), operating out of a facility in Framingham, Massachusetts, recalled certain lots of injectable methylprednisolone acetate (hereafter "the drug") prepared by NECC after reports of contamination resulting in outbreaks of fungal meningitis; NECC subsequently halted all production of the drug; the Centers for Disease Control and Prevention (CDC) and the Food and Drug Administration (FDA) coordinated a multi-state investigation, identifying numerous patients who were administered the drug prepared by NECC and who then developed fungal meningitis; the CDC observed fungal contamination by direct microscopic examination of a sample of the drug collected from NECC; the CDC reported an ever-growing number of meningitis cases, and resulting deaths, in patients who had been administered the drug prepared by NECC; the CDC, in March 2013, reported a total of 720 cases of meningitis, including 48 deaths, in 20 states linked to the drug, with Michiganders accounting for 255 of the cases and 14 deaths; the CDC "identified four separate facilities in Michigan that received the probably adulterated lots of the [drug]," which facilities are located in the four counties at issue in the petition; and the Michigan Department of Community Health (MDCH) publicly disclosed non-identifying information regarding the 14 Michigan deaths, seven of which occurred in the four counties.

On the basis of these statements, we find that a person of ordinary prudence and caution could conscientiously entertain a reasonable belief, or in other words we find probable cause, that an adulterated drug was manufactured by NECC and sold to facilities in the four counties named in the petition, resulting in various levels of personal harm to Michigan residents in those counties and beyond. See *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003) (discussing the probable cause standard, noting that probable cause can be found even where there are doubts regarding guilt, and stating "that the gap between probable cause and guilt beyond a reasonable doubt is broad"). Further, the statements regarding the sheer number of cases in Michigan and elsewhere of meningitis linked to the drug prepared by NECC supports a reasonable inference of recklessness concerning the manufacture and sale of the drug. And when the statements in the petition related to the 60 Minutes broadcast and the claims by the NECC lab technician of disregarded mold contamination are taken into consideration, it is quite easy to find probable cause that NECC personnel engaged in recklessness. For purposes of MCL 767.7d(a), the statements in the Attorney General's petition established probable cause to believe that a crime, i.e., violation of MCL 333.17764(2), or a portion of that crime, was committed in two or more counties named in the petition.

The dissent, while accepting that the CDC information referenced in the petition is strong evidence of drug adulteration, posits that there is an absence of probable cause showing that persons in Michigan participated in criminal wrongdoing or that the drugs were purchased or administered in Michigan by persons having knowledge of the adulteration or acting in reckless disregard of possible adulteration. We find this argument irrelevant, as MCL 333.17764(2) certainly does not require someone in Michigan to be involved in manufacturing and selling the adulterated drug and MCL 767.7d(a) only requires that the crime or a portion of the crime be committed in Michigan. Under MCL 762.2(1), "[a] person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state or outside of this state if any of the following circumstances exist: . . . (d) [a] victim of the offense . . . resides in this state or is located in this state at the time the criminal offense is committed[,] [or] (e) [t]he criminal offense produces substantial and detrimental effects within this state." Accordingly, NECC or its personnel can be prosecuted in Michigan for violation of MCL 333.17764(2), given the allegations in the petition and even if they were not physically located in Michigan. And MCL 762.2(2) provides that a criminal offense is considered to have been "committed partly within this state if any of the following apply: (a) [a]n act constituting an element of the criminal offense is committed within this state[;] (b) [t]he result or consequences of an act constituting an element of the criminal offense occur within this state[;] (c) [t]he criminal offense produces

consequences that have a materially harmful impact upon . . . the community welfare of this state, or results in persons within this state being defrauded or otherwise harmed." An element of the crime would include a sale of the alleged adulterated drug, which entails a transaction encompassing delivery and receipt of the drug, and, according to the petition, this occurred in the relevant Michigan counties. Further, considering that the nature of the resulting harm impacts the degree of punishment, the harm would comprise an element of the offense, and the harm was suffered by persons in Michigan. Additionally, the criminal offense, as alleged, resulted in persons within this state being harmed and produced a materially harmful impact on the welfare of Michigan communities. We also note that the petition claims that NECC is licensed by the state of Michigan as a pharmaceutical compounder, giving it authority to provide the drug to Michigan residents. Although MCL 762.2 is a jurisdictional statute, we find it pertinent and analogous in construing the language in MCL 767.7b(3)(c) and MCL 767.7d(a) regarding commission of a portion of a crime in two or more Michigan counties.

Next, the dissent simply makes demands that go beyond the language in 767.7b(3)(c) and MCL 767.7d(a), which merely require a statement of probable cause, where the dissent appears to mandate the submission of documentary evidence, investigatory actions by the Attorney General's office and law enforcement agencies, and the production of evidence obtained by federal agencies and other states investigating the events. It is in the grand jury proceedings where witnesses are subpoenaed, information is provided, and evidence is presented, and where the grand jury, on presentation and consideration of the evidence, can issue an indictment, establishing probable cause that a crime has been committed. MCL 767.21; MCL 767.22; MCL 767.23a; *People v Glass (After Remand)*, 464 Mich 266, 278-279; 627 NW2d 261 (2001). We are not the grand jury!; we are only asked to determine whether the statements in the Attorney General's petition suffice to order the convening of a grand jury. We also note that the CDC, FDA, and MDCH information referenced in the petition is investigatory in nature.

Finally, we also conclude, contrary to the dissent, that the petition "establishes reason to believe that a grand jury with jurisdiction over 2 or more of the counties named in the petition could more effectively address the criminal activity referred to in the petition than could a grand jury with jurisdiction over 1 of those counties." MCL 767.7d(b). Under the circumstances of this case, it would seem a complete waste of judicial resources and would create overlapping investigations and procedures to have individual counties conduct separate grand jury proceedings. The criminal activity at issue, which is allegedly widespread, would be more effectively addressed by one grand jury covering multiple counties; given its nature, this case calls for one concerted effort by a single grand jury regarding the sale of a specific drug that produced a similar injury. On this issue, the dissent maintains that the petition fails to assert criminal wrongdoing by persons in the four counties acting in concert. Again, there is no legal requirement that the petition allege criminal wrongdoing committed by persons in Michigan.

The petition is granted.

SHAPIRO, J.

I would deny the request to empanel a multi-county grand jury at this time, but would allow the Attorney General to resubmit the petition should he later obtain evidence sufficient to establish probable cause as required by law, before we may consider whether to empanel a grand jury to investigate possible criminal conduct by Michigan physicians and clinics.

The illnesses and deaths that followed from the injections and the advisories issued by the Centers for Disease Control and Prevention ("CDC") are strong evidence that the medication in question was adulterated during production in Massachusetts by NECC. Based on this, the majority grants the Attorney General's open-ended request to have a grand jury investigate any person or entity that purchased the medication in Michigan. It is clear, however, that a grand jury is not needed to investigate NECC. Indeed, NECC is under active investigation by both regulative and law enforcement authorities in Massachusetts as well as in Washington, D. C. If the Attorney General wishes to bring charges against NECC under Michigan law, the evidence needed to bring those charges is either already available or will be available very shortly from these other investigating agencies.[1] And significantly, the Attorney General has not limited his request to a grand jury to investigate NECC. Indeed, the petition specifically references, by name, medical clinics in Michigan. Thus, the real question before us is whether there is probable cause to conclude that these adulterated drugs were *purchased or administered in Michigan by persons or entities having knowledge of the adulteration or acting in reckless disregard of that likelihood.*

The Attorney General's petition offers almost no evidence at all, let alone evidence sufficient to establish probable cause, as to this question. The petition does not refer us to a single investigatory action taken by the Attorney General's office or by any Michigan law enforcement agency in an effort to obtain evidence of such unlawful conduct. Nor does the petition refer us to evidence obtained by federal agencies or by other states that are investigating these events. The only investigation referenced in the petition is that being conducted by the CDC, but the petitioner has not provided this Court with any of the CDC materials.[2]
The Attorney General instead relies on a 60 Minutes broadcast that contained edited interviews with two individuals, neither of whom has been interviewed by Michigan law enforcement personnel and as to whom no affidavits attesting to the truthfulness of their statements have been submitted. One of the interviewees was identified by the reporter as a lab technician at NECC and stated that he brought unsanitary conditions to the attention of an NECC supervisor at the facility in Massachusetts and that the supervisor took no action. The second interviewee, not identified by name, purported to be a telephone salesman for NECC and asserted that some unidentified NECC customers took actions demonstrating knowledge that NECC was unlawfully acting as a drug manufacturer. This individual did not, however, identify any such clinics by name, nor whether any of the relevant clinics are in Michigan, nor even how many of the hundreds of NECC customers in 23 different states behaved in this fashion. In sum, the

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[1] The majority implies that upon a showing of probable cause against one party, we have no choice but to empanel a multi-county grand jury to investigate anyone else. However, the statute makes clear that this Court is never *required* to empanel a multi-county grand jury and that the decision whether and when to do so is always discretionary with this Court. MCL 767.7d.

[2] A review of the CDC materials available on the internet reveals no allegations, let alone evidence, that Michigan residents participated in criminal wrongdoing. Nor does the October 23, 2012, Preliminary Investigation Findings (concerning NECC) of the Massachusetts Office of Health and Human Services, also available on the internet, but not cited by the petitioner.

only evidence suggesting that any clinic, let alone one in Michigan, acted knowingly or recklessly, is a single, unverified and edited statement given by an unknown individual of unknown veracity, asserting that some purchasers, somewhere in the United States, did so. This is not sufficient for a court to conclude that there is probable cause to believe that a medical provider in Michigan obtained or administered the drug knowing that it was adulterated or in reckless disregard of that likelihood.

The petition, as filed, amounts to a request that we empanel a grand jury based solely on edited statements of two individuals who have never been interviewed by Michigan law enforcement personnel and who make no allegations of criminal misconduct by anyone in Michigan purchasing or administering the adulterated medicine. The grand jury we have been asked to empanel will have sweeping investigatory powers including the power to subpoena witnesses to testify under oath and to require individuals and medical clinics to turn over private records. Given the extent of those powers, the law requires probable cause of a crime in Michigan based on evidence, not simply suspicions based upon unverified statements seen on a television show. "[G]rand juries are not licensed to engage in arbitrary fishing expeditions." *U.S. v R. Enterprises, Inc*, 498 US 292, 299; 111 S Ct 722; 112 L Ed 2d 795 (1991).

Accordingly, I would deny the petition without prejudice to its resubmission with additional evidence to support the necessary finding of probable cause. [3]

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[3] In addition to the more substantive concerns set forth above, I also find nothing in the petition that explains the need for a multi-county grand jury instead of proceeding by the normal mechanism by which prosecutors may establish county-based grand juries. The petition does not even assert that any alleged wrongdoing by persons in one county was done in concert with allegedly wrongful actions by others in other counties. In addition, the relevant counties are at significant distances from one another and grand jury service in Livingston County, as has been proposed, will create substantial hardships for jurors from Grand Traverse and Macomb Counties.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

APR 19 2013
Date

Chief Clerk