

IN THE FRANKLIN COUNTY, OHIO COURT OF COMMON PLEAS
CRIMINAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	Case No. 19 CR 2735
v.	:	JUDGE HOLBROOK
WILLIAM S. HUSEL	:	
Defendant.	:	

DECISION AND ENTRY DENYING DEFENDANT’S MOTION TO DISMISS

This matter is before the Court on Defendant William S. Husel’s (“Defendant”) motion to dismiss the indictment. The State opposes the motion. Over the State’s objection, a hearing on the motion was held December 1, 2021. At the hearing, Defendant presented the testimony of Dr. Timothy Ihrig and Sergeant Terry McConnell, as well as exhibits 1 and 2.

Upon review of the evidence presented at the hearing, the arguments of counsel, and the relevant law, the Court issues the following decision on the motion.

Background

This case involves allegations that Defendant, while a physician at Mount Carmel West hospital, overprescribed fentanyl purposely causing the death of a number of his patients. On June 3, 2019 and June 4, 2019, the case involving Defendant was presented to the Franklin County Grand Jury seeking an indictment for 25 counts of murder. On June 4, 2019, the members of the Grand Jury voted to indict Defendant on all 25 counts. With respect to each count, the Indictment, filed June 5, 2019, states,

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio upon their oath do find and present that William Scott Husel * * * in violation of section 2903.02 of the Ohio Revised Code, did purposely cause the death of [the alleged victim].

That same day, Franklin County Prosecutor Ron O'Brien held a press conference. During the conference, Prosecutor O'Brien represented that during the investigation into Defendant's conduct, "we focused on 500 micrograms [of fentanyl] and above * * * [b]ecause the expert witness we talked to said with certainty that a dosage at that level could not support any legitimate medical purpose and that a dosage at that level would cause someone's death." Hearing Exhibit 1 at p.11. Later in the press conference, Prosecutor O'Brien was asked, "How was 500 decided on as the number?" Id. at p. 17. To which he responded,

I have talked to many doctors and I have done some research and had research provided to me from medical journals, and I have found no one nowhere that says 500 micrograms of Fentanyl is an appropriate use of Fentanyl for treatment of someone being taken off a ventilator.

Id. From Prosecutor O'Brien's representations at the press conference, the defense believes that he misled the grand jury thereby prejudicially affecting the outcome of the proceedings. In support of this position, Defendant cites to the medical records of T.Y. which were in the Prosecutor's possession at the time he presented the case to the grand jury. Said records reflect that, in total, Defendant prescribed 2,500 micrograms of fentanyl to T.Y. and that T.Y. survived for more than 10 days after being administered 2,500 micrograms of fentanyl.

The defense also contends that Prosecutor O'Brien improperly withheld potentially exculpatory evidence from the grand jury. Again, citing to T.Y.'s medical records to support their position, i.e. had the grand jury been made aware of T.Y.'s medical records, they would have known that 500 micrograms of fentanyl is not a *per se* lethal dose. Dr. Ihrig testified consistent with Defendant's position further opining Defendant's prescription of doses of fentanyl in excess of 500 micrograms was appropriate.

Upon the forgoing, Defendant submits that Prosecutor O'Brien engaged in prosecutorial misconduct with respect to the grand jury proceedings, and that Defendant was materially prejudiced as a result of the same. Accordingly, Defendant requests that this Court dismiss the indictment in its entirety.

Law and Analysis

"It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge." *United States v. Williams*, 504 U.S. 36, 51 (1992). With that in mind, the Court begins with the general principles that traditionally, the grand jury has had "wide latitude to inquire into violations of criminal law" and that the "technical procedural and evidentiary rules governing the conduct of criminal trials" do not restrain its operation. *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, P37, citing *United States v. Calandra*, 414 U.S. 338, 343 (1974). Moreover, it is well-established that "a facially valid indictment is not subject to challenge based on grounds of inadequate or incompetent evidence." *Id.* In that respect, a prosecutor may cast a wide net to find evidence to place before the grand jury. *Id.* at 344.

R.C. 2939.10 also addresses the role of the prosecutor in grand jury proceedings and states, "[t]he prosecuting attorney or assistant prosecuting attorney may at all times appear before the grand jury to give information relative to a matter cognizable by it, or advice upon a legal matter when required." The prosecutor's role as the grand jury's legal advisor may "give him leeway to make comments that would not be permitted of a trial attorney, who acts strictly as an advocate and leaves the giving of legal advice to the trial judge." *Wilks*, 2018-Ohio-1562, P40, quoting 4 LaFave, Israel, King & Kerr, *Criminal Procedure*, Section 15.7(b), at 713-714

(4th Ed.2015). In this role as advisor, the Court also finds the Department of Justice's policies on grand jury practice informative. Specifically, JM9-11.010 which states:

In dealing with the grand jury, the prosecutor must always conduct himself or herself as an officer of the court whose function is to ensure that justice is done and that guilt shall not escape nor innocence suffer. The prosecutor must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, the prosecutor must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

Consistent with the Department of Justice's policies, Ohio Court's recognize the test for prosecutorial misconduct is whether the remarks were improper and, if so, whether the remarks prejudicially affected the accused's substantial rights. *State v. Lott*, 51 Ohio St. 3d 160, 165 (1990), citing *State v. Smith*, 14 Ohio St. 3d 13, 14-15, (1984). The touchstone of this analysis is the fairness of the proceeding, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

Having carefully considered the evidence, the Court finds that Defendant has failed to sufficiently demonstrate that Prosecutor O'Brien's conduct before the grand jury constituted prosecutorial misconduct. First, it is well-settled in Ohio that under R.C. 2939.10 a prosecutor is under no obligation to present potentially exculpatory evidence to the Grand Jury. See e.g. *Wilks*, supra; *State v. Ball*, 72 Ohio App.3d 549 (11th Dist.1991); *State v. Rittner*, 6th Dist. Fulton No. F-05-003, 2005-Ohio-6526; *State v. Robinson*, 8th Dist. Cuyahoga No. 85207, 2005-Ohio-5132. Thus, any failure by Prosecutor O'Brien to present T.Y.'s medical records, or any other records of Defendant's patients receiving more than 500 micrograms of fentanyl, is not grounds for dismissal under the theory of prosecutorial misconduct.

Turning to Defendant's argument that Prosecutor O'Brien misled the grand jurors, there is nothing before the Court to indicate the same. Instead, the only remarks before the Court are those made at a press conference. It would be improper for the Court to infer that the same comments were made to the grand jury. Even if it were proper to engage in such speculation, the Court notes all statements made in the press conference indicate a reliance on expert witnesses, medical professionals, or medical journals. The Court cannot say that the presentation of this information is inflammatory or otherwise operated to improperly influence the grand jury. As set forth above, grand jury proceedings are, by nature, one-sided and solely for the purpose of assessing whether there is an adequate basis for bringing a criminal charge. To be sure, the Court expects that this case will boil down to a battle of the experts. Who wins that battle is for a petit jury to decide, not the grand jury or the undersigned Judge.

Finally, though previously decided, the Court is compelled to address Defendant's renewed request for the *in camera* review of the grand jury transcript. As stated in its prior decision, the Supreme Court of Ohio has held: "Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." *State v. Greer*, 66 Ohio St.2d 139 (1981), paragraph two of the syllabus. The Supreme Court of Ohio has described a "particularized need" as: "'when the circumstances reveal a probability that the failure to provide the grand jury testimony will deny the defendant a fair trial * * *.'" *State v. Davis*, 38 Ohio St.3d 361, 365 (1988), quoting *State v. Sellards*, 17 Ohio St.3d 169, 173 (1985).

Here again, the evidence presented by the defense at the hearing did not meet the threshold showing of a particularized need. Defendant's speculation that Prosecutor O'Brien

presented a false narrative of causation or failed to present exculpatory evidence remains insufficient to demonstrate a particularized need for the transcript. See *State v. Russell*, 10th Dist No. 05AP-1325, 2006-Ohio-5945, ¶11. Moreover, the surrounding circumstances still do not support a finding that it is probable the failure to disclose the grand jury testimony will deprive Defendant of a fair trial. Accordingly, the Court denies Defendant's renewed request.

Conclusion

Based on the forgoing, Defendant's Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

Electronic notification to counsel of record

Franklin County Court of Common Pleas

Date: 12-03-2021

Case Title: STATE OF OHIO -VS- WILLIAM S HUSEL

Case Number: 19CR002735

Type: ENTRY/ORDER

It Is So Ordered.

The image shows a handwritten signature in black ink, which appears to read "Michael J. Holbrook". The signature is written over a blue circular official seal. The seal contains the text "COMMON PLEAS" at the top, "FRANKLIN COUNTY, OHIO" around the middle, and "ALL THINGS ARE POSSIBLE" at the bottom. The background of the seal and signature area has a faint, repeating pattern of the words "e-filed" and "e-signed".

/s/ Judge Michael J. Holbrook