Michigan Law Review

Volume 38 | Issue 1

1939

EVIDENCE - USE OF TRANSCRIPT OF GRAND JURY PROCEEDINGS TO REFRESH MEMORY OF WITNESS - RIGHT OF OPPONENT TO INSPECT TRANSCRIPT

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Courts Commons, and the Evidence Commons

Recommended Citation
Michigan Law Review, *EVIDENCE - USE OF TRANSCRIPT OF GRAND JURY PROCEEDINGS TO REFRESH MEMORY OF WITNESS - RIGHT OF OPPONENT TO INSPECT TRANSCRIPT*, 38 MICH. L. REV. 100 (1939).
Available at: https://repository.law.umich.edu/mlr/vol38/iss1/17

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

EVIDENCE — USE OF TRANSCRIPT OF GRAND JURY PROCEEDINGS TO REFRESH MEMORY OF WITNESS — RIGHT OF OPPONENT TO INSPECT TRANSCRIPT — In a criminal prosecution under the anti-trust laws, counsel for the United States, in the cross-examination of witnesses for the defense, based certain questions upon a transcript of the testimony of these same witnesses before the grand jury. The transcripts were used for the sole purpose of refreshing the memories of the hostile witnesses. The transcripts were not placed in the hands of the witnesses, but the witnesses were asked, "Did you testify thus-and-so before the grand jury?" The district court refused the demand of the defense counsel that they be allowed to inspect the transcript thus used for the purpose of re-direct examination of the witnesses. *Held*, such refusal was erroneous. *United States v. Socony-Vacuum Oil Co. Inc.*, (C. C. A. 7th, 1939) 105 F. (2d) 809.

At common law, the proceedings of the grand jury were veiled in secrecy.[1]

[1] 5 JONES, EVIDENCE, 2d ed., § 2206 (1926); 5 WIGMORE, EVIDENCE, 2d ed.,

It was formerly held that a grand juror could not, at a subsequent trial, be asked to state the testimony that a witness had given before them.[2] It has been intimated that such a rule was never applied to one who was a mere witness before the grand jury.[3] But it is now generally held that a grand juror may be called to show that the statements of a witness at the trial of the accused are in contradiction to those made by him before the grand jury.[4] In several states, express statutory provisions have been enacted removing the seal from the lips of the grand juror in certain specified instances,[5] and the exceptions provided for in such statutes are not deemed to be exclusive in their provisions.[6] Such results do seem to be founded upon sound logic, as after an indictment has been returned by the grand jury all reason for the secrecy of the proceedings vanishes.[7] The great weight of authority today condones the use of a transcript of

§ 2360 (1923); In re Cohen's Estate, 105 Misc. 724, 174 N. Y. S. 427 (1919); State v. Fasset, 16 Conn. 457 (1844).

[2] 5 JONES, EVIDENCE, 2d ed., § 2206 (1926); Imlay v. Rogers, 7 N. J. L. 347 (1800), overruled in State v. Bovino, 89 N. J. L. 586, 99 A. 313 (1916), where the court adopted the more modern view; 12 VINER, ABRIDGEMENT OF LAW AND EQUITY, 2d ed., 20 (1792). In State v. Campbell, 73 Kan. 688 at 705, 85 P. 784 (1906), the court said: "By the common law a grand jury was not permitted to disclose how any witness testified before that body or how any member voted."

[3] State v. Fish, 90 N. J. L. 17, 100 A. 181 (1917). In this case, 90 N. J. L. at 19, the court said, "A witness who has been examined before a grand jury is under no legal obligation to refrain from stating what was said to and by him while there." This case was reversed on appeal, State v. Fish, 91 N. J. L. 228, 102 A. 378 (1917).

[4] 5 JONES, EVIDENCE, 2d ed., § 2206 (1926); State v. McPherson, 114 Iowa 492, 87 N. W. 421 (1901); State v. Benner, 64 Me. 267 (1874). For a good discussion of this evolution, read Commonwealth v. Mead, 12 Gray (78 Mass.) 167 (1858).

[5] For example, Ind. Stat. Ann. (Burns, 1933), § 9-817: "A member of the grand jury may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or to disclose the testimony given before them by any person upon a charge against him for perjury in giving his testimony or upon the trial therefor."

[6] Hinshaw v. State, 147 Ind. 334, 47 N. E. 157 (1897). In State v. Campbell, 73 Kan. 688 at 710, 85 P. 784 (1906), the court quoted with approval 4 WIGMORE, EVIDENCE, § 2363 (1904): "Nor should any of the ensuing legitimate purposes of disclosure be considered to be obstructed by the statutory omission to mention them. . . ." The same statement is found in the second edition of Wigmore, same section.

[7] 5 WIGMORE, EVIDENCE, 2d ed., § 2360 (1923). Professor Wigmore says that the reasons for the secrecy of the grand jury proceedings are fourfold: (1) to secure the grand jurors themselves from the fear that their opinions and votes may be disclosed; (2) to secure the complainants and witnesses from disclosure of their testimony in order that the state may obtain willing witnesses (this is the most pertinent reason in the instant case); (3) to prevent the guilty accused from fleeing arrest, suborning perjury, or tampering with witnesses; (4) to protect the innocent accused from disclosure of the fact that he has been groundlessly accused. In § 2362, at page 154, Professor Wigmore says: "There remain, therefore, on principle, no cases at all in which, *after the grand jury's functions are ended*, the privileges of the witnesses not

the testimony of witnesses taken before the grand jury, "whenever it becomes necessary to the course of justice." [8] Consequently, it would seem that the decision of the court in the instant case, allowing the use of the transcript by the examining counsel, is sustained by authority and principle. Also, allowing the prosecution to refresh the memory of the witnesses by reading portions of the transcript to them would seem justified in view of the fact that the purpose of such procedure was evidently to lay a foundation for impeachment.[9] With regard to the right of the defense counsel to inspect the transcript, whenever a memorandum is used to refresh the memory of a witness, the opponent, as a general rule, has a right to inspect the memorandum in order: (1) to see whether the memorandum has a legitimate tendency to refresh the memory of the witnesses; (2) to facilitate cross-examination or re-direct examination.[10] There has been some apparent confusion in regard to the right to inspect grand jury transcripts used to refresh the memory of a witness, due to the fact that in a great many cases the right of inspection claimed was not in connection with cross-examination but was to ascertain whether grounds existed for a motion to dismiss the indictment.[11] Also, there has been some hesitancy in allowing the counsel to inspect a grand jury transcript because of the other confidential information contained therein, in addition to that used to refresh the memory of the

to have their testimony disclosed should be deemed to continue. This is, in effect, the law as generally stated to-day. . . . The common phrase is that disclosure may be required '*whenever it becomes necessary in the course of justice.*'" See also Commonwealth v. Mead, 12 Gray (78 Mass.) 167 (1858); State v. Campbell, 73 Kan. 688, 85 P. 784 (1906).

[8] Metzler v. United States, (C. C. A. 9th, 1933) 64 F. (2d) 203; Felder v. United States, (C. C. A. 2d, 1925) 9 F. (2d) 872; Bosselman v. United States, (C. C. A. 2d, 1917) 239 F. 82; People v. Salby, 198 Cal. 426, 245 P. 426 (1926); Mullins v. Commonwealth, 246 Ky. 748, 56 S. W. (2d) 370 (1933); State v. Patton, 255 Mo. 245, 164 S. W. 223 (1914); Glenn v. State, 157 Ala. 12, 47 So. 1034 (1908); State v. Klute, 160 Iowa 170, 140 N. W. 864 (1913); 74 A. L. R. 1042 at 1050 (1931).

[9] In the instant case, the transcripts were used on cross-examination, and the counsel for the government had repeatedly insisted that the witnesses were deliberately testifying falsely. This would indicate that the use of the transcripts was to lay a foundation for the impeachment of the witnesses. It has been held that it is proper to read extracts from minutes of testimony taken before the grand jury for the purpose of refreshing the recollection of a witness and for laying a foundation for impeachment, and when the purpose is not merely to extract supplementary testimony. Crafford v. State, 169 Ark. 225, 273 S. W. 13 (1925); State v. Klute, 160 Iowa 170, 140 N. W. 864 (1913).

[10] 2 WIGMORE, EVIDENCE, 2d ed., § 762 (1923); 5 JONES, EVIDENCE, 2d ed., § 2383 (1926); 22 L. R. A. (N. S.) 706 (1909), where it was said: "The propriety of allowing an adverse party to inspect, for the purpose of cross-examination, any memorandum used by a witness to refresh his memory upon the matters as to which he is testifying, appears to be universally conceded by the courts"; Morris v. United States, (C. C. A. 5th, 1907) 149 F. 123; State v. Miller, 234 Mo. 588, 137 S. W. 887 (1911); People v. Schepps, 217 Mich. 406, 186 N. W. 508 (1922).

[11] For example, People v. Kresel, 141 Misc. 593, 253 N. Y. S. 372 (1931).

witness.[12] But, as a practical matter, it would seem that the court could adequately insure an inspection of only that portion of the transcript which was used to refresh the memory of the witness. In the instant case, it was contended that no right of inspection existed because the portions of the transcript were read to the witness, instead of placing them in his hands. It is submitted that by such a technical distinction, an attorney should not be permitted to evade the right of his opponent [13] to raise the question of whether the memorandum used is a proper one for the purpose for which it is employed; although, strange to say, there appears to be an entire absence of prior authority on that precise point.

[12] Metzler v. United States, (C. C. A. 9th, 1933) 64 F. (2d) 203; Bailey v. State, 24 Ala. App. 339, 135 So. 407 (1931).

[13] Capodilupe v. Stock & Sons, 237 Mass. 550, 130 N. E. 65 (1921). In Tibbets v. Sternberg, 66 Barb. (N. Y.) 201 at 203 (1870), it was said: "The production of the paper might have been of no value to the defendant, but it is the principle thus sought to be established that is mischievous and dangerous. The right of a party to protection against the introduction against him of false, forged or manufactured evidence, which he is not permitted to inspect, must not be invaded by a hair's breadth."