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## Greenberg v. Superior Court for City and County of San Francisco

Roger J. Traynor

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[3] It is next contended that the record fails to disclose that the jury was present at all stages of the trial. There were numerous recesses during the trial. When the court would reconvene the trial judge would inquire if it was stipulated that the jurors were all present and in their places. Two or more counsel so stipulated on each occasion. Because appellant's counsel made an audible stipulation on only three occasions, it is argued that "the record is entirely silent upon the matter of whether or not the jury ever did return after any particular recess." Two or more counsel, however, did stipulate to the presence of the entire jury, and the entire jury was present at all stages of the proceedings. Nowhere is it charged that the jury or any part thereof was absent at any time when its presence was required.

[4] There is neither error nor prejudice in that part of the district attorney's closing argument challenged by the appellant. The prosecuting officer was free to discuss the conflict in the two stories related by appellant and to advance any reasonable motive therefor.

[5] The fact that during a recess of court appellant first related to defense counsel other than his own the story that he alone had perpetrated the homicide does not require a reversal. Before the reconvening of the court his own counsel was likewise so advised. The court upon being informed of appellant's change of testimony took every precaution to protect him from pursuing an ill-advised course. The court admonished the appellant in the following manner: "Now, you understand, Mr. Crimm, that you are now testifying in the case where you are accused of the crime of murder, and if you make any statements, they must be freely and voluntarily; if you give any testimony here, it must be freely and voluntarily, with the understanding that you are now on trial for the murder of the deceased in this case. And anything that you say, of course, would be considered by this Jury in the matter of determining your innocence, as well as by the Jury in the event that they find that you are guilty of the crime of murder in the first degree; it would also be considered by the jury in determining the amount of punishment that you would receive. Now you have your counsel, Mr. Artz, who has been appointed by this Court, and you have been accorded all of the rights that the law provides for a man charged with crime. I would suggest that you

be very careful, that you tell the truth, that you be not guided by anything except the absolute truth, and aside from that, you are not required to testify against yourself unless you so desire."

In the face of this advice by the court the appellant proceeded to relate the story that implicated him as the sole perpetrator of the murder. He testified further that he had no desire to see innocent persons suffer and that his change of story was entirely voluntary and not the result of fear or duress. Appellant's counsel cross-examined him with respect to the new story and at no time requested a continuance to permit further consultation between client and counsel. At all times appellant had the advice and assistance of counsel and the circumstances surrounding the revised story in no way suggests, as contended, "a denial of due process of law."

An examination of the entire record reveals nothing in the rulings on the evidence or in the giving or refusing of instructions that requires a reversal.

The judgment and order are affirmed.

Appellant's petition for a rehearing was denied February 26, 1942. Houser, J., did not participate therein.

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[S. F. No. 16656. In Bank. Jan. 29, 1942.]

MORRIS GREENBERG, Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent.

[1] **Grand Jury—Proceedings—Evidence—Effect of Absence of Evidence.**—When a grand jury indicts a person without the presentation of evidence to connect him with the commission

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[1] Quashing indictment for lack of evidence, note, 59 A. L. R. 567. See, also, 27 Am. Jur. 719.

McK. Dig. References: [1] Grand Jury, § 28; [2] Prohibition, § 43.

of the crime charged, it exceeds its authority, and the indictment returned is void and ineffectual to confer jurisdiction upon a court to try a person for the offense charged. (See Pen. Code, § 921.)

- [2] **Prohibition — Criminal Proceedings — Grand Jury—Lack of Evidence.**—A writ of prohibition will lie to restrain a trial upon an indictment which is void because unsupported by any evidence before the grand jury, there being no remedy by appeal from orders denying a motion to quash and overruling a demurrer. The common-law rule of nonimpeachability of an indictment ceased to exist in California with the amendment of Pen. Code, § 925, so as to require a transcript of testimony in cases in which an indictment is found. (*Brobeck v. Superior Court*, 152 Cal. 289, 92 Pac. 646, overruled.)

PROCEEDING in prohibition to restrain the Superior Court of the City and County of San Francisco from proceeding with a trial. Writ granted.

James C. Purcell and William E. Ferriter for Petitioner.

Matthew Brady, District Attorney, and John R. Golden, Assistant District Attorney for Respondent.

TRAYNOR, J.—The grand jury of the City and County of San Francisco returned an indictment charging petitioner and four others with conspiracy to commit grand theft in violation of Penal Code section 182. The indictment charged that all of the persons named therein procured from the Fireman's Fund Insurance Company a policy of automobile insurance on an automobile that had already been wrecked, that they then reported to the company that the car was wrecked at a time after the date of issuance of the insurance, and that the company paid them for the asserted loss. After petitioner was arraigned, he moved to quash the indictment on the ground that it was void and that the court was without jurisdiction to proceed thereon because there was no evidence before the grand jury tending to support the charges made against him. His motion was denied and he demurred to the indictment. The court overruled the demurrer and set the case for trial. Petitioner has no appeal from either the order of the court refusing to quash the indictment or the overruling of the demurrer, and has therefore petitioned this court

for a writ of prohibition to restrain the lower court from proceeding with the trial.

The transcript of the testimony upon which the indictment was based contains no evidence even remotely supporting the charges made against petitioner. Respondent contends, however, that in California prohibition will not lie to restrain a court from proceeding with the trial of a petitioner on the ground that there was no evidence presented to the grand jury of his guilt of the offense charged.

Prohibition will issue to restrain an inferior tribunal from acting in excess of its jurisdiction if there is no plain, speedy, and adequate remedy in the ordinary course of law. (Code Civ. Proc., sections 1102, 1103.) Public offenses against the State of California must, with few exceptions, be prosecuted by indictment or information, and a court has no jurisdiction to proceed with the trial of an offense unless a valid indictment or information has first been presented. (Cal. Const., art. I, section 8; Pen. Code, sections 682, 888.) An information is a written accusation of crime made by a district attorney, without action by a grand jury, after a magistrate, at a preliminary hearing, has found sufficient cause to believe the defendant guilty of a public offense and has ordered him committed. (Cal. Const., art. 1, section 8; Pen. Code, section 809; see cases cited in 7 Cal. Jur. 967, note 15.) If there is no reasonable or probable cause for the order of the magistrate the defendant may be discharged on *habeas corpus*. (Pen. Code, section 1487; see cases cited in 13 Cal. Jur. 230.) An indictment is "an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense" without the necessity of a preliminary examination by a magistrate. (Pen. Code, section 917; *People v. Goldenson*, 76 Cal. 328 [19 Pac. 161].)

[1] A grand jury's function is to return an indictment against a person only when the evidence presented to it indicates that he has committed a public offense. It is no Star Chamber tribunal empowered to return arbitrary indictments unsupported by any evidence. On the contrary the necessity of basing an indictment upon evidence is implicit in section 921 of the Penal Code which provides: "The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury."

A grand jury that indicts a person when no evidence has been presented to connect him with the commission of the crime charged, exceeds the authority conferred upon it by the Constitution and laws of the State of California, and encroaches upon the right of a person to be free from prosecution for crime unless there is some rational ground for assuming the possibility that he is guilty. (*People v. Restenblatt*, 1 Abb. Pr. (N. Y.) 268; *People v. Glen*, 173 N. Y. 395 [66 N. E. 112]; *People v. Buffalo Gravel Corp.*, 195 N. Y. Supp. 940; *People v. Brickner*, 8 N. Y. Crim. Rep. 217 [15 N. Y. Supp. 528]; *People v. Price*, 6 N. Y. Crim. Rep. 141 [2 N. Y. Supp. 414]; *Gore v. State*, 217 Ala. 68 [114 So. 794]; *Sparrenberger v. State*, 53 Ala. 481 [25 Am. Rep. 643]; *People v. Sexton*, 187 N. Y. 495 [80 N. E. 396, 116 Am. St. Rep. 621]; see *United States v. Silverthorne*, 265 Fed. 853; see 59 A. L. R. 567.) Such an indictment is void and confers no jurisdiction upon a court to try a person for the offense charged. (*Ibid.*) It has long been settled in most jurisdictions that an indictment is invalid if it is unsupported by any evidence before the grand jury. (See cases collected in 59 A. L. R. 567.) If there is some evidence to support the indictment, the courts will not inquire into its sufficiency (see cases collected in 59 A. L. R. 573), but the lack of any evidence conclusively establishes that the grand jury has exceeded its authority in returning an indictment.

[2] At common law an indictment returned by a grand jury was unimpeachable because the grand jury proceedings were clothed in secrecy and a court had no access to the evidence upon which the indictment was based. (*People v. Tinder*, 19 Cal. 539 [51 Am. Dec. 77].) There ceased to be any reason for the common law rule in this state, however, when section 925 of the Penal Code was amended to require that a transcript, available to both defendant and prosecutor, be kept of the testimony introduced before the grand jury in all criminal causes where an indictment is returned. In the case of *In re Kennedy*, 144 Cal. 634 [78 Pac. 34, 103 Am. St. Rep. 117, 1 Ann. Cas. 840, 67 L. R. A. 406], a defendant petitioned for a writ of *habeas corpus* on the ground that the uncorroborated testimony of an accomplice, which constituted the evidence presented to the grand jury, was insufficient to justify an indictment. The court properly refused the writ, holding, in accordance with the general rule, that it would not inquire into the sufficiency of the evidence.

*Brobeck v. Superior Court*, 152 Cal. 289 [92 Pac. 646], in holding that a writ of prohibition did not lie to restrain a trial court from proceeding upon an indictment where there was no evidence presented to the grand jury to support the charges, relied solely upon the authority of *In re Kennedy* without noting the difference between the two cases. At the time each case was decided, section 925 of the Penal Code merely permitted the district attorney at his discretion to have testimony before the grand jury reported but did not make such reporting mandatory. The cases therefore do not control the present situation and the views expressed therein inconsistent with this opinion are disapproved.

Petitioner cannot appeal either from the order denying his motion to quash the indictment or from the overruling of his demurrer. He could not be required to stand trial and to appeal from a possible adverse judgment without being subjected to unreasonable expense, inconvenience, and delay. (*Bruner v. Superior Court*, 92 Cal. 239 [28 Pac. 341]; *Terrill v. Superior Court*, 6 Cal. Unrep. 398 [60 Pac. 38]; *Evans v. Willis*, 22 Okla. 310 [97 Pac. 1047, 18 Ann. Cas. 258, 19 L. R. A. (NS) 1050]; see *Farraher v. Superior Court*, 45 Cal. App. 4 [187 Pac. 72].) The only adequate remedy he may seek, therefore, is a writ of prohibition (*Ibid.*). Regardless of the fact that the grand jury is a judicial tribunal from whose decisions there is no appeal (*In re Kennedy, supra*), defendant has the statutory right to restrain the court by prohibition from proceeding in excess of its jurisdiction to try an offense based on a void indictment. Petitioner is therefore entitled to a peremptory writ of prohibition restraining the respondent court from proceeding with the trial.

Let a writ of prohibition issue as prayed.

Gibson, C. J., Curtis, J., Edmonds, J., Houser, J., and Carter, J., concurred.