

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT

FILED

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DISTRICT COURT
WYANDOTTE COUNTY, KANSAS

BY  DEPUTY

STATE OF KANSAS,
Plaintiff,
vs.

JEFFREY WAYNE HENRY 18CR289
Defendant,

JOHN TIMOTHY SCHOOLEY 18CR290
Defendant,

HENRY & SONS CONSTRUCTION
COMPANY, INC. 18CR291
Defendant,

TYLER MILES 18CR292
Defendant,

KC WATERPARK MANAGEMENT LLC,
d/b/a, SCHLITTERBAHN WATERPARK OF KCK 18CR487
Defendant.

JOURNAL ENTRY

The Court has before it the "Joint Motion of Design Defendants to Dismiss for Grand Jury Abuse" which was joined by Defendant Miles and Defendant KC Waterpark Management, LLC; Defendant Henry and Defendant Schooley's "Motion to Dismiss for State's Misconduct"; Defendant Henry & Sons' "Motion to Dismiss Indictment"; Defendant Schooley and Defendant Henry's "Motion to Dismiss Indictment for Failure to State a Claim"; Defendant Miles and Defendant KC Waterpark's "Joint Motion to Dismiss for Failure to State a Claim" and Defendant Miles and Defendant KC Waterpark's "Motion to Dismiss Counts 1-18". After being fully and well advised in the premises, the Court finds as follows:

On August 7, 2016, a young boy named Caleb Schwab was killed in a tragic incident on the Verruckt waterslide at the Schlitterbahn Waterpark located in Kansas City, Kansas. A criminal investigation was conducted by the Kansas City, Kansas Police Department and the Kansas Bureau of Investigation. The prosecution of the case was turned over by the Wyandotte County District Attorney's Office to the Kansas Attorney General. In addition to the death of Caleb, the investigation revealed a number of other individuals had previously been injured while riding the Verruckt.

Instead of initiating criminal charges through the traditional means in Kansas by Affidavit and Complaint, the Attorney General convened a grand jury in Wyandotte County Kansas District Court. On March 21, 2018, the grand jury returned an Indictment alleging one count of Second Degree Murder, twelve counts of Aggravated Battery and five counts of Aggravated Endangering a Child against Defendants Jeffrey Henry, John Schooley and Henry and Sons Construction Company, Inc., as well as one count of Involuntary Manslaughter, twelve counts of Aggravated Battery and five counts of Aggravated Endangerment of a Child against Defendant Tyler Miles and, ultimately, KC Waterpark Management LLC. Two charges of Interference with LEO were originally brought against Defendant Miles but were subsequently dismissed by the State. The crimes of Second Degree Murder, Involuntary Manslaughter, Aggravated Battery and Aggravated Endangering a Child were brought against these defendants on the theory that they had acted recklessly during the design, construction and operation of the Verruckt, which was billed as the world's tallest waterslide.

In the Motion to Dismiss for Grand Jury Abuse, the Design Defendants (Henry, Schooley and Henry & Sons Construction Company) and joined by Defendant Miles and Defendant KC Waterpark Management, allege that the indictment returned against them must be dismissed for improper evidence and testimony displayed to the grand jury. Specifically, the defendants complain that 1) the grand jury was shown a made-for-TV Travel Channel video which was highly dramatized; 2) the State's expert regarding the design and construction constantly referred to ASTM standards as requirements for the building of the Verruckt waterslide and 3) the same expert referenced a prior death which occurred at a different Schlitterbahn waterpark located in South Padre Island, Texas in 2013. Collectively, the defendants argue that these abuses before the grand jury call into question the fairness of the grand jury proceedings.

The Kansas Supreme Court recently and specifically addressed the issue of grand jury abuse in State v. Turner, 300 Kan. 662 (2014). The Kansas Supreme Court clarified that Kansas offers more protections and assurances of due process protections than what is afforded by federal law. Like the grand jury abuses alleged in Turner, the question here hinges on whether the irregularities and improprieties in the grand jury proceedings, if any, justify the dismissal of the ensuing indictment. See Turner at 675.

It is important to note that the grand jury convened in this matter was not formed as part of an inquisition into possible criminal behavior. Rather, the grand jury was presented evidence and heard testimony from numerous witnesses. The evidence and testimony were elicited and submitted to them by the Kansas Attorney General's Office with the specific intent to see what charges might be appropriate. In the course of an inquisition, the presiding judge

has the hands-on responsibility to prevent the prosecutor from abusing the judicial process. Turner at 677. In a grand jury proceeding, however, no judge presides over the testimony nor is the target of the investigation or a defense attorney allowed to be present unless that individual is testifying to the grand jury. The Turner court also noted that an inquisition has a purely investigative function and the prosecutor retains his/her discretion to file a criminal complaint based upon the information gleaned during the inquisition. But in stark contrast, if a grand jury issues an indictment “no further test for probable cause is required and the indicted defendant is not entitled to a preliminary hearing. See State v. Clemons, Kan. 66, 68 (1996).

The Kansas Supreme Court also explained the importance of a grand jury decision and recognized the potential perils when a prosecution is commenced in that manner rather than the traditional complaint filed by a prosecutor. “Granted, a grand jury does not determine the guilt or innocence of a defendant, like a petit jury, but the consequences of a grand jury indictment are serious.... Moreover, the need to protect an accused individual’s constitutional rights before factfinders who are not trained in the law and consequently do not know and understand those constitutional rights is precisely the same with a grand jury as it is with a petit jury.” Turner at 679.

In Turner, the defendant Rodney L. Turner was forced to repeatedly assert his constitutional right against self-incrimination in front of the grand jury. In Kansas, an individual invoking their right against self-incrimination in a jury trial does so in front of a judge and not in the presence of the jury. The judge ultimately instructed the Turner grand jury that it was not to draw any adverse inference from Turner’s invocation of his Fifth Amendment privilege.

Nonetheless, the Kansas Supreme Court was highly dubious that the tactic did not adversely persuade and influence the grand jury to indict. “It is difficult to discern how a grand juror would be immune to those adverse consequences from which we scrupulously protect a petit juror.” Turner at 681.

The Kansas Supreme Court further clarified that the target of a grand jury investigation clearly has due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. “Obviously, the target of a grand jury investigation has a significant liberty interest at stake and is entitled to due process protection. The essence of due process is fairness between the State and the individual dealing with the State.” Turner at 684.

The Kansas Supreme Court was unequivocal in its conclusion in Turner as to the due process protections an individual must be afforded in grand jury proceedings. “But most importantly for our purposes here, the grand juror’s oath directs that the juror is to base the indictment on ‘legal evidence’. K.S.A. 22-3003. Legal evidence has been defined as all admissible evidence, both oral and documentary, of such a character that it reasonably and substantially proves the point rather than merely raising suspicion or conjecture. Black Law Dictionary 598 (8th Ed. 2004). ...Thus, our statutes contemplate that due process mandates that a Kansas grand jury should only issue an indictment based on legal evidence, rather than suspicion or conjecture.” Turner at 684.

The Turner court guides us to the proposition that when reviewing potential grand jury abuses, one must consider whether any irrelevant or unnecessary or “non-legal” evidence amounts to more than just extraneous clutter that grand jurors had to wade through. If the

answer is in the affirmative, “Certainly, then, where the indictment is potentially based on irrelevant evidence, the process has not attained the fundamental fairness required by due process protections.” Turner at 685.

Given this guidance by the Kansas Supreme Court, we next turn our attention to the three areas of abuse before the grand jury as alleged by the defendants. In doing so, it is critical to recall the basic theory which the State bases its theory of criminal culpability: The defendants recklessly designed, constructed, operated and maintained a waterslide which they knew or should have known was likely to result in serious injury or death to its patrons and took no corrective actions to stop this from happening.

The first alleged improper evidence was the publishing to the jury of a Travel Channel television episode which supposedly showed the design and testing of the Verruckt. The defendants contend that the video was made-for-TV and contained highly dramatized and fictional portrayals of the process used to create and construct the waterslide. The State downplays the importance of this video but has not adequately explained how this video could be considered “legal evidence”. Upon viewing the video, the court concludes this exhibit was not a “likeness of what it purported to represent” and depicted a staged demonstration for entertainment purposes, not a factual depiction of the design and construction of the waterslide.

The added significance of the distorted video is that the basis for the State’s legal theory is that these defendants had a cavalier, indifferent and reckless attitude towards the safety of the waterslide and this is clearly conveyed on the video shown to the grand jury. The video,

though, is a fictional and dramatized version of events created for entertainment purposes. Its submission as an exhibit in a court proceeding was highly prejudicial against the defendants. Any probative value of the video, which is questionable, is certainly outweighed by the harm caused by its inaccurate portrayal that this was a factual documentation of the process used by the defendants to design and construct the Verruckt. Without major redaction, this video would not have been allowed into evidence at a jury trial. The grand jury was clearly swayed by its exposure to this video and said video cannot be viewed as “legal evidence”.

The defendants next complain that the State’s proposed expert witness, Edward Pribonic, repeatedly and consistently referred to ASTM (American Society of Testing and Materials) standards which were not required under Kansas law at the time the Verruckt was created, designed and constructed. Mr. Pribonic stated and implied that ASTM standards were legally required and that those standards were not met by the design defendants - Henry, Schooley and Henry and Sons Construction Company. There is also a stated and legitimate concern for the conclusions made by Mr. Pribonic regarding “important design features which failed”. These assertions by the state’s purported expert witness appear to be more speculative than conclusive and it is questionable whether his assertions are actually based upon recognized and reliable scientific evidence and testing. This type of insinuation was specifically disfavored by the Turner court and would clearly require a court hearing to determine if the expert testimony met the Daubert standards for admission under the rules of evidence in Kansas. The State claims it corrected any improper portions of the expert testimony by his response to one question where he testified that Kansas law added the requirements for safety inspections but did not do so until 2017. This fleeting and somewhat

ambiguous response, however, does not cure the repeated references to ASTM standards made by the expert during his extensive testimony. Again, a grand jury of laypersons heard testimony and were exposed to evidence which was not in conformance with the applicable legal standards given the unsubstantiated, irrelevant and somewhat confusing basis for Mr. Pribonic's conclusions.

The third area of grand jury abuse alleged by the defendants also comes from the testimony of Mr. Pribonic in which he tells the grand jury about another death at a water ride at a Schlitterbahn waterpark in South Padre Island, Texas in 2013. This death to an employee of the water park occurred during maintenance of a wave ride which was designed by defendant Henry and Sons Construction. The expert testified he wrote a report about the death and there were "literally" a hundred violations of OSHA requirements. The State correctly asserts they did not solicit this testimony and did not ask any follow-up questions regarding this unrelated death. But, once again, only the State was present at the grand jury and this improper testimony came from their witness during their examination of him. As pointed out in Turner, a grand jury member who is not trained in the law is unlikely to have the ability or inclination to simply set aside and ignore such striking testimony about prior improper behavior by the defendants. Additionally, no judge was present who could give the grand jury a curative instruction or issue an admonition to disregard the tainted testimony or ignore the illegal evidence. The grand jury process is controlled by the State without the benefit of a neutral third party to protect the rights of the targeted party. Indeed, this Court has already specifically ruled that 2013 death in Texas would not be admissible in this trial as it doesn't meet the applicable standards for admission as evidence of prior bad acts as required by K.S.A. 60-455.

The only conclusion is that this reference to the wholly unrelated death of an employee in Texas and caused by the defendant's violations of a "literal" hundred OSHA regulations was not legal evidence and should not have been heard by the grand jury.

Having found that the State did commit irregularities in presenting the fictionalized and dramatized video, submitting misleading expert testimony as to the applicability of ASTM standards to the design of the Verruckt, and presenting the impermissible testimony about an unrelated death at a different Schlitterbahn location, the final inquiry for the court is whether the cumulative effect of these errors in the grand jury proceeding mandates the dismissal of the indictments returned by the grand jury. In Turner, the Kansas Supreme Court reiterated that since its holding in Cf. State v. Ward, 292 Kan. 541, 568-69 (2011) it "has consistently placed the burden of proving harmlessness upon the party that benefited from the error." Turner at 686. In this case, the State is the party who benefitted from the errors by getting the indictments it sought against these defendants.

In interpreting the United States Supreme Court's holding in Bank of Nova Scotia v. United States, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed 2d 228 (1988), our Kansas Supreme Court rejected the notion that the existence of sufficient evidence to support an indictment renders harmless any and all errors in the proceedings as a matter of law. In other words, this court cannot solely focus on any other legal and proper evidence submitted to the grand jury which could support a finding of probable cause as the criminal charges brought against these defendants. Rather the critical inquiry, according to Turner, is to look at the effect on the decision-making process rather than considering whether the evidence was sufficient without

the errors. Of particular importance, the Kansas Supreme Court explicitly stated that the question is not whether there is other non-prejudicial evidence to support a finding of probable cause. Turner at 686-87. “The prejudicial inquiry must focus on whether any violations had an effect on the grand jury’s decision to indict. If violations did substantially influence this decision, or there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless.” Bank of Nova Scotia, 487 U.S. 263.

Applying these standards to the case at bar, the Court holds that the three areas of grand jury abuse cited by the defendants are credible and persuasive and must be considered as illegal evidence that should not have been presented to the grand jury. More importantly, the issues go to the specific theory of criminal culpability espoused by the State. Namely, the fictionalized video shows the design defendants as incapable or ignorant as to how to design the world’s tallest waterslide and they were reckless and indifferent to any safety concerns by its self-imposed pressure to open the slide on an unreasonable timeframe. Next, the repeated references to ASTM standards by the State’s proposed expert were confusing and misleading as to the law which applied in Kansas during the design and construction of the Verruckt. This problematic expert testimony supports the State’s position that the defendants blatantly ignored and defied any safety requirements in the design, construction and maintenance of the Verruckt. Finally, the grand jury heard an unsolicited reference to an irrelevant death at a Texas Schlitterbahn ride which occurred as a result of it violating “literally a hundred” OSHA regulations. This statement bolsters the State’s theory, but once again it is not done so by means of legal and admissible evidence.

In conclusion, the Court has grave doubts as to whether the irregularities and improprieties improperly influenced the grand jury and ultimately bolstered its decision to indict these defendants. Quite simply, these defendants were not afforded the due process protections and fundamental fairness Kansas law requires as recently held by the Kansas Supreme Court in State v. Turner. Therefore, the cumulative effect of these violations cannot be deemed harmless.

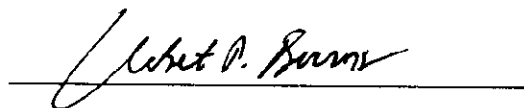
It should also be noted that the indictments against the two corporate defendants are rather unique in Kansas and are difficult for the court to comprehend as to their legal justification under the facts as determined by the grand jury. Both the Defendant Henry & Sons Construction Company and Defendant KC Waterpark filed Motions to Dismiss based upon the failure by the State to present evidence that would find those corporations criminally culpable for the actions of the other individual defendants. The Court does not need to rule on these Motions to Dismiss but would note it found limited and non-compelling evidence to support the indictments as returned against the corporate defendants based the theory of criminal culpability as presented and posited by the State.

It is a basic legal proposition that the Court must apply the law of the State of Kansas to the facts as it finds them. I obviously recognize that the circumstances and events giving rise to these indictments are indisputably tragic. A young child's life was lost and his troubling death was mourned by family, friends and the entire Kansas City community and beyond. Additionally, the investigation revealed many others were injured when they were supposed to be enjoying the thrill of riding the world's tallest waterslide. But the decision to dismiss these

charges at this time does not preclude the possibility that the State could continue to pursue this matter in a criminal court. The State could take its evidence to a different grand jury which hasn't been exposed to or irreparably tainted by the introduction of illegal evidence. Or, the State could pursue the more traditional means in Kansas and file a criminal complaint and proceed to a preliminary hearing wherein a judge would hear the evidence and determine if probable cause exists and, if so, order these defendants to stand trial on some or all of these charges.

The Motions to Dismiss the indictments against Defendant Henry, Defendant Schooley, Defendant Henry & Sons Construction Company, Defendant Miles and Defendant KC Waterpark based upon the State's misconduct before the Grand Jury are GRANTED. All other pending motions are deemed Moot.

IT IS SO ORDERED.

A handwritten signature in cursive script, reading "Robert P. Burns", is written over a solid horizontal line.

Robert P. Burns

Judge of the District Court

CERTIFICATE OF SERVICE

I hereby certify on this 22nd day of February, 2019, a copy of the above and foregoing was hand-delivered to:

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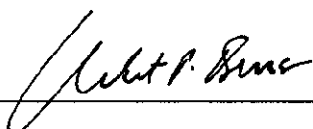
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Robert P. Burns

Judge of the District Court