5-1979

The Preliminary Hearing: A Necessary Part of Due Process

Andrea Lyon
Valparaiso University, Andrea.Lyon@valpo.edu

The Preliminary Hearing: A Necessary Part Of Due Process

by
Andrea D. Lyon

Preliminary hearings and the merits of proceeding by information rather than indictment have been the subject of much recent debate. If the recent decision by the Illinois Supreme Court in *People v. Creque*[1] is any indication of a trend, the courts are likely to continue to allow prosecutors to abuse the grand jury system. Preliminary hearings, therefore, will be of increasing importance to the citizen accused as checks upon the unfettered discretion now resting in the hands of prosecutors.

This article will briefly review the due process implications of denying the accused a preliminary hearing. In doing so, it will suggest that the grand jury system be ended or its powers checked by use of preliminary hearings to determine probable cause to charge a citizen with a crime. The article will also outline the damaging effects of the trend towards limiting the scope of preliminary hearings.

I. DUE PROCESS REQUIRES THAT THE CITIZEN ACCUSED BE AFFORDED A PRELIMINARY HEARING.

Clearly, no person should be held to answer to a criminal charge which may be punishable by death or loss of liberty unless there has been a determination of probable cause by an impartial arbiter.[2] The grand jury has usually been viewed as such an arbiter,[3] although its impartiality has recently come under attack from many quarters[4]. The present writer would prefer to see the grand jury system abolished and due process served by the requirement of a preliminary hearing at which the accused can assert rights not available to him before a grand jury.

Two cases from California and Michigan have, in fact, held that the right of an accused citizen to due process requires that he be given a preliminary hearing. The Michigan case, *People v. Duncan*,[5] declined to address itself to constitutional issues, but it did hold the following:

> [I]n each case and in all pending cases in which the right to a preliminary hearing was asserted prior to trial and is presently being asserted, such right shall be accorded to the defendant. In all future cases wherein the defendant is accused of a felony, the right to a prelimiminary hearing shall exist.[6]

Hawkins v. Superior Court,[7] a case decided by the California Supreme Court, did face the constitutional issues while holding that a denial before a grand jury of the procedural rights available to an accused citizen who is charged by information is a denial of the citizen's right to due process and the equal protection of the law:

> The defendant accused by information "immediately becomes entitled to an impressive array of procedural rights, including a preliminary hearing before a neutral and legally knowledgeable magistrate, representation by

Andrea D. Lyon practices law with the Public Defender office of Cook County, Illinois. She received her J.D. in 1976 from the Antioch School of Law in Washington, D.C.

CRIMINAL DEFENSE, page 9

retained or appointed counsel, the confrontation and cross-examination of hostile witnesses, and the opportunity to personally appear and affirmatively present exculpatory evidence." [citations omitted] In vivid contrast, the indictment procedure omits *all* of the above safeguards... This remarkable lack of even the most basic rights is compounded by the absence from the grand jury room of a neutral and detached magistrate, trained in the law, to rule on the admissibility of evidence and insure that the grand jury exercises its indicting function with proper regard for the independence and objectivity so necessary if it is to fulfill its purported role of protecting innocent citizens from unfounded accusations, even as it proceeds against those who it has probable cause to believe have committed offenses.[8]

Indeed, the need for an impartial magistrate's determination that the evidence presented will support a finding of probable cause is especially acute since hearsay is admissible before both the grand jury and the magistrate at a preliminary hearing.[9] The difference is that the testimony before a grand jury will go unrefuted, while that given at a preliminary hearing is subject to attack by the accused person's attorney. It is also unlikely that a judge at a preliminary hearing would accept hearsay evidence at face value, whereas grand juries are much more likely to do so.[10]

The fact that the grand jury has become little more than a pliant tool of the prosecutor also points up the need for an impartial judicial determination of probable cause. At the debates during the Illinois Constitutional Convention of 1970, Delegate Weisberg advocated that an accused be given a preliminary hearing whether he is charged by information or indictment because "as a practical matter the grand jury indictment... is, for all practical purposes perhaps, an executive decision because the grand jury has heard only one side of the matter."[11]

The case for the abolishment of the grand jury as a tool for establishing probable cause to charge a person with a crime is perhaps demonstrated by some startling, if not totally unexpected, facts referred to in *Hawkins:*

> The grand jury is independent only in the sense that it is not formally attached to the prosecutor's office; though legally free to vote as they please, grand jurors virtually always assent to the recommendations of the prosecuting attorney, a fact borne out by available statistical and survey data. [Citations omitted] Indeed, the fiction of grand jury independence is perhaps best demonstrated by the following fact to which the parties have stipulated: between January 1, 1974 and June 30, 1977, 235 cases were presented to the San Francisco grand jury and indictments were returned in all 235.[12]

The case of *People v. Creque*[13] is a good example of the ways in which the grand jury system can be abused — ways which have been given the approval of the Illinois Supreme Court.

Mr. Creque was charged with aggravated battery and attempted murder of his wife. His wife testified at the preliminary hearing that her husband had beaten and stabbed her but that he had stopped when his brother told him to "Come on" and "Stop." The judge at the preliminary hearing found probable cause to charge Creque with aggravated battery but not attempted murder. The prosecutor then went to the grand jury and presented Martha Creque's testimony via the hearsay statements of an investigating officer. The officer, however, failed to mention that Mr. Creque stopped stabbing his wife after his brother's intervention. The grand jury indicted Creque for attempted murder and aggravated assault. The trial judge dismissed the indictment for attempted murder on due process grounds. The Illinois Supreme Court reversed the judge's dismissal of the indictment and remanded for further proceedings. In the process, it held: (1) No showing of compelling necessity need be made in order for a prosecutor to present hearsay to a grand jury; (2) a prosecutor does not have to disclose to the grand jury that the testimony presented *is* hearsay; (3) the prosecutor does not have to inform the grand jury of its power to secure the presence of the victim by subpoena; (4) the prosecutor is not required to tell the grand jury that there had already been a finding of no probable cause as to the attempted murder;[14] (5) the prosecutor did not have to disclose to the grand jury that Creque had stopped his assault upon his brother's intervention; and (6) there is no right to cross-examine witnesses before a grand jury.

The dissent by Judge Clark went right to the heart of the matter:

> As I see it, the central issue in this case is whether the circuit court may dismiss an indictment obtained through the suppression of substantial evidence tending to negate the existence of an essential element of the offense charged. The majority's answer apparently is that the circuit court may not dismiss such an indictment, because prohibition of such prosecutorial tactics would unduly burden the administration of justice. If the grand jury is to have any hope of fulfilling its "historic function" of protecting "citizens against unfounded criminal prosecution" [citation omited] courts ought not permit prosecutors to manipulate grand jurors through suppression of substantial exculpatory evidence...
>
> Less than the whole truth, however, is not the truth and no amount of philosophizing about the need for efficiency and speed in the administration of criminal justice can change an indictment based on half the truth into one based upon the whole truth.[15]

The Illinois Supreme Court in this case gave the prosecutor "carte blanche with the grand jury,"[16] and made it even more clear that grand juries are to be considered merely tools of the prosecution. Putting such power into the hands of prosecutors will inevitably lead to abuses of that power. Requiring a subsequent judicial determination of probable cause before an impartial magistrate should be a minimum requirement of due process if (as is probable) the grand jury system is not to be abolished or drastically reformed.

II. THE SCOPE OF THE PRELIMINARY HEARING SHOULD NOT BE LIMITED

The slender protection of the preliminary hearing would not even be available to the accused citizen if the recent view that the scope of such hearings should be severely limited prevails. Judge Robert Steigman, in an article in the *Illinois Bar Journal*, has suggested that the accused at a preliminary hearing should have no right to present evidence on his own behalf, that the hearing should be ended by the judge as soon as he has heard enough to determine the existence of probable cause, and that cross-examination should be limited.[17]

Judge Steigman relied on *People v. Bonner*[18] for his opinion that the hearing may be ended as soon as the judge has decided he has heard enough. *Bonner*, however, predates *Coleman v. Alabama*,[19] a United States Supreme Court opinion which held that the preliminary hearing is a critical point in the judicial process, and thus subject to increased constitutional safeguards. It would be fairer to the accused at a preliminary hearing to limit the unfettered discretion of the judge by allowing the judge to end the hearing only after he has entertained defense counsel's offer of proof and has determined that the evidence the defense wishes to present or the cross-examination the defense wishes to continue is not relevant to a determination of probable cause. If the proffered evidence or expected line of cross-examination is relevant to such a determination, defense counsel should be allowed to continue to present his case.

The use of hearsay testimony at preliminary hearings should also be limited. A sensible rule that would prevent the preliminary hearing from being turned into a mini-trial yet would insure that the accused has an opportunity to confront his accusers has been evolved by one preliminary hearing judge in Cook County. This judge allows hearsay testimony by police officers about the testimony of other officers or about the cause of death as communicated to them by the coroner. However, hearsay testimony of a complaining witness or an eyewitness is not allowed. Such a rule seems a reasonable method of expediting the hearing without seriously jeopardizing the rights of the accused.

III. CONCLUSION

To deny an accused a full and fair preliminary hearing constitutes a denial of due process and equal protection. A preliminary hearing also assures the citizen that a finding of probable cause has only come after a neutral and detached judicial proceeding. Such neutrality and detachment is impossible under the grand jury system as it is now constituted. This writer would like to see the grand jury indictment system abolished altogether, but if that is not possible, then she would like to see grand jury indictments tempered by subsequent judicial determinations of probable cause at preliminary hearings where the accused is given the opportunity to confront his accusers, discredit their testimony, and present exculpatory testimony of his own.

FOOTNOTES

[1]72 Ill. 2d 515, 382 N.E.2d 793 (1978).

[2]U.S. CONST. amend. V; ILL. CONST. art. I, §7.

[3]*See* United States v. Dionisio, 410 U.S. 1, 23 (1973) (Douglas, J., dissenting).

[4]*See* M. FRANKEL & G. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL (1977) (a thoughtful analysis of the grand jury system which recommends major reforms but stops short of asking for abolishment). The American Bar Association approved a set of 25 recommendations for reform of the grand jury system at its August 1977 meeting. *See* Robinson, *American Bar Association Approves Grand Jury Reform Package*, CRIMINAL DEFENSE, (Vol. 4, No. 2 [May-June 1977]), at 15.

[5]201 N.W.2d 629 (Mich. 1972).

[6]*Id.* at 635.

[7]22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

[8]*Id.* at 587-89, 586 P.2d at 917-18, 150 Cal. Rptr. at 436-37.

[9]People v. Goines, 20 Ill. App. 3d 1055, 313 N.E.2d 184 (1974). *See also* People. Creque, 72 Ill. 2d 515, 516, 382 N.E.2d 793, 795 (1978).

[10]*See* People v. Creque, 72 Ill. 2d 515, 382 N.E.2d 793 (1978).

[11]Debates at the Illinois Constitutional Convention of 1970 (Verbatim Transcript), at 1451.

[12]Hawkins v. Superior Court, 22 Cal. 3d 584, 589-90, 586 P.2d 916, 919, 150 Cal. Rptr. 435, 438 (1978).

[13]72 Ill. 2d 515, 382 N.E.2d 793 (1978).

[14]Grand jury review of preliminary hearings has been sanctioned in Illinois. *See* People v. Kent, 54 Ill. 2d 161, 295 N.E.2d 710 (1972). There is not even a requirement that the prosecutor have new evidence to present to the grand jury in order to review the findings of a preliminary hearing.

[15]People v. Creque, 72 Ill. 2d 515, 528-29, 382 N.E.2d 793, 798-99 (Clark, J., dissenting).

[16]*Id.* at 529, 382 N.E.2d at 799.

[17]Steigman, *The Preliminary Hearing in Illinois*, 66 ILL. B.J. 700 (1978).

[18]37 Ill. 2d 553, 229 N.E.2d 527 (1967), *cert. den.* 392 U.S. 910 (1968).

[19]399 U.S. 1 (1978).