MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Oscar Martinez, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 26, 2023

Court of Appeals Case No. 22A-CR-1196

Appeal from the Lake Superior Court

The Honorable Jeryl F. Leach, Special Judge

Trial Court Cause No. 45G03-2201-F6-24

Robb, Judge.

Case Summary and Issue

[1] Oscar Martinez was indicted by a grand jury of resisting law enforcement as a Level 6 felony and reckless driving as a Class C misdemeanor. Martinez filed a motion to dismiss the indictment, which the trial court denied. Martinez now appeals raising multiple issues for our review, which we consolidate and restate as whether the trial court abused its discretion by denying Martinez's motion to dismiss. Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

[2] On September 18, 2021, around 11:30 p.m., Officers James Poling and Daniel Lee of the Crown Point Police Department separately witnessed a black Jeep traveling "96 miles an hour [in] a 45 mile-an-hour zone." Appellant's Appendix, Volume II at 118. Both officers activated their lights and sirens and began pursuing the vehicle. The Jeep drove "all over the place" and "in and out of traffic" in a dangerous manner. *Id.* at 118, 120. The officers caught up to the Jeep traveling eastbound on U.S. Highway 30, at which point the Jeep turned on red and blue rear emergency lights indicating that it was a police vehicle. The officers then ceased their pursuit of the vehicle.

[3] About an hour later, the officers received a tip from a Lake County sheriff's deputy that a black Jeep was seen parked in a handicap spot at Karma Cigar Bar located east of the earlier chase scene. Officer Poling went to Karma and

discovered that the Jeep was owned by the Lake County Sheriff's Department and assigned to Lake County Sheriff Martinez. *See id.* at 133.

[4] On September 27, 2021, the prosecuting attorney for Lake County petitioned the Lake Superior Court to appoint a Special Prosecutor. Stanley Levco was appointed Special Prosecutor for the purpose of representing "the State of Indiana regarding information presented by the Lake County Board of Commissioners requesting [an] investigation by the Indiana State Police regarding possible criminal charges arising out of the use of a county owned vehicle[.]" Appellant's App., Vol. III at 155.

[5] Indiana State Police Commander Kevin Smith was then assigned as the investigation officer and interviewed Martinez. Following the investigation, Special Prosecutor Levco petitioned for a grand jury to be convened, which was granted. Special Prosecutor Levco asked the grand jury to consider returning indictments against Martinez for two charges, resisting law enforcement as a Level 6 felony and reckless driving as a Class C misdemeanor.

[6] During the grand jury proceeding, Commander Smith was called to testify. First, Special Prosecutor Levco asked Commander Smith if, during his investigation, he "determine[d] any potential criminal charges that could be appropriate in this case?" Appellant's App., Vol. II at 189. Commander Smith answered:

> [A] vehicle that's 50 plus miles an hour over the speed limit is going to be considered a reckless driver. It's a misdemeanor charge of reckless driving. And then beyond that, once a vehicle

> fails to stop for a police officer that's got lights and sirens activated and continues on at that rate of speed not stopping, that would be in our indication, the prosecutor's indication, fleeing in a vehicle, which is a Level 6 felony[.]

Id. at 190.

[7] Next, Special Prosecutor Levco asked whether the State Police "have a policy or a presumption of when a person is going a particular speed that they charge reckless driving . . . ?" Appellant's App., Vol. III at 38. The following exchange occurred:

> [Smith]: [W]e don't have a set speed or policy in writing that we automatically force our officers to charge reckless driving.
>
> [Levco]: So it's really a subjective question?
>
> [Smith]: It is in each county . . . . [However,] I've never worked in a county where 51 miles an hour over the speed limit was not reckless driving. And in that situation, we would incarcerate on-site. We would stop the vehicle, put the person in handcuffs, put him in jail.

Id. Special Prosecutor Levco then questioned Commander Smith regarding the resisting law enforcement charge:

> [Levco]: And on the question of fleeing, you've had a chance to observe the videos?
>
> [Smith]: Yes.

> [Levco]: [A]nd would you agree that the question of fleeing, the critical question is whether he knew the officers were behind him trying to stop him?
>
> [Smith]: Yeah, that's critical to this case.
>
> [Levco]: If he didn't know, he's not guilty, correct?
>
> [Smith]: That's correct. If he did not know the police were behind him, then he can't be guilty of fleeing from the police because he didn't know the police were behind him.
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> * * *
>
> [Levco]: Do you have an opinion, based on your experience as a police officer whether he would know that they were behind him chasing him?
>
> [Smith]: I do specifically because of the video from Nick's Liquor store[.] . . . There's two police vehicles right behind him when he gets up to the intersection that have clearly visible bright lights flashing. You can hear on the radio transmission their sirens going. It would be nearly impossible when you're that close behind somebody to not know there's two police cars right behind you that are attempting to stop you.

Id. at 39, 41-42.

[8] Special Prosecutor Levco also read the following instruction that he planned to give the grand jury:

> A person engages in conduct intentionally if when he engages in the conduct it's his conscience [sic] objective to do so. A person

> engages in conduct knowingly if when he engages in the conduct he's aware of a high probability he's doing so. And a person engages in conduct recklessly if he engages in the conduct in plain conscience and unjustifiable disregard of harm that might result, and the disregard involves a substantial deviation from the acceptable standards of conduct.

Id. at 43-44. Special Prosecutor Levco then asked Commander Smith:

> [Levco]: [W]ould you agree that intentionally is a higher standard of knowledge than knowingly?
>
> [Smith]: Yes. I see your point with that[.]
>
> [Levco]: And then the question of resisting, it's either knowingly or intentionally. If knowingly applied, it really wouldn't matter if intentionally applied there?
>
> [Smith]: That's correct.

Id. at 44. Subsequently, a member of the grand jury and Commander Smith had the following exchange:

> [Juror]: Based on previous testimony by the officer that does training for speed driving and chases, and things of that nature for officers, would driving at this high rate of speed by a person who was trained to drive at this high rate of speed still could be considered reckless?
>
> [Smith]: It would for me as a policeman. That's certainly other policeman's [sic] right to have an opinion or use judgment, but in my opinion, the speed is the speed. I think that speed if it's Dale

> Earnhardt driving, it's still reckless, because there's other vehicles on the roadway that are not used to adapting to that speed.

Id.

[9] On January 6, 2022, the grand jury indicted Martinez for resisting law enforcement and reckless driving. On February 16, 2022, Martinez filed a motion to dismiss the indictments. Martinez argued that "[t]he grand jury proceeding yielding the indictment was defective and conducted in violation of Ind. Code § 35-34-2 and the Due Process clause of the 14th Amendment." Appellant's App., Vol. II at 72. Following a hearing, the trial court denied the motion to dismiss. Martinez now appeals.[1]

Discussion and Decision

I. Standard of Review

[10] The court may dismiss an indictment or information, upon motion of the defendant, if the grand jury proceeding is defective. Ind. Code § 35-34-1-4(a)(3). Indiana Code section 35-34-1-7 provides that "[a]n indictment shall be dismissed upon motion when the grand jury proceeding which resulted in the indictment was conducted in violation of IC 35-34-2." Generally, we review the trial court's denial of a motion to dismiss for an abuse of discretion. *Hahn v.*

[1] The trial court certified its order denying Martinez's motion to dismiss on May 2, 2022, and we accepted jurisdiction of this interlocutory appeal on June 29, 2022.

State, 67 N.E.3d 1071, 1082 (Ind. Ct. App. 2016), *trans. denied.* An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it, or when the court misinterprets the law. *Id*.

II. Motion to Dismiss

[11] The functions of a grand jury are not judicial, they are merely inquisitorial. *Ajabu v. State*, 677 N.E.2d 1035, 1039 (Ind. Ct. App. 1997), *trans. denied.* Grand jury proceedings are not a trial, or even an adversary proceeding. *Id.* Rather, the grand jury is an independent body which is charged with investigating the facts to determine "whether probable cause exists that a crime has been committed and whether an indictment . . . should be returned against one for such a crime." *Id.* (citing Black's Law Dictionary 855 (6th ed. 1990)). Unlike a petit jury, the grand jury does not determine the guilt or innocence of the accused. *Id.* Rather, the grand jury determines if there is probable cause to believe that the accused has committed a crime. *Id.*

[12] Martinez argues the trial court erred by denying his motion to dismiss because "his due process right to a neutral and detached atmosphere in the grand jury proceedings was prejudiced[.]" Brief of Appellant at 16. Our supreme court has stated that a subject of a grand jury investigation is not accorded "the full panoply of constitutional rights due a criminal defendant, but . . . violations of the letter of statutes governing grand jury machinations are viewed . . . with a jaundiced eye." *State v. Bowman*, 423 N.E.2d 605, 608 (Ind. 1981). Further,

indictments must follow from "impartial consideration in a neutral and detached atmosphere[.]" *Id.* However, only in cases in which there is such "flagrant imposition of the grand jurors' will or independent judgment" will the court find a violation of due process. *Averhart v. State*, 470 N.E.2d 666, 679 (Ind. 1984), *cert. denied,* 471 U.S. 1030 (1985).

[13] Martinez contends that Commander Smith's testimony "constituted legal conclusions and opinions [of] guilt or innocence" in violation of Indiana Code chapter 35-34-2. Br. of Appellant at 16. Specifically, Martinez claims that Commander Smith's testimony violated Indiana Code sections 35-34-2-4(j) & (k). Pursuant to Indiana Code section 35-34-2-4(j), the "grand jury shall be the exclusive judge of the facts with respect to any matter before it." And under Indiana Code section 35-34-2-4(k), the "court and the prosecuting attorney shall be the legal advisors of the grand jury, and the grand jury may not seek or receive legal advice from any other source."

[14] First, Martinez argues that the "the neutral and detached atmosphere of the proceedings [were overbore] with improper legal advice disguised as testimony[.]" Br. of Appellant at 22-23. Martinez contends Commander Smith gave legal advice when testifying regarding "which statutes applied and, more egregiously, *how* they applied to the facts as he saw them." *Id.* at 35. Further, Martinez claims that Commander Smith's testimony "concerning what speed is reckless, that speed is reckless regardless of driver ability, and what conditions make one guilty of fleeing all constitute legal conclusions and, in this case, legal advice" under Indiana Code section 35-34-2-4(k). *Id.* at 24. We disagree.

[15] Commander Smith's testimony is limited to his personal experience as a police officer or his interpretation of whether, given the specific facts of this case, he would have charged Martinez. This does not qualify as "legal advice" under Indiana Code section 35-34-2-4(k). It is merely his function as a testifying police witness. When asked about what speed would be considered reckless, Commander Smith testified, "*I've* never worked in a county where 51 miles an hour over the speed limit was not reckless driving." Appellant's App., Vol. III at 38 (emphasis added). A grand jury member asked him whether training affected what speed was considered reckless and he testified that "in *my opinion*, the speed is the speed." *Id.* at 44 (emphasis added). Even when asked whether a person is guilty of fleeing when they know the police are behind them, Commander Smith gave his opinion in the context of the specific facts of this case:

> [Levco]: Do you have an opinion, based on your experience as a police officer whether he would know that they were behind him chasing him?
>
> [Smith]: I do specifically because of the video from Nick's Liquor store[.] . . . There's two police vehicles right behind him when he gets up to the intersection that have clearly visible bright lights flashing. You can hear on the radio transmission their sirens going. It would be nearly impossible when you're that close behind somebody to not know there's two police cars right behind you that are attempting to stop you.

Id. at 41-42.

[16] Commander Smith's testimony was limited to his experience as a police officer, and he did not seek to provide legal advice to the jury. Further, when Special Prosecutor Levco asked Commander Smith about the knowingly and intentionally standard, it was the Special Prosecutor who read the instruction and merely uses questioning Commander Smith as the vehicle for presenting the information to the grand jury. Commander Smith's agreements do not amount to legal advice in contrast to the Special Prosecutor's actual articulation of the legal standard.

[17] Second, Martinez contends that Commander Smith's testimony "as to both crimes, their elements, and how they fit to the evidence presented, are opinions as to the ultimate issue, usurping the role reserved for the grand jury" pursuant to Indiana Code section 35-34-2-4(j). Br. of Appellant at 24. We disagree.[2] Commander Smith gave testimony "based on [his] experience as a police officer" regarding the events and potential charges given the facts of the case. Appellant's App., Vol. III at 41. Commander Smith even answered questions asked by the grand jury. His opinion testimony was meant to assist the grand

[2] To the extent Martinez argues that Indiana Code section 35-34-2-4(j) is the equivalent of Indiana Rule of Evidence 704(b) "for purposes of a grand jury proceeding," we also disagree. Br. of Appellant at 27. As detailed above, the grand jury serves a different function and has a different relationship with witnesses than a petit jury. As such, the same level of procedural safeguards and evidentiary rules is not required. *See Ajabu*, 677 N.E.2d at 1039 (stating that to insist otherwise would convert a grand jury proceeding into a preliminary trial on the merits). Further, this argument is merely a roundabout attempt to apply Indiana Rules of Evidence to a grand jury proceeding when, by their own terms, they plainly do not apply. Ind. Evidence Rule 101(d)(2).

jury in reaching a decision and did not impede or remove the power to be "the exclusive judge of the facts" from the grand jury. Ind. Code § 35-34-2-4(j).

[18] We conclude that Commander Smith's testimony did not violate Martinez's right to due process. Therefore, the trial court did not abuse its discretion by denying Martinez's motion to dismiss.

Conclusion[3]

[19] We conclude that the trial court did not abuse its discretion by denying Martinez's motion to dismiss. Accordingly, we affirm.

[20] Affirmed.

Mathias, J., and Foley, J., concur.

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[3] Because we conclude the trial court did not abuse its discretion by denying Martinez's motion to dismiss, we need not address his argument that the indictment must be dismissed with prejudice.