



## I. INTRODUCTION

Before the Court is a Motion for Reconsideration of Commissioner's Order and/or Appeal of Commissioner's Findings of Fact and Recommendations. The Order in question denied a Motion to Dismiss brought by Lamar Burton ("Defendant") pursuant to Criminal Rule 62(a)(5).<sup>1</sup> At a hearing on Defendant's Motion to Dismiss the Indictment, the Commissioner heard argument and made proposed findings of facts and recommendations on the record that were incorporated by reference into the Commissioner's Order, which states:

For the reasons fully set forth on the record on Dec[ember] 9, 2013, HAVING CONSIDERED the State's Reply to the Petitioner's Motion for Dismissal, IT IS HEREBY ORDERED, this 9<sup>th</sup> day of Dec[ember], 2013, that the State's request is granted and the Defendant's Motion is hereby DENIED.<sup>2</sup>

Defendant filed the present Motion on December 12, 2013. Pursuant to Rule 62(a)(5)(iii), a transcript of the proceedings below was filed with the Court on January 6, 2014. The State filed a letter and response in opposition with the Court on January 27, 2014, which the Court received in chambers on January 29, 2014.<sup>3</sup> For the reasons discussed below, Defendant's Motion for Reconsideration of Commissioner's Order and/or Appeal of Commissioner's Findings of Fact and Recommendations upon Defendant's Motion Dismiss is **DENIED**.

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<sup>1</sup> Def.'s Mot. For Reconsideration of Commissioner's Order and/or Appeal of Commissioner's Findings of Fact and Recommendations (Dec. 12, 2013) (hereinafter "Def.'s Mot. for Reconsideration").

<sup>2</sup> Order Recommending Denial of Def.'s Mot. to Dismiss (Dec. 9, 2013).

<sup>3</sup> The Court notes that the letter submitted states that "[t]he State cannot, in good faith, challenge the defendant's Motion to Vacate the Commissioner's Ruling. The State does, however, continue to challenge the Defendant's Motion to Dismiss." Letter from State, Docket No. 16 (Jan. 27, 2014). Based on the docket in this matter, the Defendant has not filed a Motion to Vacate the Commissioner's Ruling. The Court notes, however, that together with the letter, the State included a response in opposition to Defendant's Motion for Appeal of Reconsideration of Commissioner's Decision.

## II. BACKGROUND

On January 15, 2013, Defendant was shot in his right hip during a shooting that occurred near 511 North Jefferson Street in Wilmington, Delaware. Defendant was transported from the scene of the shooting to the hospital and, as a result, was not interviewed on the day he was shot. Weeks later, on February 12, 2013, Detective Micheal Gifford (“Det. Gifford”) interviewed Defendant over the telephone in an attempt to ascertain who was responsible for the shooting. During a seven minute telephone interview, which was audio recorded, Defendant stated to Det. Gifford that a man named Chris was the individual who shot him, and that Chris went to Defendant’s grandmother’s home to apologize for the shooting. Defendant also provided Det. Gifford with information about Chris—including, for example, his physical description and the neighborhood where he is from—and stated that he has known Chris for many years. Det. Gifford only spoke to Defendant once on February 12, 2013.

Det. Gifford conducted a follow-up telephone interview with Defendant on March 4, 2013, which, like the initial interview, was audio recorded. Det. Gifford explained to Defendant that he could not locate Chris. Defendant thereafter informed Det. Gifford that he lied when he identified Chris as the shooter, and stated that a different individual, who he named, was responsible for the shooting. Defendant was arrested on June 29, 2013 for Hindering Prosecution and Providing a False Statement to a Law Enforcement Official. The indictment charges, *inter alia*, that Defendant

on or about the 12th day of February 2013 in the County of New Castle, State of Delaware, did knowingly provide a false oral statement to Det. Michael Gifford, a law enforcement officer of agency, which is material to the investigation with the intent to prevent, hinder, or delay the investigation of a felony crime or offense.<sup>4</sup>

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<sup>4</sup>Def.’s Mot. to Dismiss Ex. A (Nov. 22, 2013) (Count One of the Indictment).

According to the State, Defendant received a summary of his February 12, 2013 statements to Det. Gifford on October 29, 2013.<sup>5</sup>

On November 22, 2013, Defendant filed with this Court a Motion to Dismiss the Indictment. Defendant contended that “[a] criminal charge alleging false statement as an element of an offense must contain within it either the alleged false statement itself or, at a bare minimum, a summary of it.”<sup>6</sup> Defendant asserted that the indictment charging him with Providing a False Statement to a Law Enforcement Official “is bare of the ‘essential facts’ in that it fails to alleged either verbatim or in substance what false statement [he] is alleged to have made.”<sup>7</sup> Defendant argues the indictment does not fairly inform him of what false statement he is alleged to have told Gifford and, if convicted or acquitted, does not protect him from being charged a second time with the same conduct.

The State filed a Response to Defendant’s Motion to Dismiss on December 5, 2013.<sup>8</sup> In contending that the indictment was not deficient, the State emphasized that the purpose of the indictment, which is to (1) fairly inform the accused of the offense charged so he may defend himself and (2) allow the accused to plead double jeopardy in any future prosecution, is satisfied in the case *sub judice*, because the indictment provides the date and essential elements of the offense.<sup>9</sup> In the alternative, in the event the Court found the indictment deficient, the State asserted that it would seek leave to amend the indictment in accordance with Superior Court Criminal Rule 7.<sup>10</sup>

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<sup>5</sup>State’s Resp. to Def.’s Mot. for Appeal or Reconsideration of Commissioner’s Ruling at 1 n.1 (Jan. 27, 2014).

<sup>6</sup>Def.’s Mot. to Dismiss at 2 (Nov. 22, 2013).

<sup>7</sup>*Id.*

<sup>8</sup>State’s Resp. to Def.’s Mot. to Dismiss (Dec. 5, 2013).

<sup>9</sup>*Id.* at 3.

<sup>10</sup>*Id.*

A hearing was held before The Honorable Lynne M. Parker on December 9, 2013.<sup>11</sup> Commissioner Parker explained on the record that, based on the facts of the case *sub judice*, the indictment (1) fairly informs Defendant of the offense charged, thereby permitting him to defend himself,<sup>12</sup> and (2) provides Defendant with sufficient allegations to plead double jeopardy in the event of any future prosecution.<sup>13</sup> The Commissioner noted that Defendant, himself, admitted to Det. Gifford that he lied when he identified Chris as the shooter and made related misrepresentation.<sup>14</sup> Additionally, the Commissioner emphasized on the record that when an indictment, such as the one in the present case, substantially tracks the language of the controlling statute, the indictment is generally sufficient and should not be dismissed.<sup>15</sup> As a result, the Commissioner entered an Order on December 9, 2013, denying Defendant's Motion to Dismiss "[f]or the reasons set forth on the record on Dec[ember] 9, 2013."<sup>16</sup>

### **III. DEFENDANT'S INSTANT MOTION**

Through the instant Motion, Defendant asserts that the Commissioner failed to issue, as required by Superior Court Criminal Rule 62(a)(5), written findings of fact or recommendations. Therefore, Defendant contends that the Commissioner's December 9 Order is contrary to the law. Defendant also contends that the Commissioner erred by concluding that the indictment should not be dismissed, asserting the same arguments he raised in his Motion to Dismiss relating to the indictment being deficient.

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<sup>11</sup> Transcript Def.'s Mot. to Dismiss (Dec. 9, 2013) (Docket No. 14).

<sup>12</sup> *Id.* at 9-10; *see also id.* at 11.

<sup>13</sup> *Id.* at 9-10; *see also id.* at 11.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.* at 10. The Commissioner noted that "there is a distinction . . . between perjury cases and [providing-a-false-statement-to-a-law-enforcement-officer cases] because the perjury statute is different . . . so the indictment for perjury would have to track the perjury statute to in order to be sufficient." *Id.* This Court agrees.

<sup>16</sup> Order Recommending Denial of Def.'s Mot. to Dismiss (Dec. 9, 2013) (explaining that Defendant's Motion to Dismiss is denied "for the reasons fully set forth on the record on December 9, 2013.").

The State filed a response in opposition on January 27, 2014, which the Court received in chambers on January 29, 2014, in which the State reiterates the arguments asserted through its response in opposition to Defendant’s Motion to Dismiss.<sup>17</sup>

#### **IV. DISCUSSION**

##### **A. Defendant’s Procedural Objection**

Pursuant to Superior Court Criminal Rule 62(a)(5), Commissioners of the Superior Court have “[t]he power to conduct case-dispositive hearings, including . . . motions . . . to dismiss or quash an indictment . . . , and to submit to a judge of this Court proposed findings of fact and recommendations for the disposition, by a judge, for any such matter.”<sup>18</sup> Subsection (i) of Rule 62(a)(5) requires the Commissioner’s proposed findings of facts and recommendations to be filed with the Prothonotary and mailed to all parties. Within ten days of being proposed, any party can file written objections to the Commissioner’s findings of fact and recommendations. Pursuant to Rule 62(a)(5)(iv), this Court “shall make a *de novo* determination . . . of the specified proposed findings or recommendations to which an objection is made.”<sup>19</sup>

Defendant argues that the Commissioner’s December 9 Order is contrary to the law, asserting that “no such findings of fact and/or recommendations were proposed, written, or mailed to counsel,”<sup>20</sup> and the State appears to have adopted that position. This Court, respectfully, disagrees. The Commissioner’s written Order, which Defendant received, clearly incorporates by reference the bench rulings made on the record at the December 9 hearing. On the record, the Commissioner provided proposed findings of fact

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<sup>17</sup> In addition to taking the position previously referenced. *See supra* note 3.

<sup>18</sup> Super. Ct. Crim. R. 62(a)(5).

<sup>19</sup> Super. Ct. Crim. R. 62(a)(5)(iv).

<sup>20</sup> Def.’s Mot. for Reconsideration at 1.

and recommendations to this Court, which are recited above. It appears that Defendant takes the position that, in every instance, the Commissioner's proposed findings of fact and recommendations must be articulated in a written opinion. The Court is unaware of any authority, and Defendant fails to cite any, that prevents a Commissioner from making findings of fact and recommendations on the record, which are then incorporated by reference into a written Order. Indeed, Superior Court Criminal Rule 62 seems to anticipate quite the opposite, requiring a transcript be submitted for the judge to consider in deciding the matter. The Court is satisfied the procedures used by the Commissioner were appropriate and consistent with both statute and court rule.

### **B. Defendant's Substantive Objection**

Substantively, Defendant asserts that the Commissioner's ultimate conclusions are legally erroneous. Defendant contends that an indictment that alleges a "false statement as an element of an offense must contain within it either the alleged false statement itself or, at a bare minimum, a summary of it."<sup>21</sup> Defendant reiterates his contention that the indictment in the present case is deficient because it "fails to alleged either verbatim or in substance what false statement [he] is alleged to have made."<sup>22</sup>

It is a well-established part of Delaware's criminal law jurisprudence that the purpose of an indictment is two-fold. First, the indictment must fairly notify the defendant regarding what action(s) he is called upon to defend.<sup>23</sup> Second, the indictment

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<sup>21</sup>Def.'s Mot. to Dismiss at 2. Defendant's Motion to Reconsideration incorporates by reference his Motion to Dismiss. Def.'s Mot. for Reconsideration at 2.

<sup>22</sup>*Id.*

<sup>23</sup>*State v. Blendt*, 120 A.2d 321, 323 (Del. Super. Ct. 1956) (cited by the State); *Hamling v. United States*, 418 U.S. 87, 117 (1974) (cited by Defendant).

must “effectively preclude subsequent prosecution for the same offense,” *i.e.*, double jeopardy.<sup>24</sup> In the present case, the indictment states in whole:

[Defendant] on or about the 12th day of February 2013 in the County of New Castle, State of Delaware, did knowingly provide a false oral statement to Det. Michael Gifford, a law enforcement officer of agency, which is material to the investigation with the intent to prevent, hinder, or delay the investigation of a felony crime or offense.<sup>25</sup>

The record supports only a single statement was made that date directed only to that one Detective.<sup>26</sup> Clearly, the indictment in the present case satisfies the two-fold requirements of putting Defendant on fair notice of the crime charged and preventing double jeopardy. Specifics of the statement can properly be sought through a Bill of Particulars.

The Court notes that Defendant relies on a number of cases, none from Delaware, with indictments alleging false statements, most charging perjury, to support his contention that an indictment that alleges “false statement as an element of an offense must contain within it either the alleged false statement itself or, at a bare minimum, a summary of it.”<sup>27</sup> However, in addition to not being adopted law in this State, the Court notes that the critical inquiry when evaluating the sufficiency of an indictment is the two-prong test articulated above. Accordingly, although certain circumstances may require that the specific false statement be recited, or at least summarized, the Court finds that the two-fold requirement is satisfied in the case *sub judice* based on the facts, and for the reasons, recited above.

## **V. CONCLUSION**

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<sup>24</sup>See *supra* note 24.

<sup>25</sup>Def.’s Mot. to Dismiss Ex. A (Nov. 22, 2013) (Count One of the Indictment).

<sup>26</sup> Transcript Def.’s Mot. to Dismiss at 11.

<sup>27</sup>Def.’s Mot. to Dismiss at 2 (citing *State v. Bisbee*, 69 A.3d 95, 98-99 (N.H. Supr. 2013); *People v. Aud*, 288 N.E. 2d 453, 454-55 (Ill. Supr. 1972)); *United States v. Singhal*, 876 F.Supp. 2d 82, 93-96 (D. D.C. 2012); Def.’s Mot. for Reconsideration at 3-4 (citing other authority).

For the reasons stated above, Defendant's Motion for Reconsideration of Commissioner's Order and/or Appeal of Commissioner's Findings of Fact and Recommendations upon Defendant's Motion Dismiss is **DENIED**.

**IT IS SO ORDERED.**

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**M. Jane Brady**  
Superior Court Judge