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IN THE COURT OF APPEALS OF IOWA

PHILLIP SHERBON, MARGARET SHERBON and SHERYL LARY,

Plaintiffs-Appellants,

vs.

JOAN BEEDLE, LINDA CARLSON, PATRICIA BIRUSINGH, ELAINE E. HILLER, BENEDICT E. RINDONE, LAURENCE ELLISON and JANE EITMANN,

Defendants-Appellees.

Filed May 31, 1983

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2-68736

Appeal from Pottawattamie District Court, Glen M. McGee, Judge.

Plaintiffs appeal the judgment of the trial court granting defendants' motion to dismiss in an action seeking to quash a grand jury report on the ground that it was unlawfully presented. REVERSED AND REMANDED.

Lyle A. Rodenburg, Council Bluffs, for plaintiffs-appellants.

James M. Haney, Assistant Pottawattamie County Attorney, for the defendants-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ.

Hayden, J., takes no part.

SNELL, J.

Plaintiffs appeal the judgment of the trial court granting defendants' motion to dismiss in an action seeking to quash a grand jury report on the ground that it was unlawfully presented. We reverse and remand.

Plaintiffs Phillip and Margaret Sherbon were the co-administrators of the Pottawattamie County Health Care Center, and plaintiff Sheryl Lary was an employee of the Center. In March 1982, a seven-member Pottawattamie County grand jury recommended to the County Board of Supervisors that the employment of all three plaintiffs be terminated "for conduct, willfully carried out, which could or did cause physical pain, physical injury, psychological or emotional trauma to a resident." Although criminal conduct was alleged, no indictments were returned. Plaintiffs responded to the recommendation by filing a petition for declaratory judgment and injunctive relief.

Defendants, who were the individual grand jurors, filed a motion to dismiss. They alleged that individual grand jurors were immune from suit, that the grand jury's actions were authorized by statute, and that plaintiffs had failed to allege either irreparable harm warranting an injunction or inadequacy of legal remedies warranting a declaratory judgment.

The trial court sustained defendants' motion. It did not address the issue of immunity of individual grand jurors, but the court held there was no showing that the grand jury had been improperly impaneled or had lacked authority to proceed. In the same ruling, the trial court overruled a motion for a judgment on the pleadings filed by plaintiffs.

On appeal, plaintiffs raise the following issues: (1) The grand jury lacked statutory authority to issue the type of report involved here; (2) the grand jury lacked the power to act because it had previously been discharged by the court; and (3) the grand jury lacked the power to act because a substituted grand juror had never been sworn. Because our determination of the first issue is dispositive, we do not address the other issues raised by plaintiffs.

I. Rule 14(3)

As a threshold issue, defendants argue that plaintiffs' brief does not comply with the requirements of Iowa R. App. P. 14(3). Specifically, defendants claim that plaintiffs' brief does not contain a statement of the issues presented for review. We had no difficulty finding it. That section was titled "Propositions Relied on for Review." Plaintiffs' brief met the substantial requirements of the rules, and we are not inclined to place form over substance.

II. Authority of the Grand Jury

We agree with plaintiffs that the grand jury is not empowered to conduct investigations and then make public their findings and recommendations. As the Iowa Supreme Court stated in Rector v. Smith, 11 Iowa 302 (1860),

> The grand jury have no power, nor is it their privilege or duty to present any person for a criminal offense except by indictment. If the misconduct of an officer does not amount to a crime, and is not of such magnitude as will justify the jury in finding an indictment, their powers over the offense complained of, are at an end.

Id. at 307.

The problem with grand jury "reports" that are not indictments is that they publicly charge individuals with criminal misconduct, but present no forum in which these individuals can respond. An individual accused of misconduct by a grand jury report has no opportunity to prove himself or herself innocent of the particulars charged.

In Flanders v. Schoville, 350 F. supp. 371 (N.D. Ia., 1972), a grand jury filed a report concerning the competence of an elementary school principal with the superintendent of the school district. The report recommended the principal's termination. The federal court held that the filing of such a report exceeded the power of the grand jury under Iowa law. We quote with approval from that decision.

Chapter 771 of the Iowa Code does not authorize a grand jury to file anything with any entity or agency other than the court under whose jurisdiction the jury functions. The filing of the report concerning plaintiff Flanders with the Board of Directors and Superintendent thus exceeded the power of the grand jury. In addition, such disclosure violated the statutory mandate of secrecy of grand jury proceedings proscribed by § 771.23, as did the public endorsement of the Board's request for Flanders' resignation. See Hammond v. Brown, supra 323 F. Supp. 326, at 345.

In conclusion, it is necessary to comment briefly on the failure of the defendants to adhere to the statutory procedures of Chapter 771 of the Iowa Code. Being a statutorily created body, the grand jury's powers and duties are circumscribed by the statute empowering it. Important policy reasons based on the nature of the grand jury's functions and the consequences of its actions support such limitations. The primary justification is the desire to protect the rights and reputations of persons being investigated from unfair injury and prejudice. As stated in Application of United Electrical, Radio & Machine Workers, supra 111 F. Supp. 858, at 867, "a man should not be subject to a quasi-official accusation of misconduct which he cannot answer in an authoritative forum. The Grand Jury, it is thought, when it issues such reports, is imposing the punishment of public reprimand—a punishment based on ex parte proceedings which have not yielded enough evidence to warrant indictment. When it does this it defeats the very purpose of its existence." Similarly, in People v. McCabe, 148 Misc. 330, 266 N.Y.S. 363 (1933), the court rationalized that, like the report in the present case, "A presentment is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes—the right to answer and to appeal. It accuses, but furnishes no forum for a denial. No one knows upon what evidence the findings are based. An indictment may be challenged—even defeated. The presentment is immune. It is like the 'hit and run' motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed."

In the present case the grand jury's disclosure of its investigation to unauthorized parties in violation of the secrecy requirement of § 771.23 adversely reflected on Flanders' professional competence and ability without providing him with a forum or opportunity for a denial since he was not indicted. See People v. McCabe, 148 Misc. 330, 266 N.Y.S. 363 (1933). 106 A.L.R. 1389. If Flanders had been indicted, he would have at least had a forum in which to answer and to appeal. The concepts of due

> process and procedural fairness embodied in the statutory limitations on the powers of grand juries, thus necessitate stricter compliance with these limitations than was accorded by defendants in order to prevent the potential damage resulting from unsubstantiated or unanswerable quasi-offical accusations.

Id., at 373-74.

The provisions heretofore contained in chapter 771 of the Iowa Code (1971) are now contained in Iowa R. Crim. P. 3. They are substantially unchanged. We find the reasoning of the federal district court to be persuasive, and hold that Flanders presents a correct interpretation of the Iowa law on grand juries.

The grand jury exceeded its authority in the present case when it presented a report to the County Board of Supervisors recommending termination of plaintiffs for alleged criminal conduct. The duty of the grand jury is to "inquire into all indictable offenses brought before it which may be tried within the county, and present them to the court by indictment." Iowa R. Crim. P. 3(4)(j). A special statutory duty of the grand jury is to inquire into "the condition and management of the public prisons, county institutions and places of detention within the county." Iowa R. Crim. P. 3(4)(j)(2). However, the grand jury is not privileged to disclose the contents of its investigation to the County Board of Supervisors. In Rector v. Smith, the court construed the parallel subsection 3 regarding misconduct in office of public officers.

> It is claimed that by section 2992[1] of the Code, the grand jury have the power to report otherwise than by indictment upon the subjects named in the sub-divisions of this section. And this construction is claimed upon the ground that the second sub-division particularly contemplates a report by the grand jury, and that if a report can be made upon one of the subjects, the consideration of which is thus specially enjoined upon the jury, that a report may be made upon each of the subjects named in this section, or at least they

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[1]This is a typo in the opinion. The court is referring to section 4632 (2902) of the Iowa Code (1860), which is identical to Iowa R. Crim. P. 3(4)(j).

> can report upon the condition of the prison and upon the conduct of county officers.
>
> An indictment may be presented under each of those suvdivisions. Should there be a person imprisoned in the county, it is made the special duty of the jury to inquire into the offense charged, so that the criminal may be brought to speedy trial. Should there have been a willful neglect of duty by the keepers of the prison, they are liable to be indicted for such willful neglect. There can be no question as to the power of the grand jury to indict under the other two sub-divisions. A report by a grand jury, presents nothing upon which the court can act, unless it is in reference to the condition of the prison. The court can take no jurisdiction over the complaint charged by such report. Nor can a person thus presented have an opportunity to show himself innocent of the matters complained of. With this view of the question we conclude that the report presented by defendant as a juror, was not a privileged communication, and that he cannot plead this in bar of plaintiff's right to recover.

Rector v. Smith, at 307-08. The power or the grand jury is limited to presenting indictments. If it cannot indict, its power over the offense complained of is at an end. Accordingly, we reverse the judment of the trial court and remand with instructions that judgment be entered declaring the grand jury report invalid for being beyond its authority to act.

REVERSED AND REMANDED.