

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-022034-001 DT

01/27/2005

HONORABLE MARK R. SANTANA

CLERK OF THE COURT
K. Wendroff
Deputy

FILED: 02/01/2005

STATE OF ARIZONA

HEATHER LEE KIRKA

v.

KEVIN JAMES WALSH (001)

JENNIFER C STEWART

VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY

State's Attorney:	Heather Kirka
Defendant's Attorney:	Jennifer Stewart
Defendant:	Present
Court Reporter:	Kristen Brown

This is the time set for oral argument for Defendant's Motion to Determine New Probable Cause.

Oral argument commences.

The matter will be taken under advisement.

LATER: The Court issues the following ruling:

The Court has considered the Defendant's motion for new finding of probable cause and the response. The Court has also considered oral argument of counsel.

In his motion, the Defendant argues that the prosecution presented misleading and exculpatory information to the grand jury. A prosecutor may not knowingly provide misleading information to the grand jury. Nelson v. Roysten, 137 Ariz. 272, 669 P.2d 1349 (Ct App. 1983). Defendant also argues that the prosecutor did not present important exculpatory evidence to the Grand Jury. The Defendant argues that Detective Hotchkiss failed to tell the grand jury the Defendant did not successfully draw his pistol from the shoulder holster and gave the Grand Jury the impression that the pistol had been drawn. Defendant also asserts that Detective Hotchkiss

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should have informed the grand jury that Defendant had not made any threats against the police but was attempting to commit “suicide by cop.”

Misleading information - The record indicates that Hotchkiss did indicate that Defendant did not draw his pistol, although he testified that the Defendant was attempting to pull the gun. Moreover, although Defendant may not have directly threatened the officers, he repeatedly expressed his desire that he intended to commit suicide and wanted the police to shoot him. Such statements, made during a violent struggle, could be considered threatening to the police. Based on the record, the Court cannot find that the information provided to the grand jury concerning the assault and resist was misleading. Moreover, even if Hotchkiss testimony was misleading, there is no evidence that the prosecutor *knowingly* provided such information to the grand jury.

Exculpatory evidence - Defendant also argues that this same evidence (the gun not having been pulled and the lack of threats) was exculpatory evidence that should have been presented to the Grand Jury. Defendant also argues that his statements to the police indicated that he was attempting to kill himself by “suicide by cop”, not threatening the police. Although a prosecutor need not actually present exculpatory evidence, he must inform the grand jury of its existence and give the grand jury the opportunity to order its production. Trebus v. Davis, 189 Ariz. 621, 623, 944 P.2d 1235, 1237 (1997). As noted, the Court finds that the record indicates that Hotchkiss did make clear that the gun was not drawn, but that Defendant was attempting to do so. While the Defendant may not have directly threatened the police, the struggle, his attempts to pull the gun and his repeatedly screaming “just kill me” could certainly be interpreted as creating a potential threat. Moreover, the record indicates that Detective Hotchkiss did provide the grand jury with adequate information concerning Defendant’s statements concerning suicide. Under these circumstances, it is difficult to see how the lack of a threatening statement is exculpatory. Given the record, even if the prosecutor did not inform the grand jury that the Defendant did not directly threaten the police, that omission is immaterial.

The record supports the Grand Jury’s determination of probable cause as to the indictment.

IT IS ORDERED denying the Defendant’s motion for new finding of probable cause.