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Burress gambles on testimony in hopes of avoiding prison

Story Highlights

Plaxico Burress may have testified in a very hostile environment
 Burress may have also revealed his potential trial strategy to prosecutors

Plaxico Burress hopes an unusual legal strategy will keep him out of prison. On Wednesday, the former New York Giants wide receiver testified before a Manhattan grand jury on the charges he faces for criminal possession of a weapon in the second degree. The charges, which carry a minimum three-and-a-half year prison sentence, stem from Burress accidentally shooting himself in Manhattan's Latin Quarter Club last November. Burress' counsel, **Benjamin Brafman**, and prosecutors have reportedly been unable to strike a plea deal, with Burress willing to serve one year behind bars and prosecutors demanding two. For a 31-year-old wide receiver, the difference between one and two years in prison could be worth millions of dollars.

The unusual nature of Burress' strategy derives from the dynamics of a grand jury proceeding and his decision to testify in it. In New York, as elsewhere, a grand jury proceeding is completely secret, with defense counsel barred from participating. Under New York law, a defendant enjoys the right to testify, but the grand jury proceeding has no judge and is instead run entirely by the prosecutor. As a result, the prosecutor determines how to apply the rules of evidence, which questions to ask of the testifying party and other facets of the proceeding. Also, unlike a criminal trial's jury, which normally convicts only if each juror is persuaded "beyond a reasonable doubt," only a majority of grand jurors need to vote for an indictment and they only need to have "reasonable cause to believe." To say that a grand jury proceeding is tilted in favor of the prosecution is an understatement.

Depending upon the prosecutor's style and tactics, Burress may have testified in a very hostile environment. By testifying, Burress may have also unwittingly revealed his potential trial strategy to prosecutors. Even worse, if he ultimately faces a trial and testifies in it, his testimony must be consistent with his grand jury testimony, for otherwise he could face additional charges for perjury and obstruction of justice.

Given those drawbacks, Burress' decision to testify would appear unwise. Burress, however, hopes that he persuaded the jurors that he does not deserve prison time. Based on his post-proceeding comments and those of Brafman, Burress likely told the grand jury that he was remorseful and that he takes complete responsibility. He may have also highlighted that he has already suffered from an embarrassing and painful gunshot wound and a loss of employment. Also, by publicly expressing contrition following the grand jury proceeding, Burress may have tried to impress NFL commissioner **Roger Goodell**, who under the league's personal conduct policy, has sole discretion to suspend Burress.

Unfortunately for Burress, however, any justification and excuse for carrying the gun are irrelevant under New York law. If he possessed a loaded firearm outside of his home or place of business, he committed the crime. It is a bright line matter.

As New York criminal defense attorney and former Manhattan prosecutor **Jeremy Saland** of Crotty Saland, LLP tells SI.com, Burress' appearance before the grand jury appears driven not by a desire to claim innocence but rather by a desire for jury

nullification -- meaning, in this case, the grand jury would decide to disregard the actual law which Burress appears to have broken.

"By humanizing himself beyond the perception that he is a privileged athlete, painting himself as remorseful, and establishing that he was the only one hurt, Burress hopes that he can mitigate and 'nullify' the evidence," Saland says. "Yet, the reality for Mr. Burress is that unless he can sway the emotions of the grand jury towards 'nullification,' he lacks a true legal defense."

Given the strict liability nature of Burress' alleged crime, the grand jury remains likely to vote for an indictment. In the alternative, the grand jury could vote for lesser charges or that Burress walk free. Chances are, though, Burress will be headed for a trial or a plea deal favorable to prosecutors.

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