

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM : PART K-19

P R E S E N T :

HON. SEYMOUR ROTKER,
Justice.

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against-

Indictment No.: 197/2003

Keith Campbell, Dave Palmer,
Amos Powell, Wayne Williams

Motion: Omnibus

Defendant.

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CHRISTOPHER RENFROE, ESQ.
For Keith Campbell

MARK A. CRAWFORD, ESQ.
For Dave Palmer

HERBERT KELLNER, ESQ.
For Amos Powell

JONATHAN FINK, ESQ.
For Wayne Williams

RICHARD A. BROWN, D.A.

BY: COURTNEY GOODLOE, A.D.A.
Opposed

Upon the foregoing papers, and due deliberation had, the motion is decided as per the attached memorandum this date.

Kew Gardens, New York
Dated: April 30, 2003

/S/
SEYMOUR ROTKER, J.S.C.

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-19

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THE PEOPLE OF THE STATE OF NEW YORK

BY: SEYMOUR ROTKER

- against -

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Defendant.

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The defendant's omnibus motion for pretrial relief is decided as follows:

A. Motion to Inspect Grand Jury Minutes [Cpl 210.30(2)(3)]

That branch of each defendant's motion seeking inspection of the Grand Jury minutes is granted. Inspection is mandatory absent a showing of good cause to deny the requested relief. The People have consented to *in camera* inspection.

B. Motion to Release Grand Jury Minutes to Defendants [Cpl 210.20(2)(3)]

The branch of the each defendant's motion which seeks release of the Grand Jury minutes and charge is denied. Grand Jury proceedings are secret and should not be disclosed absent a compelling and particularized need for access (CPL 190.25 (4)); Matter of the District Attorney of Suffolk County, 52 NY2d 436; Ruggiero v. Fahey, 103 AD2d 65. The defendants have all failed to demonstrate a need sufficient to overcome the presumption of confidentiality.

C. Motion to Dismiss or Reduce on the Ground of Insufficient Grand Jury Evidence [Cpl 210.20, 210.30]

The Court having inspected the minutes rules as follows:

With respect to that branch of each defendant's the motion which seeks to dismiss the indictment for evidentiary insufficiency, decision is reserved.

Defendants Williams and Palmer have served on the People and filed with the Court Requests for Bills of Particulars. Among other things Williams requested :

1. The "date, time and place of the alleged crime"
2. The specific acts allegedly committed by the defendant under each count of the indictment.
3. Whether the defendant acted as a principal or accomplice
4. If charged as an accomplice the basis for his alleged accessorial liability as to each and every count of the indictment.

The defendant Palmer requested :

1. The exact date and time of the crime
2. The substance of the defendant's conduct encompassed by the charge
3. The substance of the acts of the co-perpetrators.

The defendants Powell and Campbell have not filed requests for particulars with the Court¹. In response to the defendants' requests, however, the People have filed and served on all

¹They may or may not have filed requests with the prosecution.

defendants a Bill of Particulars that relates to all four defendants. By its terms, the Bill filed by the People properly acknowledges that the defendants are entitled to “the substance of (their) conduct encompassed by the charges which the People intend to prove on their direct case”. The information provided is that each defendant, at a specified time and place, “acting in concert with (the other three defendants) acted as lookouts, then burst through the door of the shared rented room of Karen Clennon and Latisha Hinkson without permission or authority while brandishing handguns and fired at and in the complainants’ direction while the complainants fled”. The People further assert that all defendants except the defendant Palmer acted as principals and that Palmer was an accomplice. .

Although none of the defendants have moved for a more specific Bill the court finds for the following reasons that the Bill as filed by the People is inadequate.

The bill of particulars has assumed vital significance in recent years due to the sweeping analysis that narrowed the functional importance of the indictment "qua document" in People v. Iannone, 45 NY2d 589 (1978) and the holding at the same term in People v. Fitzgerald, 45 NY2d 574 (1978), which--although not warm to "bare bones" indictments-- instructed that the remedy for an indictment's failure to provide sufficient factual information to clearly apprise the defendant of the conduct constituting the subject of the accusation (see CPL § 200.50 [7(a)]) is the defendant's statutory right to a bill of particulars. This analysis was confirmed two years later in People v. Mackey, 49 NY2d 274 (1980). When the Court declared that "Iannone and Fitzgerald held that indictments which stated no more than the bare elements of the crimes charged and in effect parroted the statute were sufficient, while noting that the defendants could discover the particulars of the crimes by requesting a bill of particulars", see, Preiser, Practice Commentary, McKinney’s Cons. Law of NY, 11A, CPL 200.95, page 540. See also, People v. Villani, 59 NY2d 781 (1983).

In essence Iannone and Fitzgerald hold that although CPL 200.50 requires an indictment to contain "(a) plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision as to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation". All that is really required is an allegation "where when and what the defendant did.", Iannone, *supra*, page 598. Under Iannone and Fitzgerald an indictment may be technically adequate to fulfill the requirements of this section, but nevertheless lack sufficient substance to be of any practical value to the defendant in regard to one or more of the factors. The reason for this seeming paradox is that under modern criminal procedure the defendant may demand and receive substantial (emphasis added) additional pre-trial information through a bill of particulars (CPL § 200.95) and through discovery (CPL Article 240). Indeed the Iannone Court wrote:

A word of caution is in order. It is beyond cavil that a defendant has a basic and fundamental right to be informed of the charges against him so that he will be able to prepare a defense. Hence the courts must exercise careful surveillance to ensure that a defendant is not deprived of this right by an overzealous prosecutor² attempting to protect his case or his witnesses. Any effort to leave a defendant in ignorance of the substance of the accusation until the time of trial must be firmly rebuffed. This is especially so where the indictment itself provides a paucity of information. In such cases, the court must be vigilant in safeguarding the defendant's rights to a bill of particulars and to effective discovery. Should the prosecutor decide to use an indictment which, although technically sufficient, does not adequately allow a defendant to properly prepare for trial, he may well run afoul of the defendant's right to be informed of the accusations against him.

² Although the reasoning of Iannone applies to this case there is no indication here of overzealous prosecution. She is merely availing herself of the right to file a bare bones indictment.

_____ Although the Bill of Particulars filed by the People in this case alleges that only the defendant Palmer acted as a principal, the Indictment itself charges that all of the alleged offenses were committed by the defendants “each, aiding the other”. The factual statement contained in the Bill is confusing but appears to allege that some of the defendants “burst through the door” of the apartment “brandishing handguns” while others “acted as lookouts”. Unless the People provide a specific statement of facts as to what each defendant is alleged to have done it is impossible to determine whether the Grand Jury evidence is sufficient to support “in concert” liability as to that defendant³.

With respect to the four weapons Counts (five through eight) only one firearm (a .357 Smith and Wesson revolver) was recovered. It was recovered from the vehicle in which the defendants were riding and when recovered contained no live ammunition. Two live rounds were recovered from the person of one of the defendants.

The Indictment charges Criminal Possession of two weapons under two different statutory sections. Based on the factual information supplied by the People in their Bill of Particulars it is impossible to determine which gun is referred in which count, when and where (in the apartment during the burglary or in the car at the arrest) each gun was allegedly possessed, whether there is sufficient evidence of possession of a “loaded” weapon.

Based upon the Court’s reading of the Grand Jury charge it appears that the jurors were instructed to consider the weapons counts with respect to the two individuals who entered the room brandishing weapons. Although the jury was also charged as to the presumption of possession stemming from presence of a firearm in a vehicle it is unclear whether the counts in the Indictment refer to possession of the weapons in the hands of two

³. The allegation that a defendant “acted as lookout” is a conclusion and not a statement of fact.

of the defendants at the time of the burglary or to possession by all four defendants of the weapon recovered from their vehicle⁴. If the latter, there is a serious question as to the sufficiency of the evidence to establish felony possession of a “loaded” firearm by any of the defendants other than the one who had the ammunition.

The weapon recovered from the vehicle contained no live ammunition. The presumption provides sufficient evidence to charge all four defendants with possession of the weapon itself. The live ammunition necessary to establish that it was “loaded” was allegedly recovered from the person of the one defendant. Thus there is no proof that while in the vehicle any defendant other than the one in possession of the ammunition possessed a “loaded” firearm.

The information as to the factual basis for the charges as requested by the defendants is not evidentiary in nature. The defendants seek to determine what the People intend to prove not how they intend to prove it. Disclosure of this information is authorized by CPL 200.95 and CPL 200.50 (7) and it is necessary to advise the defendants of the specific allegations against them, to insure that should a judgement be entered in this matter it will be sufficiently specific to provide a bar to further prosecutions, to assist the Court in determining the sufficiency of the evidence before the Grand Jury, in ruling on evidentiary matters during the trial and ultimately in charging the jury.

In view of the foregoing the Court will reserve decision on the motion to dismiss for factual insufficiency until the People have had an opportunity to file a more specific Bill of Particulars setting forth the specific acts of each of the defendants with respect to each and every count of the indictment. With respect to Counts five through eight the People should

⁴ A properly drafted indictment could charge both.

specify which firearm (the recovered weapon is a .357 revolver and the other is evidently a .45 caliber automatic) was allegedly possessed in each count, the time and place of possession and the specific acts of each defendant or the evidentiary presumptions that are relied on to establish liability.

The People will provide the revised Bill by May 14, 2003 the defendants will have until May 21, 2003 to respond in writing with any arguments with respect to the factual sufficiency of the allegations in the enhanced Bill of Particulars. Unexcused failure to comply with this schedule may result in preclusion of evidence or other sanctions.

D. Motion to Dismiss Based on Defective Grand Jury Proceedings [Cpl 210.35]

CPL 210.35 specifies five grounds under which an indictment may be dismissed due to defects in the Grand Jury process. Grand Jury proceedings carry a presumption of regularity, Melville v. Morgenthau, 307 F. Supp., 738, 740. To overcome that presumption there must be a strong showing by the defendant of particularized need or gross and prejudicial irregularity in the proceedings or some similarly compelling reason, United States v. Diguardi, 332 F. Supp. 720. The majority of the irregularities claimed by the defendants are encompassed in subsection five of CPL 210.35. This section requires a specific factual showing that any alleged defect “impaired” the “integrity” of the process and may “prejudice” the defendant. The all of the defendants have failed to make the required showing under this section. Accordingly the motion to dismiss is denied except to note that the Court has, in fact, inspected the minutes and finds no gross defect in the proceedings.

The defendant Palmer has alleged that the ballistics report entered into evidence to establish operability of the firearm and the ammunition was hearsay as per Matter of Rodney J. (NYLJ, June 10, 1993, p. 22) The certification attached to the report in this case differed from the one which the court disapproved in Rodney J and was sufficient.

E. Motion for Discovery and Inspection [Cpl 240.20, 40]

_____The branch of the motion of each of the defendants which seeks discovery and inspection is granted to the extent of the information supplied in the People's responding papers, as prescribed in CPL §240.20. Although the People represent that they are not in possession of any Brady material at this time, they are reminded that they remain under a continuing duty to provide the defense with any exculpatory material they may obtain in the future, Brady v. Maryland, 373 US 83.

With respect to discovery, the defendant Williams has specifically requested disclosure of "any other information...currently in the possession of the Office of the District Attorney (including prior inconsistent statements) which when viewed from the point of view of the defendant either (i) supports or is consistent with innocence; (ii) is inconsistent with his guilt as to any count or lesser included offense...or (iii) supports or is consistent with any claim that the Defendant's rights under the State or Federal Constitution has been violated".

This is a specific limited request for potential Brady material. The defendants are entitled to and the People must produce exculpatory material. In fact, CPL 240.20(2), which controls discovery and disclosure, places an affirmative burden upon the prosecutor to "make a diligent, good faith effort to ascertain the existence of demanded property" and even "to cause such property to be made available where it exists but is not within the prosecutor's possession or control". Unless the material is produced neither the Court nor the People can reach an informed conclusion as to whether or not contains exculpatory matter.

Therefore, the Court orders the prosecution to produce for *in camera* inspection all routine police reports prepared in connection with this matter⁵. The Court is not ordering disclosure of this material to the defense at this time. It is ordering that the reports be produced so that the Court can determine to what extent, if any, the material must be disclosed.

F. Motion to Discover Witness Statements [Cpl 240.44, 45]

The branch of the motion seeking discovery of statements made by witnesses who the District Attorney intends to call at trial or hearing made pursuant to People v. Rosario, 9 NY2d 286 and People v. Consolazio, 40 NY2d 446 is granted to the extent that the People are reminded of their obligation to make such material available to the defense at the commencement of trial or hearing in this matter pursuant to CPL 240.45 (1)(a) and CPL 240.44 (1)⁶.

G. Suppression of Identification Testimony [Cpl 710.20 (6)(4)]

The branch of the motion of each defendant for suppression of identification evidence is granted to the extent that a hearing is ordered (CPL §710.60 (4) with respect to all

⁵. By this request the defendant is not attempting to conduct a wide ranging fishing expedition into the People's case. The material he seeks is finite in nature and will, in any event, be provided to him at some future date. Diligent trial preparation would seem to require that the prosecutor obtain and review these routine, though highly significant, materials.

⁶ The material referred to in these sections is, by and large, the very material which the Court is ordering produced for in camera inspection.

defendants except for the defendant Williams. The object of the hearing under this section will be to determine whether showup procedures employed by the police were unnecessarily suggestive so as to require suppression of testimony regarding those procedures and regarding any prospective in court identifications of the defendants (Wade hearing).

With respect to the defendant Williams, the People have alleged and the defendant was known to the complaining witnesses because he rented a room in the same multifamily apartment unit which they occupied. Unless this allegation can be refuted by the defendant he is not entitled to a hearing under CPL 710.20 (6) , People v. Rodriguez, 79 NY2d 445 (1992).

The Branch of the motion of each defendant for suppression of identification testimony as the direct fruit of an arrest without probable cause (CPL 710.20(4))is granted as to all defendants to the extent that a hearing is ordered to determine whether their arrest was authorized (Dunnaway hearing).

H. Suppression of Tangible Property [Cpl 710.20(1)]

The Branch of each defendant's motion seeking suppression of the firearm recovered from the vehicle in which they were arrested and/or the live ammunition recovered from the person of the defendant Palmer is granted to that a hearing is ordered to determine whether the search and seizure of these items was lawful (Mapp hearing).

I Suppression of Statements [Cpl 710.20 (3)(4)]

The branch of the defendant Williams motion seeking to suppress statements made to law enforcement officers is granted to the extent that a hearing is ordered to determine

whether the statement was “involuntarily made” under CPL 60.45 or was the direct fruit of an illegal arrest (Huntley/Duanaway hearing). No other defendants made statements.

J. Reservation of Rights

The branch of the motion which seeks to reserve rights pursuant to CPL 255.20 is granted to the extent that any additional, supplemental or demand motions will be considered by the Court when they are made in compliance with the requirements of CPL 255.20(2) and (3).

K. Miscellaneous Relief

The defendant’s motion for such other relief as this court deems just and proper is denied. The moving papers fail to state grounds for further relief.

The Clerk of the Court is directed to forward a copy of this memorandum and order to the attorney for the defendant and to the District Attorney.

Kew Gardens, New York
Dated: April 30, 2003

/S/
SEYMOUR ROTKER, J.S.C.