

People v Gibian

2006 NY Slip Op 30144(U)

October 10, 2006

Supreme Court, Suffolk County

Docket Number: 0000599/2005

Judge: Robert W. Doyle

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SUPREME COURT-STATE OF NEW YORK

CRIMINAL TERM, SUFFOLK COUNTY

P R E S E N T:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

HEARING DATE: 10-5-06
RELIEF: Ventimiglia

X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

THOMAS J. SPOTA, SUFFOLK COUNTY DISTRICT ATTORNEY
By: John Scott Prudenti, Esq.
200 Center Drive
Riverhead, New York 11901

ZACHARY R. GIBIAN,

Defendant.
X

DEFENDANT'S ATTY:
WILLIAM J. KEAHON, ESQ.
One Suffolk Square, Suite 500
Islandia, New York 11749

Defendant is charged with two counts of Murder in the Second Degree. Pursuant to a request by the People for a determination of the admissibility of certain "prior crimes or bad acts" of defendant as part of their direct case, a Ventimiglia hearing (People v. Ventimiglia, 52 NY2d 350, 438 NYS2d 261) was held before the Court on Thursday, October 5, 2006. At issue was the admissibility of potential testimony from six of defendant's friends who the People contend will testify that defendant had smoked marijuana with them and had used prescription narcotics in the past. It is the People's contention that this evidence is admissible as Molineux evidence (People v. Molineux, 168 NY 264) since it is relevant to the issue of defendant's motive in committing the crime with which he stands charged.

Evidence of crimes committed by a defendant, other than the one charged, is ordinarily irrelevant and is not admissible to prove guilt (People v. Allweiss, 48 NY2d 40, 421 NYS2d 341). "It is meant to eliminate the risk that a jury, not fully convinced of the defendant's guilt of the crime charged may, nevertheless, find against him because his conduct generally merits punishment" (People v. Allweiss, *supra* at p. 46 *citing* People v. Molineux, 168 NY264, 294; People v. Zackowitz, 254 NY 192, 198; People v. Fiore, 34 NY2d 81, 84-85). Thus, evidence of other, uncharged crimes or bad acts, which is offered solely to establish defendant's predisposition to commit the offense with which he is charged, is not admissible. However, in People v. Molineux (*supra*), the Court of Appeals held for the first time that where evidence of prior uncharged crimes is relevant to an issue at trial, such proof may be admissible in certain instances. The Molineux case held that where evidence of prior crimes was relevant to issues at trial involving defendant's motive, intent, modus operandi, or identity as well as the existence of a common scheme or plan in committing this crime, evidence of defendant's prior criminal activity could be admissible.

In deciding whether to admit such evidence, the Court must make a two part inquiry. The first issue is whether the evidence of prior crimes is relevant to a Molineux issue. Once that question is answered in the affirmative, the Court must then determine whether the probative value of such evidence outweighs its potential for prejudice (People v. Alvino, 71 NY2d 233, 525 NYS2d 7).

Here, the People argue that evidence of defendant's prior illegal drug use is relevant to the issue of motive. The People assert that the victim of this crime, defendant's step father, had attempted to interfere with defendant's socialization with a group of his friends who the victim thought were not a good influence on him since they were, among other things, users of marijuana and illegal prescription drugs. According to the People, the testimony at trial will be that defendant's step father did not want defendant socializing with this group of friends and had attempted to place restrictions on his contact with them. It is their position that defendant's motive in killing his step father was, at least in part, to eliminate this interference with his relationships with these friends and his illegal drug use.

Thus, the People argue that defendant's prior use of marijuana and illegal prescription drugs is relevant on the issue of motive since it was the victim's attempted interference with this use that provided defendant with a motive to commit the crime of murder. At the hearing, the People presented the names of six individuals who they intend to call at trial who will testify that defendant had smoked marijuana and consumed illegal prescription drugs during the period of time prior to the murder.

In opposition to the People's application, defendant raises several issues. Defendant notes that there is presently no proof in the record of the proceedings before the Court to suggest that defendant smoked marijuana or utilized illegal drugs. During the period of time that defendant was released on bail but subject to supervision, none of the routine drug tests performed on him came back positive. In his statements given to the police at the time of his arrest, not only is there no mention of drug use, but rather a denial by defendant of such use. Defendant argues that in order for Molineux evidence to be admissible at trial, the motive attributed to him must have some legal or logical relation to the criminal act according to known rules and principles of human conduct. According to defendant, in the absence of some other evidence of prior drug use, the proof sought to be introduced by the People bears no logical or legal basis for admission.

Consequently, defendant asserts that in the absence of any logic to the admission of such evidence, its prejudicial value far outweighs whatever probative value it might have. Defendant contends that the introduction of such evidence is an attempt by the People to smear the character of defendant in the eyes of the jury so that they will be more likely to convict defendant for the crime charged.

Defendant also argues that before the Court rules on the admissibility of this evidence, the People should produce these witnesses in order to allow defendant an opportunity to examine these witnesses and to test the truthfulness of their statements. Defendant notes that in People v. Ventimiglia (52 NY2d 350, 438 NYS2d 261), the Court of Appeals held that in reaching a determination as to the admissibility of evidence of this type, the Court can direct that the prosecutor detail the evidence "either as an offer of proof by counsel or, preferably, by presenting the live testimony of the witness" (People v. Ventimiglia, *supra* at p. 362). The defendant argues

that under these circumstances, he should be afforded an opportunity to question these witnesses prior to their testimony at trial.

At the hearing, the People stated that they were in possession of written statements from five of the six witnesses that they intended to call and offered them to the Court for an “in camera” inspection in order to assist the Court in making a determination on this application.¹ By letter from counsel for defendant received by the Court shortly after the conclusion of the hearing, defendant requested that those statements be released to him in order to avoid a violation of his constitutional rights.²

Initially, it must be noted that defendant has requested disclosure of any cooperation agreement between the People and any of these six witnesses. While the People have provided defendant with a copy of a cooperation agreement with respect to one of the witnesses, it was represented in Court that there were no such agreements with respect to the other five witnesses. Since cooperation agreements do constitute evidence favorable to the defense and are considered Brady material (Brady v. Maryland, 373 US 83, 83 S Ct1194; *see also*, People v. Steadman, 82 NY2d 1, 603 NYS2d 382), the People should be aware that in the event such agreements are entered into with any of the remaining five witnesses, such agreements should be immediately disclosed to defendant.

After listening to the arguments offered by both the People and defendant during the course of the hearing and review of the offer of proof by the People, the Court concludes that this evidence is indeed relevant on the issue of defendant’s motive in committing the murder with which he is charged. Under the People’s theory that defendant killed his step father in order to eliminate his interference with defendant’s ability to smoke marijuana and use illegal prescription drugs, defendant’s prior use of these drugs is surely relevant. However, before the Court can determine the admissibility of such evidence, it must weigh the probative value of such evidence against its prejudicial effect on the jury (*see, People v. Alvino, supra*). In this instance, the prior acts sought to be utilized by the People are the use and possession of marijuana and the illegal use and possession of prescription narcotic drugs, both of which are crimes. As might be expected in such circumstances, there was no proof that these crimes had previously been reported to law enforcement authorities nor any independent connection of defendant with these activities other than the testimony of these six witnesses. Thus, the probative value of this evidence will depend almost exclusively on the strength of the testimony of these witnesses.

Accordingly, the Court will reserve decision on the use of the testimony of each of these witnesses until the Court has had an opportunity to observe their testimony, outside the presence of the jury, prior to their examination at trial. At such time, defendant will have a limited opportunity to cross examine these witnesses solely with respect to their testimony on the

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While the People represented that there were five such statements for submission, the Court is in receipt of statements from only four witnesses.

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Although the letter from defense counsel was mistakenly addressed to another justice of this Court, the letter eventually reached the appropriate part of the Court despite the obvious mistake.

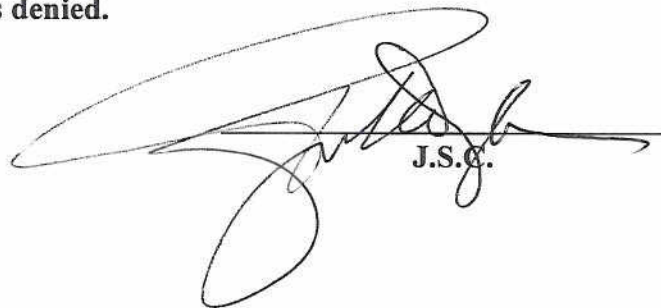
Molineux issue and no other.³ At the conclusion of the testimony of each of these witnesses, the Court will rule on whether they will be permitted to testify, before the jury, about defendant's prior use and possession of marijuana and prescription drugs.

Finally, defendant has raised an issue with regard to the alleged distribution by defendant of certain prescription narcotics to some of his friends after the time of the murder of defendant's step father. While defendant argues that this evidence is inadmissible since it is evidence of subsequent criminal conduct and would have no probative value in this case, it must be noted that the Molineux principles are equally applicable to evidence of crimes allegedly committed by defendant after the crime for which he or she is tried. (*See, e.g., People v. Dupree*, 110 AD2d 777, 487 NYS2d 847; *People v. Powell*, 107 AD2d 718, 484 NYS2d 75; *People v. Gines*, 36 NY2d 932, 373 NYS2d 543). In fact, the Molineux decision itself holds that "evidence of uncharged crimes both prior and subsequent to the date of the charged crimes (is) highly probative to show defendant's intent, motive and common plan, scheme or design" to commit the crimes charged (*People v. Molineux, supra*, p. 291, 61 NE 286). Here, as previously noted, the People's theory is that defendant committed this crime in order to eliminate his step father's interference with his relationships with his friends and his use of marijuana and illegal drugs with them. Thus, the proof that defendant took his mother's prescription medication after the murder and gave those pills to several of his friends is extremely relevant on the issue of defendant's motive in committing the murder. The distribution and use of these illegal drugs is the very same conduct which the victim had sought to interfere with and which, according to the People, had motivated defendant to commit the murder. The fact that defendant engaged in this conduct immediately after the murder is clearly probative on the issue of motive.

In addition, the distribution of these illegal prescription drugs is, as the People argue, inextricably interwoven with the rest of the evidence in this case and completes the narrative of the facts surrounding the crime (*see, People v. Ventimiglia, supra; People v. Gines*, 36 NY2d 932, 373 NYS2d 543). Proof of the distribution of these drugs, occurring immediately after the murder and during the course of and shortly after the disposal of the murder weapon and defendant's bloody clothes, allows the jury a thorough appreciation of the interwoven events involving defendant's criminal conduct.

Therefore, defendant's application to preclude the introduction of evidence of the distribution of the illegal drugs is denied.

Dated: October 10, 2006



J.S.C.

³Obviously, prior to the testimony of each of the witnesses, defendant will be entitled to any written statements of these witnesses, including the statement submitted to the Court for in camera review, since the statements constitute Rosario material (*see, CPL section 240.44*)