

People v Thompson

2007 NY Slip Op 31274(U)

May 16, 2007

Supreme Court, Queens County

Docket Number: 0002416/1992

Judge: Sheri S. Roman

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MOTIONS

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-18 QUEENS COUNTY

P R E S E N T: Hon. Sheri S. Roman,
Justice

PEOPLE OF THE STATE OF NEW YORK	:
	:Ind. No.: 2416/92
	:
-against-	:Motion: <u>Article 78</u>
	:
RODNEY THOMPSON,	:Submitted: March 21, 2007
	:
	:
DEFENDANT.	:
	:

The following papers numbered
1 to 5 submitted in this motion.

Rodney Thompson, Pro Se
For the Motion


Hon. Richard A. Brown, D.A.
By: Josette Simmons-McGhee, Esq.
Opposed

Papers
Numbered

Notice of Motion and Affidavits/Affirmations Annexed.....1-2
Answering and Reply Affidavits/Affirmations.....3-5

Upon the proceedings held in this matter, and in the opinion of the court herein, defendant's application for a judgment against the Queens County District Attorney's Office pursuant to Article 78 of the Civil Practice Law and Rules seeking to compel the Office of the Queens County District Attorney to provide records pursuant to The Freedom of Information Law, is **granted in part and denied in part**. See the accompanying memorandum of this date.

Date: May 16, 2007
Gloria D'Amico
Clerk


Sheri S. Roman, J.S.C.

MEMORANDUM
SUPREME COURT QUEENS COUNTY
CRIMINAL TERM PART K-18

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THE PEOPLE OF THE STATE OF NEW YORK      :
                                           : Indictment No.: 2416/92
           -against-                       :
                                           :
RODNEY THOMAS,                            : BY: Sheri S. Roman, J.
                                           :
                                           :
                                           : Defendant.: DATED: May 16, 2007
-----X

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Defendant moves, by order to show cause, for an order, pursuant to Article 78 of the Civil Practice Law and Rules compelling the Queens County District Attorney's Office, to provide certain documents pertaining to the within case pursuant to Article 6 of the Public Officers Law, commonly known as The Freedom of Information Law.

On January 11, 1993, defendant was convicted, after a jury trial before Justice Steven Fisher, of Kidnapping in the First Degree, Rape in the First Degree(five counts), Sodomy in the First Degree(four counts), Robbery in the Third Degree, and Assault in the Second Degree.

On July 1, 1993, defendant was sentenced to an aggregate indeterminate term of incarceration amounting to 119 1/2 years to life.

Defendant appealed the convictions and by order dated August 5, 1996, the convictions were affirmed by the Appellate Division, Second Department. See People v. Thompson, 222 A.D. 2d 156 (2d Dept. 1996). Defendant then appealed to the Court of Appeals

which unanimously affirmed the order of the Appellate Division. See People v. Thompson, 90 N.Y. 2d 615(1997).

The charges arose out of an incident which took place on May 23, 1992. Although this court did not preside over the trial, the facts have been gleaned from the affirmations submitted with the motions, from the records contained in the court file, and from the decisions of the appellate courts.

On April May 23, 1992, defendant, Rodney Thompson, armed with a knife, approached the female victim in the street, stabbed her in the thigh and forced her to walk with him to his apartment. Once in his apartment, he blindfolded the complainant, removed her jewelry and clothes and then raped and sodomized her over a period of twenty hours.

Defendant's initial request for documents pursuant to the Freedom of Information Law was made to the Queens County District Attorney's Office by letter dated April 9, 2004. In his letter, defendant requested all documents pertaining to his case which were contained in the files of the Queens District Attorney's Office. The documents he requested in his application related to thirty-three categories of information.

The thirty-three categories, *as specified by defendant*, are as follows:

1. Felony Complaints and Supporting Depositions;
2. Notices pursuant to Criminal Procedure Law 190.50(5)(a) and

Criminal Procedure Law Section 710.30(1)(a)(b) regarding notices of Grand Jury presentation, and intention to offer of statements and/or identification;

3. Voluntary Disclosure Forms, Attachments and Annotations;
4. Data Analysis Forms and Early Case Assessment Bureau;
5. Any and all data as compiled and filed pursuant to Criminal Procedure Law Section 240.20(1)(a-j), as amended;
6. Reports and records from other agencies;
7. Deferral of prosecution, as distributed, ECAB file, Arresting Officer File, Deputy Chief/ECAB and Commanding Officer;
8. Synopsis Sheet;
9. Grand Jury Synopsis Sheets;
10. Notes and legal memoranda;
11. Any and all DD5s and UF-61s;
12. Any and all radio runs; C.B. Transmissions, Sprint Tapes, Finest Message Switching System, N.Y.P.D. On-Line Booking system;
13. Warrants of file system;
14. Search/Arrest Warrants, Affidavits, Oath of Affirmations, Inventories, Returns, as well as any and all Transcripts of such Judicial Proceedings or Processes;
15. Material Witness proceedings including affidavits, orders and final decisions and judgments;
16. Exhibits and witness lists of the People and or defense at pretrial, trial and sentencing;

17. Interview, Police Reports, memo books, and statements
18. Subpoenas, notes, surveillance applications;
19. Investigators Reports, Notes;
20. Subpoenaed evidence;
21. Intelligence reports, notes or files from agencies;
22. 104th Precinct Police Department Index Sheets;
23. No documents specified;
24. Police Officer Memo Book Entries;
25. Mug Shots;
26. Evidentiary Photographs;
27. Crime Scene Unit Reports;
28. Crime Scene Photographs;
29. Crime Scene Map/Schematics;
30. Police Maps/Diagrams;
31. Complaint Follow-Up/Informational (DD5s/UF61s);
32. Laboratory Reports, Examination and Analysis; and
33. Subpoenas.

On April 28, 2004, Assistant District Attorney Tina LoSchiavo, the Records Access Officer for the Queens District Attorney, informed defendant by letter that they received his request and would respond to his request within 60 days. On July 29, 2004, Ms. Loschiavo again wrote to defendant stating that the District Attorney's Office was working on his request and that they would give him another status report within 60 days. On

September 24, 2004, November 23, 2004 and March 4, 2004, Ms. Schiavo wrote to defendant explaining that the District Attorney's Office was still working on his request. On October 17, 2005, Assistant District Attorney Josette Simmons-McGhee in her capacity as Records Access Officer for the Queens County District Attorney's Office wrote to defendant stating that the Office was processing his request and that they would provide him with a list by December 15, 2005, stating which documents were disclosable under the Freedom of Information Law.

On May 2, 2006, Assistant District Attorney Simmons-McGhee notified defendant that his request for documents was denied in its entirety based upon Section 50-b(1) of the Civil Rights Law which states:

"Section 50-b(1) of the Civil Rights Law provides that the identity of a victim of a sex offense shall be confidential. If the request involves a conviction for a sex crime none of the documents are disclosable unless a waiver or authorization by the victim consenting to such disclosure is submitted. See Public Officers Law Section 87(2)(a)1 Civil Rights Law Section 50-b."

By letter dated May 16, 2006, defendant appealed this decision to Executive Assistant District Attorney Gary Fidel, the Freedom of Information Law Appeals Officer at the Office of the Queens County District Attorney. Defendant stated that he needed the documents to challenge his conviction.

By letter dated August 16, 2006, Executive Assistant District Attorney Fidel responded to the defendant stating that the appeal

was granted in part, to the extent that certain documents were found to be disclosable to the defendant. Those documents were listed as:

1. Certificate of Disposition;
2. Notices(8 pages);
3. Arrest Report(2 pages);
4. Precinct Map(4 pages);
5. CPL 30.30 Statement;
6. Notice of Appearance;
7. Statement to police(3 pages); and
8. Criminal Justice Administration Interview.

Assistant District Attorney Fidel stated that the additional documents requested by defendant were not disclosable pursuant to Civil Rights Law Section 50-b(1) which requires that any document which tends to identify the victim of a sex offense shall remain confidential.

In the instant Article 78 petition, defendant requests that the court order the remainder of the documents to be disclosed. In addition, defendant has submitted a list containing an additional forty-eight categories of documents to be released, which were not contained in his original request. Defendant claims that all of the materials are not exempt from disclosure and that he needs the documents to challenge the judgment of conviction.

On March 16, 2007, Assistant District Attorney Simmons-McGhee filed a response in opposition to defendant's Article 78 petition contending that this court is without jurisdiction to entertain the petitioner's request for the forty-eight additional categories of documents that were not part of his initial request. The Assistant District Attorney, in her answer, contends that these documents are not properly the subject of an Article 78 proceeding as this is the first time defendant has requested the additional documents and petitioner has not exhausted all administrative remedies as to the new documents he is requesting.

This court is in agreement that petitioner made no prior formal request for the documents enumerated in his petition as items 34-81, and as a result, there has been no administrative determination with respect to those documents. Accordingly, the requested documents delineated as 34-81 are not properly the subject of this Article 78 proceeding. See Public Officers Law Section 89(4)(a); Matter of Tinker Street Cinema v. State of New York Department of Transportation, 254 A.D. 2d 293 (2d Dept. 1998).

On May 11, 2007, Assistant District Attorney Simmons-McGhee filed a supplemental answer in response to the original thirty three categories of documents which are the subject of this petition. In the supplemental answer, Ms. Simmons-McGhee consented to the release of additional documents from the District Attorney file which do not contain the victim's name and address or which do

not tend to identify the victim. Those documents are:

1. Subpoenas Duces Tecum(7 pages);
2. Take-Out Order(10 pages);
3. Miranda Warning and defendant's statement(3 pages);
4. Maps(4 pages);
5. Certificate of Disposition(1 page);
6. Criminal Justice Interview Report(1 page);
7. Expense Report(2 pages);
8. Mugshots of Rodney Thompson(12);
9. Photographs of lineup(3);
10. Photographs of Rodney Thompson(3);
11. Indictment(19 pages);
12. Notice of Appeal(3 pages);
13. Order to Show Cause;
14. Notice of Motion;
15. Decision and Order dated November 17, 1992(5 pages);
16. Decision and Order dated September 14, 1992;
17. Documents in the file relating to an unrelated arrest(Arrest Run Report; early Case Assessment Bureau Data Sheet and Arrest Report).

Ms. Simmons-McGhee has consented to the release of the documents upon payment of reproduction costs.

With respect to the remainder of the requested documents, Assistant District Attorney Simmons-McGhee states in her answer

that after her review of the file she found that certain documents are exempt from disclosure pursuant to Civil Rights Law Section 50-b(1) which exempts from disclosure and portion of any police report, paper, photograph, court file or other documents that tends to identify the victim of a sex offense.

Ms. McGhee states that all of the documents compiled by the Queens District Attorney's office at the initial stages of its investigation were denied because these documents bear not only the name of the victim, but also the location, date and time of the incident-information that could be used to identify the victim. Based upon this exemption, Assistant District Attorney Simmons-McGhee states that, petitioner's request for the felony complaint and supporting depositions, Voluntary Disclosure Forms with attachments and annotations, and Early Case Assessment Bureau(Intake Bureau Crime Report) has been denied. Further petitioner's request for any and all data filed pursuant to CPL Section 240.20 contain information which would tend to identify the victim.

Assistant District Attorney Simmons-McGhee also states that, information detailing the location time and date of the report may tend to identify the victim, and therefore petitioners request for DD5s and UF 61s, affidavits, interviews conducted, investigators reports, notes, 104 precinct police department index sheets, police officers memo book entries, evidentiary photographs, exhibits crime

scene unit reports crime scene photographs crime scene map/schematics police maps/diagrams laboratory reports, examination and analysis and subpoenas have been denied.

This court is in agreement with the Assistant District Attorney that requests for certain records are too vague for consideration. See Public Officers Law Section 89(3) which requires an office to provide only those records which are reasonably described in a manner that permits the records to be readily located by this office. The requests which fit within this category are reports or records from other agencies, deferral of prosecution as distributed inventories, returns, any and all material witnesses proceedings including but not limited to affidavits orders and final decision/judgments intelligence reports notes or files from agencies.

The People are not required to disclose those documents which they state are exempt pursuant to Civil Rights Law Section 50-b(1) because they contain the name of the victim or tend to identify the victim. Further, any requests for documents arising from grand jury proceedings, including the Grand Jury Synopsis, are exempt from disclosure pursuant to C.P.L. section 215.70. See Matter of Mullgrav v. Santucci, 195 A.D. 2d 786 (3d Dept. 1993). Those documents which consist of attorney work product and material prepared for litigation are also exempt from disclosure under the Freedom of Information Law. See Public Officers Law 87(2)(g); Woods

v. Kings County Dist. Attys. Office, 234 A.D.2d 554 (2d Dept. 1996).

In addition, Ms. Simmons-McGhee states that "after a diligent search of the archived records stored by the Queens County District Attorney's Office, I was still unable to locate the files relating to the above-captioned matter." In her supplemental response, she states that certain documents were eventually located, but not the entire file. The courts have held in this regard that an agency is not responsible to supply copies of documents which cannot be located after a diligent search. See Rattley v. New York City Police Department, 96 N.Y. 2d 873 (2001); Powell v. E.F. Bernhardt, Esq., 19 A.D. 3d 307 (1st Dept. 2005).

This court finds, therefore, that the affirmation of the Assistant District Attorney sufficiently demonstrates that the documents which have not been made available to the petitioner by the Office of the District Attorney either do not exist or meet a lawful exemption from FOIL disclosure. In the Matter of Charles Robert v. Robert LoCicero, 28 A.D. 3d 566 (2d Dept. 2006).

Accordingly, this court finds that the petition is granted only with respect to the documents which the People have agreed to make available to the petitioner. In all other respects it is denied.

Order entered accordingly.



Sheri S. Roman, J.S.C.