

People v Guzman

2007 NY Slip Op 33828(U)

November 16, 2007

Supreme Court, Suffolk County

Docket Number: 0002061/2007

Judge: James C. Hudson

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County Court of the County of Suffolk
Part 7 - State of New York

PRESENT:

Hon. JAMES HUDSON

PEOPLE OF THE STATE OF NEW YORK,

ORIG. RETURN DATE: 10/30/07

FINAL SUBMIT DATE: 11/09/07

Plaintiff,

PLTF'S/PET'S ATTY:

HON. THOMAS J. SPOTA
Suffolk County District Attorney
By: KATHLEEN BECKER LANGLAN, ESQ.
200 Center Drive
Riverhead, New York 11901

-against-

JOE L GUZMAN,

Defendant.

DEFT'S/RESP'S ATTY:

PALERMO, PALERMO & TUOHY, P.C.
By: EDWARD PALERMO, ESQ.
94 West Main Street
Smithtown, New York 11787

Upon the following papers numbered 1 to 9 read on this motion for omnibus relief _____
Notice of Motion and supporting papers 1-7; Affirmation/affidavit in opposition and supporting papers 8-9;
Affirmation/affidavit in reply and supporting papers _____; Other _____; (~~and after hearing counsel in support of and~~
~~opposed to the motion~~) it is,

Before the Court is an omnibus motion by the Defendant requesting several forms of relief.
The People consented in part and opposed in part. After careful consideration it is hereby:

ORDERED, the defendant's application for Bill of Particulars is denied as moot; and it is further

ORDERED, the defendant's application to have his case severed from the co-defendant, Mr. Ricardo Espinal, is denied as moot; and it is further

ORDERED that defendant's application to preclude any in-custody statements he made to law enforcement officials is granted; and it is further

ORDERED, that the defendant's application for a hearing to determine whether the People may introduce the defendant's prior uncharged criminal, vicious or immoral conduct if the defendant testifies at trial is granted. A hearing on the matter will be held prior to trial; and it is further

ORDERED that defendant's application to suppress the identification procedure in this case granted to the extent that a *Rodriguez* hearing shall be held prior to trial to determine whether the

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identification procedure used by the police in this case is one for which a suppression hearing is appropriate; and it is further

ORDERED, the defendant's application to make further pretrial motions is denied absent a showing of unforeseeable circumstances or unless the motion is based on information obtained as a direct result of this decision.

The defendant motioned for a Court order directing the People to furnish them with a Bill of Particulars. The People opposed the application indicating that they had previously supplied the defendant with the felony complaint which sufficiently specified the "conduct which is the subject of the charges" (*People v. Skolnik*, 135 Misc.2d 964, 517 N.Y.S.2d 411 [County Ct., Albany 1987] see also *People v. Smith*, 103 A.D.2d 859, 477 N.Y.S.2d 917 [3 Dept., 1984]). The defendant did not submit a reply contesting the sufficiency of the People's answer. Therefore it seems that the People have fully complied with the defendant's request. Accordingly defendant's application is denied as moot.

The defendant also motioned to have his case severed from the co-defendant, Ricardo Espinal, because this co-defendant gave a written statement to the police implicating the defendant in the commission of the alleged crimes. If this statement is introduced at trial and the co-defendant does not testify, Mr. Guzman's Sixth Amendment rights to confront witnesses would be violated. This scenario is commonly referred to as the *Bruton* issue. In *Bruton v. United States* (391 U.S. 123, 88 S.Ct. 1620 [1968]) the Supreme Court held that a criminal defendant is deprived of his Sixth Amendment right to be confronted with the witnesses against him, when a nontestifying co-defendant's incriminating pretrial confession is introduced at a joint trial, even if the jury is instructed to only consider the confession against the co-defendant. This issue, however, is rendered moot because the co-defendant, Mr. Ricardo Espinal, has already pled guilty thereby alleviating any prejudicial concerns.

The defendant's application to preclude any statements the defendant may have made to law enforcement officials is granted. The People's CPL 710.30 notice did not indicate that any statements were made by the defendant to law enforcement officials and more than fifteen days have passed since the defendant's arraignment. The People did, however, indicate that the defendant made statements to undercover officers during the commission of the alleged crimes before he was in custody and that they intended to use these out of custody statements at trial. The defense did not submit a reply contesting the admissibility of these statements. Out-of-custody statements are not subject to a *Huntley* hearing (*People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 843 [1965]) because *Miranda* warnings (*Miranda v. Ariz.*, 384 U.S. 436, 86 S.Ct. 1602 [1966]) do not attach (see *People v. Schreiner*, 77 N.Y.2d 733, 570 N.Y.S.2d 464 [1991] — note that in this case the Court, in foot number 1, differentiated the out of custody statements made to the detective and the statements made to a psychiatrist during a "compulsory psychiatric examination"). In any case, since there are no statements in the People's 710.30 notice, any such statements, if they exist, are precluded.

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The People consented the defendant's request for a *Sandoval* hearing (*People v. Sandoval*, 34 N.Y.2d 371 [1974]) to determine whether the defendant has any prior uncharged criminal, vicious or immoral conduct that may be admissible if the defendant testifies at trial. Therefore a *Sandoval* hearing shall be held prior to trial.

The defense also made a request to suppress the identification testimony in this case. They argued that the CPL 710.30 notice indicated that the defendant participated in a "show up" procedure. The People opposed the application, properly pointing out that the 710.30 notice did not contain notice of a "show-up" but instead indicated that the defendant was identified at the scene.

The defendant was arrested on June 28, 2007 for allegedly selling drugs to an undercover officer on May 3, 2006, May 17, 2006 and May 31, 2006. The People indicated in their papers that the defendant attempted to sell cocaine to an undercover police officer on June 28, 2007 when he was arrested. The defendant has not been charged with the alleged June 28, 2007 attempted drug sale. At the time of the arrest the undercover officer confirmed that the defendant was the same person who had previously sold him drugs in May of 2006.

While the courts recognize that proper police confirmation procedures are excluded from CPL 710.30 notice requirements (*People v. Morales*, 37 N.Y.2d 262, 372 N.Y.S.2d 25 [1975] — a follow-up station house show-up identification of a suspect by a trained and experienced undercover narcotics officer six hours after the buy-and-bust was not unduly suggestive; *People v. Wharton*, 74 N.Y.2d 921, 550 N.Y.S.2d 260 [1989] — confirmation by undercover officer who observed defendant during the face-to-face drug transaction at the station house approximately three hours later did not warrant a *Wade* hearing), the police are not *per se* immune from tainted identification procedures. In *People v. Gordon* (76 N.Y.2d 595, 561 N.Y.S.2d 903 [1990] and *People v. Waring*, 183 A.D.2d 271, 590 N.Y.S.2d 506 [2 Dept., 1992]), both cases involving undercover drug sales, the Courts have made it clear that there is no "trained officer exception" to tainted identification procedures. In *Gordon* supra, a 10-day lapse between the first buy and the second transaction with an undercover police officer, followed by a highly suggestive custodial show-up, was not an integral police procedure and required the necessary protections affecting identification procedures. In *Waring* supra, where the appellant's identity was suggested by other officers and a viewing of a photograph after the first sale, the court found that the photographic viewings were not confirmatory in nature, but were employed to aid the officer in identifying the appellant and thus were tainted.

In the case at bar the People contend that at the time of the defendant's arrest the arresting officer "confirmed" that the defendant was the person who sold him drugs in May of 2006. The People, however, never explained the confirmation procedure or how the defendant was "identified" at his arrest or the circumstances of the viewing. This information is especially crucial since the arrest on June 28, 2007 took place more than a year after the alleged May 31, 2006 drug sale for which he was indicted. Without this information the Court has no way of determining whether the police identification procedures used in this case are subject to a *Wade* hearing. Therefore the Court will grant the defendant's motion the extent

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that a *Rodriguez* hearing will be held prior to trial to determine whether the identification procedure used by the police in this case is one for which a suppression hearing is appropriate (see *People v. Rodriguez*, 79 N.Y.2d 445 [1992]).

The defendant's application to make further pretrial motions in the future is denied absent a showing of unforeseeable circumstances or unless the motion is based on information obtained as a direct result of this decision.

This constitutes the decision and order of the Court.

**Dated: Riverhead, New York
November 16, 2007**



**JAMES HUDSON
J.C.C.**