

People v Lorenzo

2007 NY Slip Op 34339(U)

December 13, 2007

Suffolk County Ct

Docket Number: 0002793/2007

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,

Plaintiff,

-against-

POLITO LORENZO,

Defendant.

ORIG. RETURN DATE: 12/07/07

FINAL SUBMIT DATE: 12/10/07

PLTF'S/PET'S ATTY:

HON. THOMAS J. SPOTA
Suffolk County District Attorney
By: IAN T. FITZGERALD, ESQ.
200 Center Drive
Riverhead, New York 11901

DEFT'S/RESP'S ATTY:

LAW OFFICES OF MS. SHARMAN SHABAB
Attorney for Defendant
62 Nichols Court - Suite 303
Hempstead, New York 11550

Upon the following papers numbered 1 to 6 read on this motion for omnibus relief
Notice of Motion and supporting papers 1-3; Affirmation/affidavit in opposition and supporting papers 4-6;
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 opposed in part and consented in part. After careful consideration the Court hereby orders the
following.

ORDERED, that the evidence presented to the Grand Jury was legally sufficient to sustain
counts one, two, three, four, five, six, seven, and eight of the indictment; and it is further

ORDERED, that counts nine and ten, Criminal Mischief in the Fourth Degree (Penal Law
§145.00[3], are hereby dismissed; and it is further

ORDERED, that the defendant's application to suppress his oral and/or written statement to
the police is granted to the extent that the Court shall conduct a hearing prior to trial to determine its
admissibility; and it is further

ORDERED, that the defendant's application for a hearing to determine whether there was
probable cause for his arrest is denied; and it is further

PEOPLE V. LORENZO
INDICTMENT NO. 02793-2007

ORDERED, that the defendant's application to suppress the physical evidence in this case is denied; and it is further

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

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

ORDERED, the defendant's request for *Rosario* materials (*People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448 [1961]) is granted to the extent that the People shall provide such materials in accordance with CPL 240.45; and it is further

ORDERED, the People's cross-motion for reciprocal discovery is granted; and it is further

ORDERED, the People's cross-motion for reciprocal disclosure of *Rosario* material is granted.

The defendant moved to dismiss the indictment on the grounds that the evidence before the Grand Jury was insufficient to establish the offenses charged (CPL §210.20[1][b]), and that the Grand Jury proceedings were legally defective (CPL §210.20[1][c] and §210.35[5]). The People did not oppose an *in camera* inspection of the Grand Jury minutes.

After reviewing the Grand Jury minutes the Court finds that the People properly instructed the Grand Jury on the law on all counts of the indictment (*People v. Mayo*, 36 N.Y.2d 1002, 374 N.Y.S.2d 609 [1975]), however the Court finds that the evidence presented to the Grand Jury was legally insufficient to sustain counts nine and ten.

It is alleged that the defendant recklessly drove a car into two fences. Damage was caused to each fence. The defendant was indicted on multiple counts; counts nine and ten charged the defendant with Criminal Mischief in the Fourth Degree (PL §145.00[3]). To be indicted on these crimes the People have the burden of proving that the defendant damaged each fence in a reckless manner, and that the damage to each fence was greater than two hundred and fifty dollars. The People offered a sworn affidavit from each property owner to demonstrate the value of the damaged fence. Each property owner estimated the total damage of their respective fence to be "at least three hundred dollars." Neither witness provided a basis for his estimate.

CPL §§190.30(3)[b],[c] allows property owners to furnish written or oral statements, made under oath, to establish the monetary value of, or damage to, that person's property before a Grand Jury.

PEOPLE V. LORENZO
INDICTMENT NO. 02793-2007

This procedure was enacted to eliminate the need to have complainants personally appear (see, Preiser, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL §180.60, at 146). Nothing contained in CPL §190.30(3) or its legislative history, however, suggests that the state Legislature sought to effect a substantive change in New York law by conferring legally sufficient status upon a lay witness' unsupported statement of value (*People v. Lopez*, 79 N.Y.2d 402, 583 N.Y.S.2d 356 [1992]). Additionally, in *People v. Montes* (118 A.D.2d 812, 500 N.Y.S.2d 308 [2 Dept., 1986]) the Second Department determined that the complainant's trial testimony, standing alone, as to the value of his property, was insufficient to establish the value of the property.

In *People v. Gains* (136 A.D.2d 731, 524 N.Y.S.2d 70 [2 Dept., 1988]) the complainant testified that the "approximate cost" of replacing a door "and everything" was "approximately three hundred to three hundred and twenty five dollars, the best I can recall." This testimony was not supported by any documentation or other proof that the said amount represented the reasonable cost of such repairs. The Appellate Division for the Second Department held that this evidence was insufficient for the jury to infer that the damages exceeded the required statutory amount of two hundred and fifty dollars.

Similarly in the case at bar, the complainants merely claimed that the total cost of repair was "at least three hundred dollars." Without supporting documentation or a basis for the complainant's belief, there is no way to determine whether three hundred dollars represented the reasonable cost of such repairs and therefore the Court is unable to determine whether the damages exceeded the two hundred and fifty dollar threshold.

The Court is familiar with *People v. Garcia* (29 A.D.3d 255, 812 N.Y.S.2d 66 [1 Dept., 2006]) from the Appellate Division for the First Department where the Appellate Court found the complainant's testimony, coupled with photographs of the damaged property, sufficient to establish the value of the property in question. However, *Garcia* is distinguishable because in *Garcia* the People also presented receipts for the value of the damaged property's original purchase price, leading the Court to conclude that the People's argument, "common sense dictates that repairs of the magnitude required in this case cannot be made in New York City for under \$250," was persuasive (emphasis added, *id.* at 264). The First Department concluded "that there was ample evidentiary support for the trial court's conclusion that repair costs of at least \$250 were proved" (*id.*).

Therefore pursuant to CPL §210.20(1)(a), counts eight and nine of the indictment, Criminal Mischief in the Fourth Degree (PL §145.00[3]), are dismissed.

The defendant motioned for a hearing to suppress his oral and/or written statements to law enforcement officials due to the voluntariness of the statements. The People consented to a hearing on this matter. Therefore the Court will hold a *Huntley* hearing pursuant to *People v. Huntley* (15 N.Y.2d 72, 255 N.Y.S.2d 838, 843 [1965]) to determine the admissibility of the defendant's statements.

PEOPLE V. LORENZO
INDICTMENT NO. 02793-2007

The defendant's omnibus motion requested discovery pursuant to CPL 240.20. The People responded to the defendant's request in their answer and 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.

Similarly, the defendant motioned for a Court order directing the People to furnish them with a Bill of Particulars. The People responded to the defendant's demand by supplying a Bill of Particulars in their answer. 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 People have also acknowledged their duty to disclose *Rosario* material (*People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448 [1961]) at the appropriate time pursuant to CPL 240.45.

Defendant further motioned for a *Mapp/Dunaway* hearing (*Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 [1961], *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 [1979]) to determine whether there was sufficient probable cause for the defendant's arrest and seizure of evidence. The defendant did not submit an affidavit containing sworn allegations of fact (CPL 710.60). The Court of Appeals stated in *People v. Mendoza* (82 N.Y.2d 415, 604 N.Y.S.2d 922 [1993]) and *People v. Bryant* (8 N.Y.3d 530, 838 N.Y.S.2d 7 [2007]), that hearings are not automatic or generally available for the asking by boilerplate allegations. Rather, the Court is required to review the factual sufficiency of the motion, with reference to the pleadings, the context of the motion and defendant's access to information. The lack of sworn facts to support defendant's request for hearings is fatal to the defendant's application, especially in light of the fact that the defense did not make their demand for discovery or a Bill of Particulars until the filing of this motion. Therefore the defendant's application for a probable cause hearing and a hearing to suppress evidence is denied.

The People's cross-motion for reciprocal discovery (CPL 240.30) and reciprocal disclosure of *Rosario* material (CPL 240.45(2)(a)) was unopposed, therefore granted.

This constitutes the decision and order of the Court.

Dated: Riverhead, New York
December 13, 2007



JAMES HUDSON
J.C.C.