

People v Gallo

2007 NY Slip Op 34566(U)

October 15, 2007

Supreme Court, Westchester County

Docket Number: 07-0493

Judge: Robert M. DiBella

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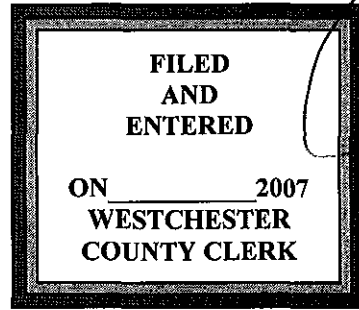
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

THE PEOPLE OF THE STATE OF NEW YORK

- against -



ROBERT GALLO,

Defendant.

FILED

**DECISION & ORDER
Indictment No. 07-0493**

DIBELLA, J.

OCT 17 2007

**TIMOTHY C. IDONI
COUNTY CLERK
WESTCHESTER**

The defendant is charged by indictment with two counts of Murder in the Second Degree and three counts of Criminal Possession of a Weapon in the Fourth Degree. The defendant allegedly committed these crimes on or about April 2, 2007, in the Town of Cortlandt, County of Westchester.

The defendant moves for omnibus relief. The People oppose the motion. The motion is granted in part and denied in part as follows.

DEFENDANT'S MOTION TO INSPECT AND DISMISS OR REDUCE

This application is granted to the extent that the court has conducted an in camera inspection of the minutes of the Grand Jury proceedings, which were delivered to the court on September 27, 2007. The court has determined that it is not necessary for the defendant to inspect such minutes to assist the court in making its determination on the instant motion [CPL § 210.30 (3)].

Upon inspection, the court finds that there was insufficient evidence before to the grand jury to sustain Count Two of the indictment charging Murder in the Second Degree in violation

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of Penal Law 125.25(3). That count charges that the defendant caused the death of another in the course of and in furtherance of committing a burglary. A defendant commits a burglary when he knowingly enters and remains unlawfully inside a dwelling with the intent to commit a crime therein. See Penal Law 140.25. The intent to commit the crime, however, must be contemporaneous with the entry. See People v. Gaines, 74 N.Y.2d 358 (1989). Here, there was no evidence before the grand jury that the defendant entered and remained unlawfully inside the decedent's house or that he had the intent to commit a crime when entering the house. Accordingly, the court Count Two of the indictment is dismissed with leave to represent.

The remaining counts of the indictment were based upon adequate, competent evidence legally sufficient to support the crimes charged. See People v. Leichtweis, 59 A.D.2d 383 (2d Dept. 1977). The court also finds that the instructions given to the grand jury were both adequate and complete and, therefore, in compliance with the dictates of People v. Valles, 62 N.Y.2d 36 (1984). Finding no infirmity warranting dismissal of the instant indictment, the defendant's motion for dismissal is denied. In addition, the court finds no reason to reduce any of the remaining counts in this indictment pursuant to CPL §210.20 (1-a)

MOTION FOR A SANDOVAL/VENTIMIGLIA HEARING

This court grants a Sandoval hearing on the consent of the People. The defendant is reminded that he will have the burden of informing the court of those prior arrests,

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adjudications and convictions which he wishes to preclude [People v. Matthews, 68 N.Y.2d 118 and People v. Malphurs, 111 A.D.2d 266 (2d Dept. 1985)].

With respect to the defendant's application pursuant to People v. Ventimiglia, 52 N.Y.2d 350, the People must seek a preliminary ruling and hearing by this court before introducing any evidence of the defendant's prior uncharged criminal, vicious or immoral conduct on their direct case. However, currently, there is no basis to order a Ventimiglia hearing.

DEFENDANT'S MOTION FOR ADDITIONAL DISCOVERY

The defendant's motion for discovery is granted to the extent provided for in the Criminal Procedure Law Article 240 and the Consent Discovery Order. To any further extent, the application is denied as seeking material or information beyond the scope of discovery [see Pirro v. LaCava, 240 A.D.2d 909 (2d Dept. 1997)].

The People recognize their continuing duty to disclose exculpatory material [see Brady v. Maryland, 373 U.S. 83 and Giglio v. United States, 405 U.S. 150] at the earliest possible date. If the People are or become aware of any material which is arguably exculpatory but they are not willing to consent to its disclosure, they are directed to disclose the material to the court for its in camera inspection and determination as to whether it will be disclosed to the defendant.

MOTION TO SUPPRESS STATEMENTS

This application is granted to the extent that the trial court will conduct a Huntley hearing prior to trial concerning statements allegedly made by the defendant which were

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noticed by the People pursuant to CPL § 710.30 (1)(a), for the purpose of determining whether any of the said statements were involuntarily made by the defendant within the meaning of CPL §60.45 [CPL § 710.20 (3) and CPL § 710.60 (3) (b); People v. Weaver, 49 N.Y.2d 1012 (1980)].

MOTION FOR A FURTHER BILL OF PARTICULARS

Denied. The Bill of Particulars served with the Consent Order is sufficient to adequately inform the defendant of the substance of his alleged conduct and to enable him to prepare and conduct a defense [People v. Byrnes, 126 A.D.2d 735, 736 (2d Dept. 1987)].

MOTION FOR LEAVE TO MAKE FURTHER MOTIONS

There is no right to make additional or supplemental motions that may be reserved. The motion for leave to make additional motions is denied, unless and until the defendant demonstrates good cause for filing such a motion or motions, [CPL §255.20 (3)].

MOTION TO SUPPRESS TANGIBLE EVIDENCE

This application is granted to the extent that the Court will conduct a Mapp/Payton/Dunaway hearing prior to trial for the purpose of determining whether physical evidence should be excluded as the product of an unlawful warrantless arrest, warrantless search [§CPL 710.20(1) and 710.60; [Mapp v. United States 367 U.S. 643 (1961); Payton v. New York, 445 U.S. 573 (1980)]; see also Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248 (1979)] or other violation of the defendant's rights [see Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529 (1988)].

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This constitutes the Decision and Order of the court.

The following papers were considered:

- (1) Defendant's Notice of Motion and Affirmation of Scot F. Hersh, Esq. dated August 23, 2007 with annexed Exhibits A through E;
- (2) The People's Affidavit in Opposition by A.D.A. Christopher Daniele dated September 11, 2007, with annexed Memorandum of Law and Exhibits A and B;
- (3) Defendant's Reply Affidavit in Opposition by Scot F. Hersh, Esq. dated September 24, 2007; and
- (4) the Stenographic minutes of the Westchester County Grand Jury proceedings conducted on June 27, 2007.

Dated: White Plains, New York
October 15, 2007


HON. ROBERT DIBELLA, A.J.S.C.

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