

People v Diamond

2007 NY Slip Op 34568(U)

August 21, 2007

Supreme Court, Westchester County

Docket Number: 07-00507-04

Judge: Robert A. Neary

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TIMOTHY CADONTE
 COUNTY CLERK
 COUNTY OF WESTCHESTER
 AUG 22 2007

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ENTERED
 ON 8-22- 2007
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF WESTCHESTER

-----X
 THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION AND ORDER

PIERRE RENE, ANDRE HINDS, BRANDON BROWN,
JERRY DIAMOND, TARA MC QUEEN, TYRONE LEE,
 CARMEN VAZ, DEBRA FLEARY AND ALICIA BERRY,

Ind. No. 07-00507-04

Defendants.

-----X
 NEARY, J.

The defendant, Jerry Diamond, has been indicted for the crimes of Criminal Possession of Stolen Property in the Second Degree (2 counts), Conspiracy in the Fourth Degree, Scheme to Defraud in the First Degree, Criminal Possession of Stolen Property in the Third Degree, Identify Theft in the First Degree and Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree. The defendant has filed an omnibus motion which consists of a Notice of Motion and an Affirmation and Memorandum of Law in support thereof. In response, the People have submitted an Affirmation in Opposition together with a Memorandum of Law.

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Having read all of the submitted papers and reviewed the court's file, this Court makes the following determination.

A. MOTION FOR DISCOVERY AND INSPECTION PURSUANT TO CPL ARTICLE 240

The defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 240. If any items set forth in CPL Article 240 have not been provided to the defendant pursuant to the Consent Discovery Order in the instant matter, said items are to be provided forthwith.

The People recognize their continuing duty to disclose exculpatory material at the earliest possible date. [See Brady v. Maryland, 373 US 83, 83 S Ct. 1194, 10 LE2d 215 and Giglio v. United States, 405 US 150, 92 S Ct. 763, 31 LE2d 104]. If the People are or become aware of any material which is arguable exculpatory but they are not willing to consent to its disclosure, they are directed to disclose such material to the Court for its *in camera* inspection and determination as to whether such will be disclosed to the defendant.

To any further extent, the application is denied as seeking material or information beyond the scope of discovery. [See People v. Colavito, 87 NY2d 423, 639 NYS2d 996, 663 NE2d 308; Matter of Brown v. Grosso, 285 AD2d 642, 729 NYS2d 492, lv. denied 97 NY2d 605, 737 NYS2d 52, 762 NE2d 930; Matter of Brown v. Appelman, 241 AD2d 279, 672 NYS2d 373; Matter of Catterson v. Jones, 229 AD2d 435, 644 NYS2d 573; Matter of Catterson v. Rohl, 202 AD2d 420, 608 NYS2d 696, lv. denied 83 NY2d 755, 613 NYS2d 127, 241 NE2d 279].

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B. MOTION TO INSPECT THE GRAND JURY MINUTES AND TO DISMISS THE INDICTMENT

The defendant's motion to inspect the Grand Jury minutes is granted. Upon an *in camera* inspection of the Grand Jury minutes by Court, the motion to dismiss the indictment is denied.

The Court has reviewed the minutes of the proceeding before the Grand Jury. The Grand Jury was properly instructed (see People v. Calbud, 49 NY2d 389, 426 NYS2d 389, 402 NE2d 1140 and People v. Valles, 62 NY2d 36, 476 NYS2d 50, 464 NE2d 418) and the evidence presented, if accepted as true, would be legally sufficient to establish every element of the offenses charged. [See CPL §210.30(2)]. In addition, the minutes reveal that a quorum of the grand jurors was present during the presentation of evidence and at the time the district attorney instructed the Grand Jury on the law, and that it was instructed that only those grand jurors who had heard all of the evidence could participate in voting on the matter.

C. MOTION TO SUPPRESS NOTICED STATEMENTS PURSUANT TO CPL ARTICLE 710

This branch of the defendant's motion is granted to the extent that a Huntley hearing shall be held prior to trial to determine the admissibility and voluntariness of any statements allegedly made by the defendant, which have been noticed by the People pursuant to CPL §710.30 (1)(a), CPL §710.20(3), CPL §710.60[3][b]; People v. Weaver, 49 NY2d 1012, 429 NYS2d 399, 406 NE2d 1335.

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D. MOTION TO SUPPRESS PHYSICAL EVIDENCE PURSUANT TO CPL ARTICLE 710

This branch of the defendant's motion is granted solely to the extent of conducting a Mapp hearing prior to trial to determine the propriety of any search of the defendant's person or vehicle in which he was the operator which resulted in the seizure of property. [Mapp v. Ohio, 367 US 643, 81 S Ct. 1684, 6 LE2d 1081].

This motion is denied as to any evidence obtained as a result of two search warrant executions. The Court has reviewed the warrant applications and accompanying papers and finds that they provided the signing magistrate with probable cause to believe that evidence could be located at the location described in the warrant applications.

E. MOTION FOR A SANDOVAL/VENTIMIGLIA HEARING

This branch of the defendant's motion is granted to the limited extent of conducting a Sandoval hearing immediately prior to trial at which time: (1) the People must notify the defendant of all specific instances of the defendant's prior uncharged criminal, vicious or immoral conduct of which the People have knowledge and which the People intend to use at trial for the purposes of impeaching the credibility of the defendant (see CPL §240.43); and (2) the defendant must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf. [See People v. Malphurs, 111 AD2d 266, 269].

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In addition, with respect to the defendant's application pursuant to People v. Ventimiglia, 52 NY2d 350, this Court grants this aspect of the motion to the limited extent of conduct a Ventimiglia hearing immediately prior to trial to determine whether or not any evidence of uncharged crimes may be used by the People to prove their case in chief.

F. MOTION TO SEVER PURSUANT TO CPL ARTICLE 220

The defendant moves for a severance from his co-defendants. The defendant was properly joined in the same indictment. [See CPL §200.40(1)]. The Court may, however, for good cause shown order that defendant be tried separately. Good cause includes a showing that defendant would be "unduly prejudiced by a joint trial." [See CPL §200.40(1)]. Further, where the proof against all defendants is supplied by the same evidence, "only the most cogent reasons warrant a severance." [See People v. Bornholdt, 33 NY2d 75, 87, cert. denied 416 US 95 and People v. Kevin Watts, 159 AD2d 740]. And, ". . . a strong public policy favors joinder, because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses. . . ." [People v. Mahboubian, 74 NY2d 174, 183].

This Court must determine the admissibility and possibility of the redaction of the co-defendants' statements and whether the co-defendants will be testifying at defendant's trial.

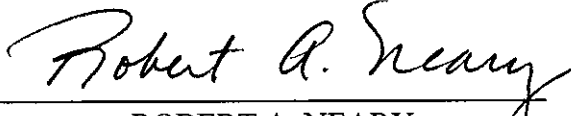
According, the defendant's motion for a severance is denied as premature, with leave to renew upon a determination of the admissibility of co-defendants' alleged statements,

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and upon a showing that a joint trial will result in unfair prejudice to him and substantially impair his defense.

This constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
August 21, 2007



ROBERT A. NEARY
ACTING SUPREME COURT JUSTICE

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