

People v Bernardez
2008 NY Slip Op 33751(U)
February 22, 2008
Supreme Court, Westchester County
Docket Number: 07-00054-02
Judge: Robert A. Neary
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**FILED
AND
ENTERED
ON 2-25-2008
WESTCHESTER
COUNTY CLERK**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

- against -

JUAN BERNARDEZ,

FILED
FEB 25 2008
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION AND ORDER

Ind. No. 07-00054-02

Defendant.

-----X
NEARY, J.

By filing a notice of intent to offer psychiatric evidence at trial pursuant to CPL 250.10(1)(a) and upon oral motion, the defendant seeks to avail himself of a possible psychiatric defense despite conceding his failure to comply with the provisions of CPL 250.10(2) which require such notice be filed within thirty (30) days of an entry of a not guilty plea to the indictment.

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FINDINGS OF FACT

By the instant indictment, the defendant stands accused of the crimes of Murder 2nd Degree, under both intentional and felony murder theories; Kidnaping 1st Degree; Burglary 1st Degree; Robbery 1st Degree; and Criminal Possession of a Weapon 2nd Degree. It is alleged that the defendant and his co-defendant, Samuel Saunders, shot and killed Dr. Leandro Lozada inside his Yonkers home on or about January 3, 2007 in the course of a robbery.

On March 21, 2007, the defendant was arraigned before this Court and entered a not guilty plea to each count of the indictment. The defendant timely filed an Omnibus motion, the People responded and the Court rendered a decision dated July 16, 2007 which granted certain relief and denied other requests. The defendant's Omnibus motion is devoid of any mention of defendant's alleged psychiatric issues or defenses.

Commencing January 3, 2008, joint *Huntley*, *Wade* and *Sandoval* hearings were conducted by this Court involving both this defendant and co-defendant, Samuel Saunders. At the conclusion of these hearings, the defendant's motion for a severance was granted on January 11, 2008.

On January 18, 2008, the defendant filed for the first time a Notice of Defense citing CPL 250.10. This notice was followed by an amended and more expansive notice on January 24, 2008.

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In oral argument before this Court on the issue of the defendant's intention to offer psychiatric evidence at trial, defense counsel indicated that he had first become alerted to the possibility of the defendant's alleged psychiatric history when reviewing *Rosario* material during January, 2008 in preparing for trial. Counsel indicated certain of the *Rosario* material prompted him to question the defendant's mother about social security disability payments defendant had received for about thirteen (13) years prior to the date of the crimes for which he stands indicted. Upon further investigation, counsel determined these disability payments may have arisen because of psychological difficulties the defendant encountered as a youth.

Based upon a preliminary ruling that the Court was reluctantly inclined to permit the late filing of the notice under CPL 250.10, defense counsel began to acquire pertinent records from the Social Security Administration and New York City Board of Education. Contemporaneously, counsel has had the defendant examined by psychologist, Laurence S. Baker, Ph.D., whose preliminary three (3) page report has been provided to the People. On February 14, 2008, the defendant consented to an examination by Dr. Alan Tuckman, a psychiatrist retained by the People. Jury selection was scheduled for March 24, 2008.

CONCLUSIONS OF LAW

Defendant's Amended Notice of Defense pursuant to CPL 250.10 dated January 24, 2008, indicates "Such evidence will be offered to connect defendant's mental disease or defect to:

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(1) his inability to form the intent to murder, rob or kidnap; and (2) his submission to authority affecting the voluntariness of his statements.”

The notice further states “psychiatric evidence . . . will be offered at trial. . . . regarding his learning disability resulting in diminished mental capacity and/or impaired intellectual functioning and ability.”

In oral argument before the Court, defense counsel attributes the extreme lateness of the notice to the fact that neither the defendant nor his mother drew counsel’s attention to the client’s disability status until the eve of trial, and then only after the Rosario material alerted counsel to the possibility of the defendant’s psychiatric history. The defendant also denies that the proffer of psychiatric evidence at trial would prejudice the prosecution, since the People would have an ample opportunity to review the defendant’s social security disability file and his public school records; speak with his psychologist; and have him examined by their own expert.

The People have opposed the defendant’s motion orally on procedural grounds, citing both the untimeliness and vagueness of the notice plus an absence of a good cause showing. Alternatively, the People note that the late introduction of psychiatric evidence into the case prejudices their ability to rebut such evidence and testimony because their expert would not have had the opportunity to examine the defendant at a point in time more closely associated with the commission of the crimes charged.

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Absent from the People's argument on this last point is any statistical or analytical support for their contention that the late examination of the defendant would have a detrimental impact upon their expert's ability to meaningfully assess the defendant's mental condition.

Pursuant to CPL 250.10(2), psychiatric evidence may not be admitted at trial by the defense unless the appropriate notice is served on the People within thirty (30) days of the entry of a not guilty plea to an indictment. However, this same section also provides that untimely service and filing of such notice may be permitted by the Court in the interests of justice and for good cause shown. Clearly, the decision whether or not to allow the late psychiatric notice and filing rests within the sound discretion of the trial court. [*See People v. Alomonor*, 93 NY2d 571; *see also, People v. Berk*, 88 NY2d 257, *cert. denied* 519 US 859].

In *People v. Berk*, *supra* at 266, the Court of Appeals notes that such discretion is not absolute since "[e]xclusion of relevant and probative testimony as a sanction for a defendant's failure to comply with a statutory notice requirement implicates a defendant's constitutional right to present witnesses in his own defense." Thus a trial court must balance this right against any resulting prejudice to the People should the defendant be permitted to serve and file a late psychiatric notice.

While the People urge the Court to deny the untimely request by the defendant to file a psychiatric notice because this would serve to deprive them of the opportunity to conduct a reliable psychiatric examination of the defendant within a time period more closely connected to the defendant's arraignment, it is significant to note that such a claim of prejudice has not been held to

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be sufficient to overcome a defendant's constitutional right to present evidence in his defense by any other court in this State.

The legislative intent of the notice provisions of CPL 250.10 suggests the timing parameters were designed mainly to prevent undo delay of the trial proceedings and "disadvantage to the prosecution as a result of surprise." [See *People v. Berk, supra* at 263 quoting *Ronson v. Commissioner of Corrections*, 463 F. Supp. 97, 103]. Thus, the legislative intent of this section was not directed primarily at affording the prosecution an opportunity to examine the defendant at or near the arraignment date.

Consistent with this analysis, those courts which have engaged in the specific balancing exercise required by the Court of Appeals in *Berk*, have found that only where the defendant's request to file a late CPL 250.10 notice is made in the midst of trial proceedings will the balance of prejudice weigh in favor of preclusion. [See *People v. Hill*, 4 NY3d 876 (notice given during jury selection); *People v. Berk, supra* (notice given during trial); *People v. Conley*, 11 AD3d 706, *lv. denied* 4 NY3d 762 (notice given during jury selection); *People v. Brown*, 4 AD3d 886 (notice given during re-trial)]. Indeed, where the defendant's request to file a late CPL 250.10 notice is made far enough in advance of trial to afford the People the opportunity to have the defendant examined by a psychiatric professional of their own choosing without unduly delaying the trial proceedings, the balance of prejudice will not justify the preclusion of the psychiatric evidence. [See *People v. Gracius*, 6 AD3d 222, 223, *lv. denied* 2 NY3d 800 (notice given prior to start of trial; see also *People v. Holland*, 173 Misc.2d 286 (notice given prior to start of trial); *People v. Royster*,

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Supreme Court, Westchester County, April 18, 1997, Cowhey, J., Indictment No. 96-0991 (notice given prior to start of trial)].

Of further significance, the People to their credit, and in anticipation of a decision favorable to the defendant on this issue of late psychiatric notice, have recently had a psychiatric professional of their choosing conduct an examination of the defendant and the defense has agreed to provide copies of any relevant psychiatric and/or mental health records of the defendant to the prosecution immediately upon receipt of same.

As stated earlier and as recognized by the Court of Appeals, it appears that the timing provision of the advance notice requirement of CPL 250.10 was designed to "ensure the prosecution sufficient opportunity 'to obtain the psychiatric and other evidence necessary to refute' the proffered defense of mental infirmity." [See *People v. Berk, supra*, at 2363, quoting Memorandum of Commission. on Revision of Penal Law and Criminal Code following L. 1963, ch 595].

As a trial date for this matter has been set for March 24, 2008, more than a month hence, there appears to be sufficient time allotted to the prosecution to complete a meaningful examination of the defendant and a review of his psychiatric and /or mental health records . Furthermore, the defendant's psychiatric expert witness has only recently had an opportunity to examine the defendant, thereby placing the psychiatric experts for both the defense and the People on an equal footing in terms of the timing of their respective examinations of the defendant. Finally, the Court notes that the potential significance of the psychiatric evidence sought herein, implicates

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the defendant's constitutional right to present witnesses in his own defense and establishes a compelling need to afford the defendant an opportunity to present such evidence in support of his defense during the trial of this case.

Based upon the foregoing, the Court does not find that the prejudice to be visited upon the People in the event that the defense is permitted to file their notice of intent to proffer psychiatric evidence at trial is sufficient to outweigh the Court's interest in preserving the defendant's constitutional right to present witnesses in his own defense.

Accordingly, the defendant's instant application seeking leave of the Court to file a notice of intent to proffer psychiatric evidence at trial pursuant to CPL 250.10(1)(a) is granted, and it is

ORDERED that the final examination report prepared by the psychiatric expert of the defendant's choosing, including all documentary material relied upon in the formulation of his opinions reached therein, shall be furnished by the defense to the People on or before March 7, 2008, and it is

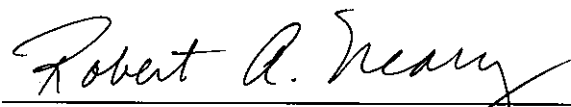
ORDERED that the defendant, if he has not already done so, shall submit to a psychiatric examination by a psychiatric expert of the People's choosing within one week from the date of the People's receipt of the above-referenced materials from the defense, but in no event shall such examination take place after March 14, 2008 without leave of this Court, and it is

ORDERED that all parties shall be prepared to commence the trial of this matter on March 24, 2008.

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

Dated: White Plains, New York
February 22, 2008



ROBERT A. NEARY
ACTING SUPREME COURT JUSTICE

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