

Matter of Castillo v Bailey

2010 NY Slip Op 32972(U)

October 15, 2010

Supreme Court, New York County

Docket Number: 402270/10

Judge: Alexander W., Jr. Hunter

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: ~~EDWARD~~ Alexander W. Hunter, Jr. PART 3533
Justice

ELVIS CASTILLO
- v -
PATRICIA BAILEY

INDEX NO. 402270/10
MOTION DATE 9/24/10
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 16 were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1-9</u>
<u>10-16</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

See memorandum decision and judgment attached hereto.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: October 15, 2010 _____
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
In the Matter of the Application of Elvis Castillo,

Index No.: 402270/10

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules

-against-

Appeals Officer and Assistant District Attorney
Patricia Bailey of the New York County District
Attorney's Office,

Respondent.

HON. ALEXANDER W. HUNTER, JR.

UNFILED JUDGMENT
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The application by pro se petitioner pursuant to Article 78, challenging the administrative respondent's determination of March 9, 2010, which denied petitioner's Freedom of Information Law (FOIL) request for a copy of the grand jury subpoenas, is denied.

Petitioner is an inmate at Sullivan Correctional Facility. He challenges the denial made by Patricia J. Bailey, the New York County Assistant District Attorney and Chief of the Special Litigation Bureau, of his FOIL request for a copy of the New York County grand jury subpoenas. Petitioner asserts that on May 16, 2009, he made a FOIL request asking for a copy of the New York County grand jury subpoenas issued to the individuals who were requested to testify in front of the grand jury in petitioner's criminal action.

Petitioner contends that On July 23, 2009, he submitted a letter to the Records Access Officer at the New York County District Attorney's Office, informing said individual that he had not received a response to his original request. Petitioner also advised that he wished to appeal the constructive denial of his FOIL request. On August 26, 2009, he received a letter dated August 21, 2009 from respondent, claiming that his request to appeal is premature. Moreover, the case worker who was handling his FOIL request was on vacation and she would take care of the matter upon her return.

On December 7, 2009, petitioner received a letter from Assistant District Attorney Susan Roque, stating that petitioner's FOIL request for the grand jury subpoenas of all the witnesses who testified against petitioner is denied. Ms. Roque further stated that on May 17, 2001 and prior to the suppression hearing and trial, petitioner's attorney was provided with all of the documents related to the case, totaling 400 pages, which included the grand jury subpoenas from the criminal action.

On December 15, 2009, petitioner appealed the denial of his FOIL request on the ground that he never requested the grand jury testimony of the witnesses as Ms. Roque claimed in her letter to him. Petitioner also asserts that respondent Bailey misconstrued his request when she wrote in her letter to him that the denial of grand jury materials as well as the identity of those

who appeared before it, is upheld since those records are exempted from disclosure by state statute. Respondent cites to the case of Matter of Newton v. District Attorney of Bronx County, 186 A.D.2d 57 (1st Dept. 1992) in support of her denial. However, petitioner contends that said case is not legally on point because petitioner in that case asked for an in-camera inspection of the prosecutor's work sheet which is not what petitioner herein is asking for. He simply requests one photocopy of each of the grand jury subpoenas for each material witness who testified before the grand jury in his criminal action.

Petitioner contends that he is legally entitled to a photocopy of said subpoenas pursuant to Newsday Inc. v. Empire State Development Corp., 98 N.Y.2d 359 (2002). He is not asking for a copy of the minutes for the grand jury testimony of each of the witnesses. Therefore, respondent's determination denying his FOIL request should be vacated and respondent should be directed to provide him with a copy of the grand jury subpoenas.

Respondent opposes the application and provides a detailed account of the crimes for which petitioner was convicted. Respondent asserts that petitioner seeks records from a criminal prosecution in New York County wherein he was convicted of six counts each of robbery in the first and second degrees in connection with three separate armed robberies committed over a period of two weeks. In each of the robberies, petitioner and other individuals entered retail stores armed with guns, bound their victims and stole money from them and their stores. On at least two occasions, petitioner and his accomplices threatened to kill their captives if they did not surrender all of the money they had. Petitioner and his accomplices were apprehended as they prepared to commit a fourth armed robbery in Queens. Respondent asserts that victims from each of the three robberies in New York County positively identified petitioner in a police lineup following petitioner's arrest.

Petitioner was indicted on September 6, 2000 and charged with three counts each of first and second degree robbery for the first incident. On October 6, 2000, he was charged with an additional three counts each of first and second degree robbery in connection with the second and third incidents. The matters went to a jury trial on May 25, 2001 and on June 4, 2001, petitioner was found guilty of all twelve charges and was sentenced to an aggregate term of thirty years in prison. Petitioner appealed his conviction and same was unanimously affirmed by the Appellate Division, First Department.

Respondent next addresses petitioner's FOIL request and appeal. Respondent contends that the transcripts of all grand jury testimony related to the indictments as well as the grand jury subpoenas were provided to petitioner's attorney prior to his trial. Therefore, respondent informed petitioner that the District Attorney's Office was not required to provide petitioner with duplicate copies. Additionally, the Records Access Officer informed petitioner that materials related to grand jury proceedings are confidential pursuant to Criminal Procedure Law §190.25(4) and Penal Law §215.70 and are exempt from FOIL disclosure.

Respondent argues that the instant petition should be dismissed as a review of the files and records in petitioner's case reveals that the District Attorney's Office does not possess grand jury subpoenas associated with petitioner's case or copies thereof. Since the District Attorney's Office cannot be compelled to produce material which it does not possess, then the instant petition must be dismissed.

Next, respondent argues that even if petitioner's file did include copies of grand jury subpoenas issued in petitioner's criminal case, those subpoenas would be exempted from disclosure. Respondent cites to Criminal Procedure Law §190.25(4) which prohibits the disclosure of the nature or substance of any grand jury testimony, evidence or any decision, result or other matter attending a grand jury proceeding. In addition, Penal Law §217.30 makes it a class E felony to intentionally disclose to another the nature or substance of any grand jury testimony or any decision, result or other matter attending a grand jury proceeding. Respondent contends that grand jury subpoenas are matters attending to a grand jury proceeding and are, thus, specifically exempted from disclosure.

Respondent asserts that since the grand jury subpoenas petitioner seeks would include personal addresses of grand jury witnesses, they would be exempt from disclosure under Public Officers Law §87(2)(e)(iii) as "identify[ing] a confidential source and disclos[ing] confidential information relating to a criminal investigation." Moreover, pursuant to case law, the names, addresses and statements of confidential witnesses compiled during a criminal investigation are exempt from disclosure. Respondent also asserts that personal addresses of the grand jury witnesses contained in the subpoenas would be exempt from FOIL disclosure under the public safety and invasion of privacy exemptions. Since the requested subpoenas would likely contain the home addresses of victims in the three armed robberies charged in the indictment and in the course of their crimes, petitioner and his accomplices bound the victims and threatened to kill them, then there is reason to believe that disclosure of the victims' personal addresses could endanger the life or safety of those victims and their families.

Respondent argues that even though petitioner contends that he is entitled to copies of the grand jury subpoenas under Newsday v. Empire State Development Corp. (supra), petitioner misconstrues the holding of that case. In that case, the Court of Appeals concluded that documents prepared by a court were not protected by FOIL's judiciary exemption once they fell into possession of an agency as defined by the Public Officers Law and thus became agency records. The Court of Appeals specifically noted that because the Empire State Development Corporation never argued that a statutory exemption to the grand jury subpoenas applies, the Court had not been called upon to address the application of any such potential exclusion or exemption. The Court of Appeals merely concluded that grand jury subpoenas did not enjoy a blanket exemption as court records and did not, as petitioner suggests, announce an unqualified right to their disclosure. Accordingly, petitioner's application should be dismissed.

This court finds that respondent's denial of petitioner's FOIL request was not arbitrary or capricious. Respondent contends that the District Attorney's Office is not in possession of the grand jury subpoenas associated with petitioner's case and, therefore, cannot be compelled to produce material which it does not possess. Respondent cites to case law in support of her position and asserts that the petition should be dismissed. However, in the case of Matter of Lugo v. Galperin, 269 A.D.2d 338 (1st Dept. 2000), the Assistant District Attorney affirmed that a diligent search of the District Attorney's file was conducted and the requested FOIL documents were not found. In the case at bar, the respondent failed to indicate whether or not such a search was conducted for the grand jury subpoenas requested by petitioner.

Nevertheless, respondent is correct that even if the District Attorney's office was in possession of said grand jury subpoenas, petitioner's attorney was provided with all transcripts of grand jury testimony as well as the grand jury subpoenas related to his indictments prior to his

trial and the District Attorney's Office is not obligated to provide petitioner with duplicate copies. See, Matter of Huston v. Turkel, 236 A.D.2d 283 (1st Dept. 1997).


In addition, petitioner's FOIL request was properly denied by respondent pursuant to Public Officers Law §87(2)(e)(iii) which states that an agency, "...may deny access to records or portions thereof that...are compiled for law enforcement purposes and which, if disclosed, would identify a confidential source or disclose confidential information relating to a criminal investigation..." Additionally, Public Officers Law §87(2)(f) permits an agency to deny access to records if disclosure would endanger the life or safety of any person. In the case at bar, petitioner was accused of binding his victims and threatening to kill them. The grand jury subpoenas contain the home addresses of the victims and witnesses and respondent had good reason to believe that disclosure of same could endanger the life or safety of the victims, witnesses or their families.

Finally, respondent is correct that the case of Matter of Newsday v. Empire State Development Corp., (supra), does not stand for the premise that petitioner has an unqualified right to disclosure of grand jury subpoenas. In that case, the Empire State Development Corporation did not argue, as respondent does here, that a statutory exemption to the grand jury subpoenas applies.

Accordingly, it is hereby

ADJUDGED, that the petition is denied and the proceeding is dismissed, without costs and disbursements to the respondent.

Dated: October 15, 2010



J.S.C.

UNFILED JUDGMENT

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