

People v Rodriguez

2010 NY Slip Op 33619(U)

July 12, 2010

Sup Ct, Kings County

Docket Number: 9688/06

Judge: Gustin L. Reichbach

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 27

	x	
THE PEOPLE OF THE STATE OF NEW YORK,	:	Decision and Order
	:	
-against-	:	Indictment No. 9688/06
	:	
Cesar Rodriguez,	:	<u>Dated</u> : July 12, 2010
Defendant.	:	
	x	

The movant/defendant/appellant was convicted of Manslaughter in the First Degree after a jury trial in March 2008. The defendant’s wife, Nixzaliz Santiago was similarly convicted of Manslaughter in the First Degree at a separate trial. The defendants were charged with Acting in Concert in the brutal death of their daughter Nixzmary Brown. At the time of her death Nixzmary Brown was seven years old and weighed but 36 pounds. An autopsy of the decedent revealed multiple injuries of her head of varying ages, with bruising on her forehead, eyelids, nostrils, right ear, upper lip, lower lip, and most critically an acute subdural hematoma on the right side of her head adherent to the dura. Additionally, there were multiple contusions of different ages on the child’s upper and lower back, including buttocks. There were old abrasions to her right shoulder, her left shoulder, hip, abdomen and the back of her neck. Additionally there were multiple contusions of varying ages on both of her arms, legs, thighs, knees and ankles. In short, the injuries inflicted over time to this child showed injuries from the top of her head to the bottom of her feet.

During the course of this trial, after the Court (Hall, J.) conducted an *in camera* proceeding, a portion of the record was sealed because of safety concerns for a witness. Trial testimony taken in a closed courtroom involving a witness identified only as Jane Doe, who was in prison with co-defendant Nixzaliz Santiago and to whom defendant Santiago purportedly made incriminating statements, was also sealed. The defense contends these statements are exculpatory as to his client. The defendant now moves to unseal that trial record for the purpose of prosecuting the defendant’s appeal. The defense also seeks what it characterizes as a post-

conviction motion for discovery/Brady material, specifically the Grand Jury testimony of Dr. Joaquin Guttierrez, the medical examiner who performed the autopsy on Nixzmary Brown. Dr. Guttierrez's autopsy report had been provided to the defense but Dr. Guttierrez was not called as a witness at trial. At trial, the People's medical expert was a forensic pathologist, Dr. Barbara Sampson, a colleague of Dr. Gutierrez at the Office of the Chief Medical Examiner.

The autopsy report prepared by Dr. Guttierrez, provided to the defense almost two years before trial, sets forth as the cause of death "child abuse syndrome, including blunt impact to head with subdural hematoma". At trial, Dr. Sampson testified consistent with the autopsy report prepared by Dr. Gutierrez that the cause of death was child abuse syndrome including blunt impact to the head.

A notice of appeal was filed on the defendant's behalf on April 3, 2008, but that appeal has not yet been perfected.

This motion is brought by defendant's trial counsel. It appears that as of this date no appellate counsel has filed a notice of appearance.

The District Attorney's office opposes the instant motion arguing that there is no underlying proceeding before the Court and that the defendant's motion to unseal the records for the purpose of prosecuting the defendant's appeal, should be addressed by appellate counsel to the Appellate Division. See generally 22 NYC RR 670.9-670.10.2. Similarly, the People oppose the defendant's motion seeking to disclose Dr. Gutierrez's Grand Jury testimony as being without merit for failing to demonstrate a "compelling and particularized need", characterizing the defendant's request that this Grand Jury testimony "may" contain Brady material, as simply an unparticularized fishing expedition. The People either claim that Dr. Gutierrez's Grand Jury testimony is wholly consistent with the testimony given at trial by Dr. Sampson. The People also contend there is no statutory provision for post-trial discovery.

At the conclusion of the first round of oral argument on the motion the Court requested and received the transcripts of the testimony of Dr. Gutierrez for an *in camera* review.

Procedural Discussion

This matter appears before the Court in an unusual procedural posture. A notice of appeal has been filed in the Appellate Division and there is no proceeding pending before this Court. The instant motion is not made pursuant to CPL§440, CPL §330, or indeed under any

provision of the Criminal Procedural Law. When asked by the Court, what procedural authority existed for the Court to entertain the instant motions, defense counsel suggested that in connection with the unsealing order, the Court has inherent power to unseal and revise its own orders and, as to the request for the disclosure of the Grand Jury testimony, the defense counsel invokes the general interest of justice authority of the Court.

The Court will discuss these two claims *seriatim*.

Unsealing the Trial Record

During the portion of the trial that was closed to the public, a witness, identified only as Jane Doe, testified to various admissions made to her by Nixzaliz Santiago while they were incarcerated at the same facility. The existence of this witness together with a manuscript prepared by her based on her conversations with the defendant Santiago was given to the defense only after jury selection had been completed, open statements given and several witnesses called. The defense claims that had this material been timely provided the entire thrust of the defense presentation would have been different. The defense in its moving paper specifies how this material would have impacted on their voir dire of prospective jurors, claiming that this material offered a completely different motive for Santiago to kill her daughter and had this material been made available in a timely fashion, they would not have felt obliged to maintain credibility with the jury by acknowledging that some of the old injuries, which they argued at trial could not have been fatal, were inflicted by the defendant Rodriguez. In support of these assertions, the defense submitted a supplemental application in which, over the course of five pages, it sets forth in great detail, many of the admissions purportedly made by Santiago to this jailhouse informant. The defense claims that had they been given this material in advance of trial it would have altered their strategy at trial.

The very details provided by the defense in their supplemental application belies their claim that they need to unseal the entire sealed record in order to properly prosecute the appeal. Whatever the merits of their underlying Brady claim, it is clear from the details provided in the supplemental application that, having been present during Jane Doe's testimony and arguments in connection therewith, defense counsel has more than enough specific information to advance their Brady argument at the Appellate Division. Claiming that their notes and recollection are not complete, the defendant seeks unsealing so as to be able to supply the Appellate Division

with additional examples of Santiago's acknowledgement of guilt and her intent to place the blame on defendant Rodriguez.

This Court is of the view that the defendants already possess enough specific information regarding these purported admissions to be able to fully advance their claims of prejudice and Brady violations in this regard to the appellate court. Now that a notice of appeal has been filed these sealed transcripts are part of the court record on appeal. To the extent that the defendant feels that they need further access to the sealed records to provide additional examples of Santiago's admissions and motives, such unsealing request, can and should be made directly to the Appellate Division. The defendant's request to this Court to unseal that portion of the record previously sealed by the trial judge is denied without prejudice to renew their application to the Appellate Division.

Dr. Gutierrez's Grand Jury Testimony

As previously noted, the defense seeks disclosure of Dr. Gutierrez's grand jury testimony alleging that because of other claimed late disclosures of materials to defense during the course of the trial, "there is ample reason to believe that the People have likewise failed to make appropriate disclosure regarding Dr. Gutierrez's grand jury testimony." The defense however fails to set forth a singular particularized claim in support of their assertion that there is "ample reason" to believe that Dr. Gutierrez's testimony constitutes Brady material. *Brady v. Maryland*, 373 US 83.

The defense theory at trial was that the death of Nixzmary Brown was caused not as a consequence of the accumulation of injuries denominated "child abuse syndrome" but rather that the single cause of death was blunt trauma impact to the head.

Brady v. Maryland, 373 US 83, requires the prosecution to turn over to the defense any material in its possession, custody, or control that is both favorable and material to the defense. To constitute Brady material "the evidence at issue must be favorable to the accused either because it is exculpatory or because it is impeaching." *Strickland v. Greene*, 527 US 263.

The District Attorney opposes the instant motion correctly noting that the defense claims are entirely speculative and as such do not constitute the "compelling and particularized" need necessary to overcome the traditional secrecy of grand jury testimony. The District Attorney

further claims that Dr. Gutierrez's grand jury testimony does not contain any Brady material and was entirely consistent with the trial testimony of Dr. Sampson.

A recurrent problem in the application of Brady rule's disclosure requirements is that, as structured, the initial determination as to whether or not material is either exculpatory or impeaching is left to the discretion and good faith of the prosecution. Thus, the initial determination as to what might be materially helpful to the defense is left in the first instance to the discretion of its adversary, the District Attorney. Furthermore, the requirements demonstrating a "compelling and particularized need," is difficult in circumstances where what is being sought is unknown in its particulars to the defense, i.e., what the grand jury testimony specifically is.

There are innumerable public policy reasons for the maintenance of confidentiality, indeed, secrecy of grand jury proceedings. Such secrecy is necessary to protect the integrity of the judicial process, to prevent the innocent from having their reputations tarnished by the publication of grand jury testimony that might not result in an indictment, and also to protect the identity and safety of witnesses, whose safety may be jeopardized if their testimony is revealed. None of those considerations seem to obtain in the instant case. The trial of this matter has been concluded, the defendant convicted and thus concerns for shielding the innocent do not apply. Furthermore, the witness in this case is a pathologist with the Office of the Chief Medical Examiner whose testimony was based on an autopsy he performed. Questions of safety have no application.

Because of the seriousness of the charges for which the defendant stands convicted, and the narrow and particularized focus of the defense, to wit, whether or not the blunt trauma impact to the head was the singular cause of death as the defense contented at trial, the People agreed to have this Court conduct an *in camera* inspection of the grand jury minutes. The Court did so.

The medical examiner, Dr. Sampson, testified at trial that the cause of death was the "entire child abuse syndrome."

When asked by the defense under cross examination if the child had not received the blow or blows that caused the subdural hematoma, would the child have died, Dr. Sampson's answer was "I think only God knows that." Dr. Sampson at trial and Dr. Gutierrez in the grand jury testimony both indicated that the cause of this child's tragic death was "child abuse syndrome including blunt impact trauma to the head with subdural hematoma." In that regard

the testimony of both Dr. Sampson and Dr. Gutierrez are consistent. In his grand jury testimony of January 13, 2006 and November 13, 2006, Dr. Gutierrez testified, as did Dr. Sampson, that “the cause of death was child abuse syndrome, including blunt impact with subdural hematoma.” However, unlike Dr. Sampson’s somewhat equivocal statement when asked whether the subdural hematoma alone could have caused the child’s death (“only God knows that”), Dr. Gutierrez was asked the following question and gave the following answer in his Grand Jury testimony of November 14, 2006:

Question: And could this brain injury, as a shorthand way of putting it, have been fatal in and of itself?

Answer: Yes.

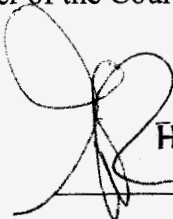
The District Attorney further asked whether this injury had it been treated at a local hospital within a reasonable time of its infliction, “could she have and would she have survived?” To which the doctor answered, “yes.”

This Court, having not presided over the trial of this case and having not been presented by either side with the entirety of Dr. Sampson’s testimony is unable to conclude whether or not this material does or does not constitute *Brady* material. Often times, the Court is in no better position than the District Attorney to evaluate whether material will be exculpatory or materially impeaching requiring its provision to the defense. This Court makes no finding that such testimony by Dr. Gutierrez can, in light of all the evidence in the case, be deemed exculpatory. Furthermore, since the defendants were charged with acting in concert it is unclear to this Court that even if the defense was able to establish that the co-defendant was the one who inflicted this blow to the head, it would have affected the outcome of the defendant’s trial. But the Court also recognizes that it is difficult for the defense to make that argument in the absence of being provided with the potentially exculpatory or impeaching material. What is clear is that this material is not directly impeaching of a witness’s general credibility, but rather is directly relevant to an issue that was central to the defense at trial.

Consequently, under the facts and circumstances of this case and in the interest of justice the Court is ordering the People to turn over to the defense pages 12, 13, and 14 of Dr. Gutierrez’s grand jury testimony of November 14, 2006.

Conclusion

This constitutes the Decision and Order of the Court.



HON. GUSTIN L. REICHBACH
N.Y.S. SUPREME COURT

Gustin L. Reichbach
J.S.C.

ENTERED
JUL 14 2010
NANCY T. SUNSHINE
CLERK