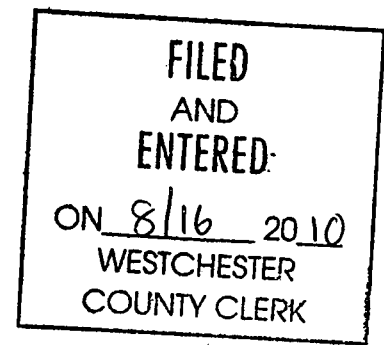


People v Phillips
2010 NY Slip Op 34053(U)
August 13, 2010
Supreme Court, Westchester County
Docket Number: 2010-380
Judge: Robert K. Holdman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

THE PEOPLE OF THE STATE OF NEW YORK,



DECISION & ORDER

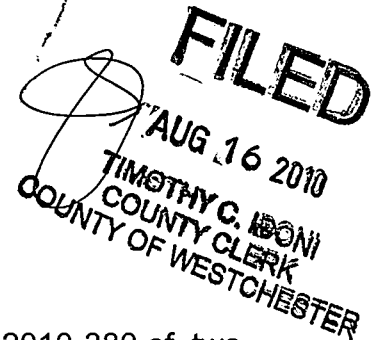
-against-

Ind. # 2010-380

JASON PHILLIPS,

Defendant.

HOLDMAN, J.



The defendant stands accused under Indictment number 2010-380 of two counts of Attempted Robbery in the Second Degree, one count of Attempted Robbery in the Third Degree, one count of Attempted Grand Larceny in the Fourth Degree, one count of Menacing in the Second Degree and one count of Unlawful Imprisonment.

By notice of motion dated July 13, 2010, with accompanying affirmation, the defendant moves for omnibus relief. In response, the People have submitted an affidavit in opposition sworn to July 27, 2010 with an accompanying memorandum of law. The motion is decided as follows:

Discovery and Inspection

The People's response to the defendant's request for discovery and inspection is sufficient. The District Attorney is reminded of the continuing obligation to provide exculpatory information to the defendant. See *Brady v. Maryland*, 373 U.S. 83 (1963).

Exculpatory information includes any information that would be "favorable to the defense, material either to guilt or punishment, or affecting the credibility of prosecution witnesses," irrespective of whether the District Attorney credits such information.

People v. Baxley, 84 N.Y.2d 208, 213 (1994). The District Attorney is directed to disclose any such information to the defense. However, with regards to the numerous reports and witnesses' statements and/or agreements the defense has requested, defense is well aware that such materials are not discoverable at this time and this Court will not require the People to furnish such documents at this juncture. C.P.L. §§ 240.44(1), 240.45(1). The People are reminded of their obligations with respect to the defendant's request for scientific, medical or other tests or examination conducted as well as the reports, notes and documentation prepared as a result. The People are also reminded of their continuing obligation to disclose any agreements between the People and witnesses. See *Giglio v. United States*, 405 U.S. 150 (1972).

Grand Jury Minutes/Dismissal of Indictment

The defendant's motion to inspect the Grand Jury minutes is granted. Upon inspection, the motion to dismiss the indictment or reduce a charged offense in the indictment is denied. The minutes reveal that a quorum of the grand jurors were present during the presentation of evidence and at the time the District Attorney's instructed the Grand Jury on the law. The evidence before the Grand Jury was legally sufficient to support each and every count in the indictment. The defendant's application for release of the Grand Jury minutes is accordingly denied. The defendant's motion to dismiss the indictment for a defect in the District Attorney's

instructions on the law to the Grand Jury is denied. The instructions were not defective as a matter of law.

Pre-trial hearings

A *Wade* hearing is granted to determine the propriety of the identification made in this case. *United States v. Wade*, 388 U.S. 218 (1967).

The defendant's motion for a *Goggins* hearing is denied with leave to renew. The defendant must articulate some foundation before privileged matter affecting the substantive issues must be disclosed. The initial burden result upon the defendant to show disclosure is necessary. *People v. Pena*, 37 N.Y.2d 642; *People v. Goggins*, 34 N.Y.2d 163, 170 (1974). The defendant must demonstrate more than bare assertions or conclusory allegations that the production of the informant is necessary to establish innocence. *Goggins*, 34 N.Y.2d at 169. Moreover, within his motion, the defendant must establish that his demand does not have an improper motive. *People v. Goggins*, 34 N.Y.2d 163, 170 (1974); *see also Roviato v. United States*, 353 U.S. 53, 65, n.15. This case does involve a question of identification and the defendant denies his presence at the time and place of the alleged events. As a result, if during the *Wade* hearing, facts are revealed with respect to the existence of an informant which may bear directly on the guilt or innocence of the defendant, this court will revisit the issue upon the proper motion by the defendant. Therefore, the defendant's motion is denied with leave to renew.

Sandoval/Ventimiglia

Pursuant to CPL 240.43, immediately prior to the commencement of jury selection, the prosecutor shall, upon request of the defendant, notify the defendant of any prior criminal act which the People seek to use in the cross-examination of the defendant as well as all specific instances of a defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the credibility of the defendant. Thereafter, upon defendant's request of the trial court, a *Sandoval* hearing and/or *Ventimiglia* hearing shall be conducted by the trial court prior to the commencement of trial. *People v. Sandoval*, 34 N.Y.2d 371 (1974); *People v. Ventimiglia*, 52 N.Y.2d 350 (1981); and *People v. Molineaux*, 168 N.Y.2d 264 (1991).

Reciprocal Discovery

The defendant is ordered to respond to the People's demand for reciprocal discovery, or to file a refusal to disclose pursuant to C.P.L. § 240.35 within ten days of the date of this order. Failure of the defendant to comply with the demand, or to file a written refusal may result in preclusion of any evidence subject to discovery under C.P.L. § 240.30.

Severance

Defendant's motion to sever the counts is denied for the following reasons. The offenses listed in the indictment were properly joinable in a single indictment pursuant to

C.P.L. 200.20(2)(b) and (c). The People allege, and this court agrees, that proof of the crime of Attempted Robbery in the Second Degree will be material and admissible as evidence in chief upon the crime of the Attempted Robbery in the Third Degree based upon the theory pursuant Molineux and its progeny, that the defendant had the same modus operandi for both sets of charges. Proof of the first offense would be material and admissible as evidence in chief upon a trial of the other offenses and proof the other offenses would be material and admissible as evidence in chief upon a trial of the first offense. The overlapping of evidence, as well as such offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law. As such, the charges are joinable under C.P.L. 220.20(2)(b). No discretionary severance is available. C.P.L. 220.20(3).

Additionally, the charges are joinable under CPL 200.20(2)(c) which authorizes joinder of charges of different criminal transactions where the offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law.

For the party moving for severance to be successful, the party must demonstrate either one of the two following points:

1. The counts were not joinable pursuant to the statutory criteria of CPL 220.20(2) and its four subdivisions; or
2. The only basis for the original joinder of the counts in the indictment is pursuant to 200.20(2)(c), the moving party asks the court to exercise its discretion because the severance would be "in the interest of justice and for good cause shown". The statute goes on to list specific examples of what should be considered "good

cause" by the court. See CPL 200.20(3)(a & b).

Severance based on the discretion of the judge is available ONLY when the sole basis of the joinder is subdivision 2(c) ("the same or similar crime" subdivision). The Court does not have the discretion or authority to sever if the joinder of the charges is based on any of the other three subdivisions.

Here, where the defendant is charged with different counts of attempted robbery predicated on distinct events occurring on different dates and involve different victims, since the crimes were the same or similar in law, these charges are properly joinable. *People v. Mack*, 111 A.D.2d 186 (2nd Dept. 1986); see also *People v. Veeney*, 215 A.D.2d 605 (2nd Dept. 1995).

The court finds that these counts were properly joined under CPL 200.20 2(b) and (c). Only when the crimes are joined SOLELY on the basis of CPL 200.20(2)(c), does the court have the authority to sever the counts. Therefore, discretionary severance is not available. The Defendant failed to make a sufficient showing for a discretionary severance pursuant to CPL 200.20(3). See *People v. Singh*, 2009 WL 709196 (2nd Dept. March 17, 2009), 2009 N.Y. Slip. Op. 02005. There is a strong public policy favoring joinder because it expedites the judicial process, reduces court congestion and avoids the necessity of recalling witnesses. *People v. Mahboubian*, 72 N.Y.2d 174, 183 (1989); *People v. Dean*, 1 A.D.3d 446, 448 (2nd Dept. 2003); *People v. Gonzalez*, 229 A.D.3d 398, 398-399 (2nd Dept. 1996). Therefore, defendant's motion to sever is denied.

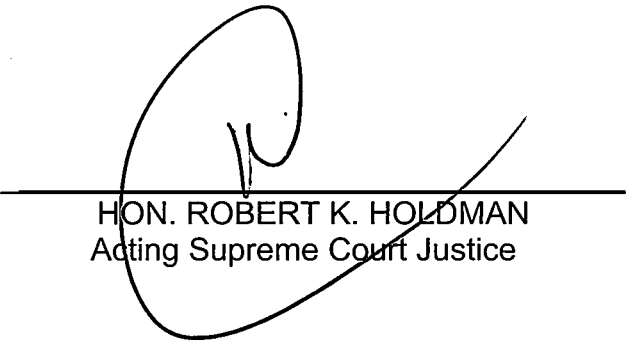
Leave For Further Motions

Upon a proper showing, the Court will entertain appropriate additional motions based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised in this motion. See C.P.L. § 255.20(3).

This Decision shall constitute the Order of this Court.

ENTER

Dated: White Plains, New York
August 13, 2010



HON. ROBERT K. HOLDMAN
Acting Supreme Court Justice

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