People v Roberts
2010 NY Slip Op 34069(U)
April 8, 2010
County Court, Broome County
Docket Number: 09-541
Judge: Joseph F. Cawley
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STATE OF NEW YORK
COUNTY COURT : : BROOME COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DECISION AND ORDER
Indictment No. 09-541

ROBERTS, AARON A. JR. and
RIZK, MOHAMED A.,

Defendant.

FILED

APR 22 2010

SUPREME/COUNTY COURT
CLERKS OFFICE

JOSEPH F. CAWLEY, J.

The defendant **MOHAMED A. RIZK**. is charged with two counts of Burglary in the First Degree (P.L. 20.00 and 140.30(2) and (3)), Burglary in the Second Degree (P.L. 20.00 and 140.25(2)), Robbery in the First Degree (P.L. 20 and 160.15(3)), and Criminal Possession of a Weapon in the Fourth Degree (P.L. 265.01(2).

Defendant now moves pursuant to Section 210.30 of the Criminal Procedure Law for an examination of the stenographic minutes of the grand jury proceeding for the purpose of determining whether the evidence before the grand jury was legally sufficient to support the charge(s) contained in the indictment, and seeks dismissal or reduction of the indictment for the insufficiency of the evidence or for other defects in the grand jury proceedings. (Criminal Procedure Law §210.20).

The People have interposed no objection to the Court's examination of the grand jury minutes and have provided same for Court review. Upon examination thereof, the Court finds that release of the minutes to the defense is not necessary to assist the Court in making its determination on the motion. Accordingly, the defendant's request for release of the grand jury minutes is denied.

In reviewing the legal sufficiency of an indictment, the court must view the evidence in the light most favorable to the People and determine whether the evidence, if unexplained or uncontradicted, would be sufficient to support a guilty verdict after trial. The court's inquiry is limited to assessing whether the facts, if proven, and the logical inferences flowing therefrom, supply proof of each element of the charged crimes.

CPL 200.30(1) provides that "[e]ach count of an indictment may charge one offense only." Thus duplicitous counts, "understood by the court to mean one or more counts of an indictment which, individually, charge more than one offense" (People v. Rosado, 64 A.D.2d 172; People v. Richlin, 74 Misc.2d 906, 907) are forbidden. "The test by which to determine whether a single count in an indictment is bad for duplicity is: Could the defendant under it be convicted of either one of the crimes charged therein, should the district attorney elect to waive the other?" (People v. Klipfel, 160 N.Y.371). Crimes which are independently committed and are separate and distinct from one another must be charged in separate counts of the indictment (People v. MacAfee, 76 A.D.2d 157). Therefore, where a crime is made out by the commission of one act, that act must be the only offense alleged in that count. Put another way, acts which separately and individually make out distinct crimes must be charged in separate and distinct counts (People v. Keindl, 68 N.Y.2d 410; People v. MacAfee, *supra*; People v. Brannon, 58 A.D.2d 34).

The prohibition against duplicity ensures the reliability of a unanimous verdict. If two or more offenses are alleged in one count, individual jurors might vote to convict a defendant on the basis of one offense but not the other, while other jurors may vote to convict on the basis of the other offense. The defendant would thus stand convicted under that count, even though the jury may never have reached a unanimous verdict as to any one of the offenses (People v. Keindl, *supra*; *see,* People v MacAfee, *supra*).

As to the instant indictment, Carl Hamilton and Steven Hamilton are alleged to be the victims. Count 1 (Burglary in the First Degree) alleges, *inter alia*, that "...in effecting entry or while in the dwelling or in immediate flight therefrom, Aaron A. Roberts, Jr., did cause physical injury to ***Carl Hamilton and/or Steven Hamilton,*** ...". An essential element of the crime charged is that one of the participants did cause physical injury to a person that was not a participant in the crime. Therefore, if sufficient proof exists, defendant could be found guilty of Burglary in the First Degree with respect to ***Carl*** Hamilton. Likewise, if sufficient proof exists, he could be determined to be guilty of the crime of Burglary in the First Degree with respect to ***Steven*** Hamilton. Therefore, were this count to stand as pleaded, individual jurors could vote to convict defendant based upon a finding of personal injury to Carl Hamilton, and not Steven Hamilton, while other jurors might vote to convict based upon a finding of personal injury to Steven Hamilton, but not Carl Hamilton. Thus, defendant could be convicted under this count even though the jury had not reached a unanimous verdict as to each/either complainant. The foregoing renders this count defective.

Count 2 also charges defendants with Burglary in the First Degree. It alleges that while acting in concert, defendant Rizk threatened the use of a knife, and/or Roberts threatened the immediate use of a handgun as a blunt force weapon, said knife and/or handgun being dangerous instruments. An essential element of the crime charged is that one of the participants used or threatened the immediate use of a dangerous instrument. Were this count to stand as pleaded, individual jurors might vote to convict believing that Rizk was armed with a knife, while not believing that Roberts was armed with a gun. At the same time, other individual jurors might vote to convict on the basis of a belief that *Roberts* was armed, while not believing that Rizk was. Thus, defendant could be convicted under this count even though the jury had not reached a unanimous verdict on the elements of the crime. Count 2 is therefore likewise defective.

For the reasons set forth above, Count 4, charging defendants with Robbery in the First Degree, likewise suffers from duplicity and is defective.

Therefore, Counts 1, 2 and 4 are hereby dismissed, with leave to re-present within 45 days of the date of this decision.

With respect to Count 3 (Burglary in the Second Degree) and Count 8 (Criminal Possession of a Weapon in the Fourth Degree), the evidence before the grand jury was legally sufficient to establish the commission by the defendant Rizk of the offenses charged or lesser included offenses thereof. The legal instructions given were sufficient, fair and accurate. The presentation was legal and proper.

The Court finds no additional defects in the grand jury proceedings warranting dismissal or reduction.

The defendant's motion to dismiss or reduce is denied as to Counts 3 and 8.

The defendant has requested Ventimiglia and Sandoval hearings. The People have indicated that they will seek to introduce on their direct case evidence of uncharged criminal conduct. As such, a Ventimiglia hearing will be conducted prior to jury selection.

The People have not indicated that they will seek to cross-examine the defendant, in the event he does testify at trial, with prior convictions as well as the underlying facts of said convictions. Based upon the foregoing, defendant's request for a Sandoval hearing is denied.

Defendant seeks preclusion pursuant to CPL §710.30 of any statements alleged to have been made by him and/or any identification evidence not identified in the Notice served on the accused within 15 days of his arraignment on the instant indictment. The People have responded that police reports containing the foregoing information was provided to defendant prior to his arraignment on the present indictment. As there are no sworn allegations of fact (CPL §710.60) by defendant in the Affidavit submitted in support of his motion which identify statements and/or

identification proceedings other than those referenced in the People's §710.30 Notice and/or the police reports referenced therein, defendant's preclusion motion is denied, with leave to renew (CPL 710.40 (4)).

The defendant has also moved for suppression of identification testimony. The People oppose suppression, but do not oppose a hearing on the issue. Defendant's motion to suppress identification testimony is granted to the extent that a Wade hearing will be scheduled by the Court.

The defendant has requested suppression of statements allegedly made to law enforcement, and the prosecutor has consented to a Huntley hearing to determine their admissibility. The defendant's motion is granted to the extent that a Huntley hearing will be scheduled by the Court.

Defendant seeks an order of this court allowing him and/or his representatives access to the location where the crime allegedly occurred, for the purpose of inspection and photographing. The People's responding papers do not address this request.

The limitations contained within CPL Article 240 are relevant only to the extent that the item or information sought is within the possession or control of the party from whom it is sought, or may, by a diligent good faith effort, be produced by such party (*see,* CPL 240.20(2); 240.30(2)). Conversely, if that which is sought is ***not*** within the possession or control of one of the parties to the action, then the provisions of CPL Article 240 have no bearing upon the process (People v. Davis, 196 Misc.2d 977).

The "crime scene" herein is unquestionably not within the possession or control of the prosecutor. Although a defendant's access to inspect an alleged crime scene implicates concepts of fundamental fairness (People v. Davis, 196 Misc.2d 977), the "innocent" property owner also has fundamental rights and interests which must be considered (Davis, *id.*). Unlike People v.

LeGrande, 182 Misc.2d 375 (where the "innocent" property owner, through the cooperation of the District Attorney's Office, appeared on the return date of the application, thereby satisfying due process concerns for the property owner), there is no indication that the property owner in this case has received notice of the instant application. No affidavits of service have been filed with the court or other proof that notice of this application has been served upon the persons or entities entitled to be heard.

The defendant's motion in this regard is presently denied. It is recommended that defense counsel "first seek access by informal means, i.e., simply ask the appropriate persons or entity for permission, and, if rebuffed, that he apply on notice for orders pursuant to CPLR 3120(b)". (*See generally,* People v. Bestline Prods., 52 A.D.2d 17 (1st Dept 1976), *revd. on other grounds,* 41 N.Y.2d 997 (1977); People v. Karpeles, 146 Misc.2d 53 (Richmond Co. Crim Ct.1989).

Defendant also requests a hearing, stating at paragraph 11 of his affirmation that the "stop, and the subsequent search and seizure, was without a sufficient legal basis for the stop of defend-ant". Although the People have consented to Huntley and Wade hearings, they do object, based upon a lack of sufficient pleading, to a Mapp/Dunaway hearing.

"It is fundamental that a motion may be decided without a hearing unless the papers submitted raise a factual dispute on a material point which must be resolved before the court can decide the legal issues." People v. Mendoza, 82 N.Y.2d 415. Suppression motions **must state the legal ground of the motions** and "must contain sworn allegations of fact," made by the defendant or another person. (CPL 710.60(1)). The allegations may be based upon personal knowledge or information and belief, so long as the sources of information and grounds for belief are stated. *Id.* The Court must rely upon the motion papers in deciding, *inter alia,* whether to grant a hearing, and the motion may be summarily denied if defendant does not allege a proper

legal basis for suppression, or (with two exceptions not applicable here) if the sworn allegations of fact do not support the ground alleged. (CPL 710.60(3)(a)(b)).

The People's argument has legal authority; however, the CPL does not ***mandate*** summary denial of defendant's motion, even if the factual allegations are deficient (CPL 710.60(3)). If the court orders a Huntley or Wade hearing, and defendant's Mapp motion is grounded in the same facts involving the same police witnesses, the court may deem it appropriate in the exercise of discretion to consider the Mapp motion despite deficiency of the pleadings. Indeed, considera-tions of judicial economy militate in favor or this procedure; as an appellate court might conclude that summary denial of the Mapp motion was improper, requiring the parties and witnesses to reassemble for a new hearing months or years later (People v. Mendoza 82 N.Y.2d 415).

In light of the foregoing, notwithstanding the minimal factual pleadings set forth in defend-ant's motion in support of the Dunaway/Mapp application, his motion is granted to the extent that a Dunaway/Mapp hearing will be scheduled by the court.

The Court notes that the defense has made various discovery demands, as well as a demand for a Bill of Particulars, to which demands the People have responded. If the responses served are deficient in the view of the defense, the defendant may make an appropriate timely motion to com-pel specific disclosures or to preclude or for other applicable relief.

This constitutes the Decision and Order of the Court.

It is so Ordered.

DATED: April 8, 2010
Binghamton, NY

HON. JOSEPH R. CAWLEY
Broome County Court Judge

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