

People v Lindsay

2011 NY Slip Op 34228(U)

October 12, 2011

Supreme Court, Westchester County

Docket Number: 11-0282

Judge: Richard A. Molea

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

FILED and ENTERED
October 13, 2011
**WESTCHESTER
COUNTY CLERK**

-against-

DECISION AND ORDER

AKEEM LINDSAY,
Defendant.
-----X
MOLEA, J.

FILED No. 11-0282
OCT. 13 2011
TIMOTHY C. IBAN
COUNTY CLERK
TY OF WESTCHESTER

Upon considering the defendant's instant application for leave to file a late notice of intent to proffer psychiatric evidence, the Court has considered the following papers: order to show cause and affirmation in support of counsel for the defendant, Allan Focarile, Esq., and the correspondence of Assistant District Attorney V. Rashawn Woodley.

RELIEF REQUESTED

By order to show cause, the defendant moves the Court for leave to file a notice of intent to proffer psychiatric evidence at trial pursuant to Section 250.10 of the Criminal Procedure Law (CPL), despite the conceded failure of the defense to comply with those terms of CPL 250.10(2) which require that such notice be filed within thirty (30) days following the defendant's entry of a plea of not guilty to the indictment.

FINDINGS OF FACT

Under the instant indictment, the defendant has been charged with one count of Murder in the second degree pursuant to Penal Law § 125.25(1), one count of Criminal Possession of a Weapon in the third degree pursuant to Penal Law § 265.02(1), two counts of Attempted Assault in the first degree pursuant to Penal Law § 120.10(1), and a single count of Assault in the second degree pursuant to Penal Law § 120.05(6). These charges are based upon allegations that the defendant repeatedly struck Lisa Stabler with a machete causing her death on or about February 11, 2011 at approximately 11:30 p.m. in the City of New Rochelle. On April 20, 2011, the defendant was arraigned on the instant indictment before the Westchester County Court (Zambelli, J.) and entered a plea of not guilty to all of the counts charged thereunder. By Decision and Order, filed and entered on August 25, 2011, the Supreme Court, Westchester County (Lorenzo, J.) addressed the defendant's omnibus motion seeking various forms of relief, granting same to the extent that hearings were ordered concerning the permissible scope of cross-examination of the defendant at trial. By Trial Readiness Order, dated September 7, 2011, the Supreme Court, Westchester County (Lorenzo, J.) transferred the instant indictment to the Trial Assignment Part (TAP) presided over by this Court for further proceedings involving the scheduling of the trial of this matter and the assignment of a trial judge.

On September 16, 2011, the defense filed the instant motion by order to show cause seeking leave to file an untimely notice of intent to proffer psychiatric evidence at trial and the Court executed same, established a motion schedule and adjourned the case until October 13, 2011 for further proceedings. On September 30, 2011, the People filed a letter with this Court

memorializing their consent to the untimely filing by the defendant of a notice of intent to proffer psychiatric evidence at trial.

CONCLUSIONS OF LAW

The defense moves this Court to enter an order granting leave to file a notice evincing the defendant's intention to proffer psychiatric evidence at trial in support of his proposed defense that, in substance, the defendant suffered from extreme emotional disturbance when he is alleged to have committed the crimes charged under the instant indictment. The People do not oppose the defendant's instant application.

Pursuant to CPL 250.10(2), psychiatric evidence may not be admitted at trial by the defense "unless the defendant serves upon the people and files with the court a written notice of his intention to present psychiatric evidence . . . before trial and not more than thirty days after entry of the plea of not guilty to the indictment." However, CPL 250.10(2) further provides that the untimely service and filing of such a notice of intent may be permitted by the courts in the interest of justice and for good cause shown, so long as the application is made prior to the close of the evidence in the case on trial. It is now well-settled that the decision of the trial court, upon consideration of these statutory factors, to either grant or deny the defense the opportunity to serve and file a late notice of intent to proffer psychiatric evidence is a discretionary determination to be made on a case-by-case basis (*see People v Alomonor*, 93 NY2d 571; *see also People v Berk*, 88 NY2d 257, *cert. denied* 519 US 859; *People v DiDonato*, 87 NY2d 992). In this regard, the Court of Appeals has cautioned that such discretion is not absolute, as the

“[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” (*People v Berk, supra*, at 266). Therefore, the trial court’s determination must be based upon a balancing of this constitutional right against the resulting prejudice to the People in the event that the defense was afforded the opportunity to serve and file an untimely notice of intention to proffer psychiatric evidence (*see People v Berk, supra*, at 266).

It is significant to note that the People do not oppose the instant application and thereby do not suggest that the failure of the defense to comply with the timing provisions of the statute has effectively deprived them of the opportunity to have a sufficiently reliable psychiatric examination of the defendant performed in advance of trial, nor do they suggest that any other form of prejudice would result. Moreover, scrutiny of any claim of resulting prejudice must account for a recognition that the advance notice provisions of CPL 250.10 do not appear to have been enacted to prevent disadvantage to the People resulting from the deprivation of their opportunity to have a psychiatric examination of the defendant performed close-in-time to the defendant’s arraignment, rather the legislative intent underlying the advance notice provisions of CPL 250.10 suggests that the timing provision was designed primarily to prevent the undue delay of trial proceedings and “disadvantage to the prosecution as a result of surprise” (*People v Berk, supra*, at 263, quoting *Ronson v Commissioner of Correction*, 463 F.Supp. 97, 103).

Consistent with this analysis, those courts which have engaged in the specific balancing exercise prescribed 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*, Supreme Ct., Westchester County, April 18, 1997, Cowhey, J., indictment No. 96-0991 [notice given prior to start of trial]).

As a trial date for this matter has not yet been scheduled, if the Court were to grant the defendant's instant leave application, the prosecution would not be deprived of an adequate opportunity to have the defendant examined by a psychiatric expert of their choosing without unduly delaying the progress of trial proceedings in this case. Furthermore, any resulting prejudice to the People is minimized where, as here, the defendant's proposed psychiatric expert witness has not yet 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 concludes that the potential significance of the psychiatric evidence sought here in support of the proposed defense implicates 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

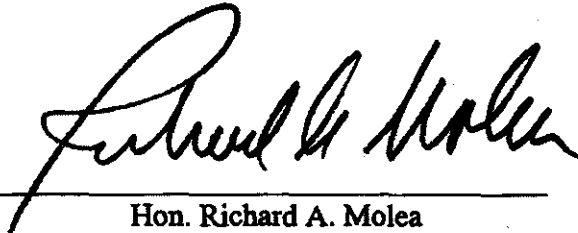
support of his defense during the trial of this case.

Accordingly, upon consideration of the merits of the defendant's proffer of good cause for the failure to file a notice of intent to introduce psychiatric evidence at trial within the limitations period prescribed by CPL 250.10(2), as well as the absence of any objection by the People, the Court finds that the defense has demonstrated that good cause exists to excuse the failure to timely file the notice at issue.

Based upon the foregoing, the defendant's instant application seeking leave of the Court to file an untimely notice of intent to proffer psychiatric evidence at trial pursuant to CPL 250.10 is granted.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
October 12, 2011



Hon. Richard A. Molea
Acting Justice of the Supreme Court