

People v Abudul-Halim
2012 NY Slip Op 33853(U)
October 5, 2012
County Court, Westchester County
Docket Number: 12-0683-01
Judge: Barbara G. Zambelli
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FILED

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<p>FILED AND ENTERED ON <u>Oct. 5</u> 2012 WESTCHESTER COUNTY CLERK</p>

CLERK
COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION & ORDER

- against -

Indictment No.: 12-0683-01

JAWWAD ABUDUL-HALIM and
AQUADOISE BIRCH,

Defendants.

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ZAMBELLI, J.

The defendant has been indicted for arson in the second degree, burglary in the first degree and criminal mischief in the second degree allegedly committed on or about February 12, 2012, four counts of tampering with a witness in the third degree and two counts of intimidating a victim or witness in the third degree, allegedly committed on or about between May 27, 2012 and May 31, 2012 in the County of Westchester. He now moves by notice of motion with supporting affirmation and memorandum of law for omnibus relief. The People's response consists of an affirmation in opposition and a memorandum of law. Upon consideration of these papers, as well as review of the grand jury minutes and exhibits and the consent discovery order entered in this case, the motion is disposed of as follows:

1. MOTION TO INSPECT/DISMISS/REDUCE

This application is granted to the extent that the Court has conducted an in camera inspection of the minutes of the grand jury proceedings. Upon review of the evidence presented, this Court finds that all counts were supported by sufficient evidence and that

the instructions given were appropriate. There was no other infirmity which would warrant a dismissal of the indictment. Accordingly, that branch of the motion which seeks dismissal of the indictment is denied. The Court further finds no facts which would warrant releasing any portion of the minutes of the grand jury proceedings to the defense (CPL §210.30[3]).

2. MOTION FOR DISCOVERY AND INSPECTION

This application is granted to the limited extent of ordering that the People are to provide the defendant with materials and information, the disclosure of which is required pursuant to the provisions of CPL §240.44 and §240.45. The defendant's demand for disclosure of items or information to which he is entitled pursuant to the provisions of CPL §240.20(1)(a) through (l) is granted upon the People's consent, except for that material for which the Court signed a protective order on September 6, 2012. The application is otherwise denied as it seeks items or information which are beyond the scope of discovery and the defendant has failed to show that such items are material to the preparation of his defense (CPL §240.40 [1][a]).

3. MOTION FOR EXCULPATORY INFORMATION

The People are reminded of the continuing obligation to provide exculpatory information to the defendant (Brady v. Maryland, 373 U.S. 83). 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" (People v. Baxley, 84 N.Y.2d 208, 213). The People are directed to disclose any such information to the defense. Where a question exists as to whether a particular item should be disclosed, they are directed to submit the material or information to the Court, which will conduct an in camera examination to resolve the issue.

4. MOTION FOR THE UNSEALING OF THE SEARCH WARRANT
AFFIDAVITS & MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant moves to unseal the search warrant affidavits in this case on the grounds that a review of these documents is necessary so that he may challenge the warrants' validity and better move to suppress physical evidence as the product of an illegal search and seizure. Defendant alleges that the police lacked probable cause for the search warrants and submits that there was also no probable cause, or any legitimate reason, to arrest him; thus he submits that the evidence recovered from his person is the fruit of the poisonous tree of his illegal arrest. Defendant denies having committed the arson, as he submits that he and his co-defendant were at a party in the Bronx on the date and time in question and has served alibi notice upon the People in this regard.

The People oppose the motion and submit that the warrants are supported by probable cause. As to the defendant's arrest, the People submit that probable cause existed based upon defendant's identification by a witness as a person seen leaving the crime scene at the time of the crime, which was corroborated by police review of surveillance video from the premises, as the police knew defendant and recognized him from the video. The People therefore submit that probable cause existed for defendant's arrest and anything recovered from his person was recovered incident to that allegedly valid arrest.

Defendant's motion to suppress physical evidence refers specifically to the cell phone which was allegedly recovered from his person upon his arrest. The People indicate that there are two search warrant affidavits at issue. One was signed by the Hon. Albert Lorenzo on March 14, 2012 (more than two months prior to defendant's arrest) for the

cellular phone sites for defendant's telephones, and one was issued by the undersigned on July 3, 2012 for the contents of the cellular telephones seized from defendant upon his arrest. Subsequent to defendant's motion, the People produced redacted search warrant affidavits to the defense, who objected to the redactions as overbroad. The People provided both the redacted and unredacted versions of the search warrant affidavits to this Court for in camera review.

In determining whether to disclose an affidavit in support of a search warrant, the Court of Appeals has sanctioned the use of a four-step procedure (see People v. Castillo, 80 NY2d 578, 586). First, the Court must review the search warrant to determine by application of the Aguilar-Spinelli two-prong test whether probable cause appears to be alleged on its face, or whether there is any reason to believe, initially, that the warrant is facially perjurious. After conducting such an in camera review, the Court finds that probable cause appears to be alleged on the face of the affidavits, and the affidavits do not appear to be perjured.

The second step requires an in camera, ex parte inquiry of the witness in order to evaluate any claim that the witnesses' safety and/or any future investigations would be jeopardized if the contents of the affidavit were revealed (see e.g. People v. Hunt, 227 AD2d 568). If the Court is of the opinion that disclosure of the contents of the affidavit will not, in fact, jeopardize the life of the witness and/or any future investigation, then the Court will order disclosure of the affidavit.

In the event the Court finds that non-disclosure is necessary, the Court will proceed to the third step, which involves an attempt to redact the affidavit to safeguard the witnesses' identity. In the event that such portions can be redacted so as not to reveal the

identity of the witness and the affidavit will remain essentially intact, then the material will be redacted and defense counsel will receive a copy of the modified affidavit.

If the Court finds that the affidavit cannot be redacted, the Court will then conduct an ex parte, in camera, Darden-type hearing. Defendant's motion to suppress physical evidence recovered as a result of the execution of the search warrants is held in abeyance pending the result of the Court's Castillo inquiry.

To the extent that defendant seeks to suppress evidence recovered from other search warrants issued in this case for his co-defendant's property, defendant has failed to establish standing to contest the search of that property, as he has not demonstrated an expectation of privacy therein, and his motion to suppress the evidence recovered from those search warrants is denied.

As to defendant's allegation that there was no probable cause for his arrest, in that he contends that he was elsewhere on the time and date of the crime, defendant's motion is granted only to the extent that a pre-trial hearing will be held to determine whether probable cause existed for defendant's arrest (Dunaway v. New York, 442 U.S. 200 (1979)).

5. MOTION TO SUPPRESS PRIOR BAD ACTS (SANDOVAL AND VENTIMIGLIA)

Granted on consent of the People to the extent that this Court directs that a hearing be held immediately prior to trial. Prior to the commencement of jury selection, the People will disclose to defendant all specific instances of his prior uncharged crimes and bad acts they expect to introduce at trial for impeachment purposes (CPL §240.43). Defendant must then sustain his burden of informing the Court of the prior convictions and misconduct which might unfairly affect him as a witness in his own behalf (People v. Matthews, 68 NY2d 118, 121-122). In the event the People seek to introduce defendant's prior bad acts

on their direct case, the burden is on the People to seek a Ventimiglia hearing to determine the admissibility of such evidence (People v. Ventimiglia, 52 NY2d 350).

6. MOTION TO STRIKE IRRELEVANT AND PREJUDICIAL STATEMENTS

The defendant's motion to strike allegedly prejudicial language from the indictment is denied. The phrase "against the peace and dignity of the People of the State of New York" merely identifies the defendant's alleged acts as public, rather than private, wrongs (see People v. Winters, 194 AD2d 703; People v. Gill 164 AD.2d 867).

7. MOTION TO STRIKE ALIBI DEMAND

This motion is denied. There is no merit to the defendant's contention that CPL §250.20 is unconstitutional (see People v. Dawson, 185 AD2d 854; People v. Cruz, 176 AD2d 751; People v. Gil, 164 AD2d 867; People v. Peterson, 96 AD2d 871).

8. MOTION TO SEVER

Defendant argues that he will be unduly prejudiced if he is tried jointly with his co-defendants because he alleges that they have irreconcilable defenses and because his co-defendant will not be bound by the Court's Sandoval ruling. The People oppose the motion as premature.

The defendant's claims are conclusory and do not rise to the level of the compelling reasons required to mandate severance at this time (see People v. Mahboubian, 74 NY2d 174). Defendant's motion is denied with leave to renew before the trial judge.

9. MOTION TO STRIKE STATEMENT AND IDENTIFICATION NOTICES

The defendant's motion is denied. The language in the notices served by the People in accordance with CPL §710.30 informed the defendant of the time, place and manner in which the statements and identifications were made (CPL §710.30[1]; see

People v. Lopez, 84 NY2d 425; People v. Hartley, 244 AD2d 712).

In the affirmation in opposition, the People contend that the defendant waived his right to challenge the sufficiency of the CPL §710.30 notices by moving in the alternative to suppress the noticed statements and identifications. However, a defendant may move in the alternative to suppress without waiving a preclusion claim, so long as the suppression claim is not litigated to a final determination (see People v. Kirkland, 89 NY2d 903; People v. Smith, 283 AD2d 189; People v. Figueroa, 278 AD2d 139; People v. Heller, 180 Misc2d 160; cf. People v. Smith, 8 Misc3d 441).

10. MOTION TO SUPPRESS STATEMENTS

The People have served the defendant with one CPL §710.30 notice regarding three oral statements. The defendant moves to suppress the noticed statements on the grounds that they were made while he was in custody without Miranda warnings and were involuntary, and that the noticed statements were a product of his illegal arrest, as set forth in section 4, infra. Defendant further argues that the statements were taken despite the fact that he demanded an attorney upon his arrest; he submits that he never waived his right to counsel. The People oppose the motion and argue that probable cause existed for defendant's arrest, as set forth in section 4, infra. As to defendant's statements, the People argue that the statement made on May 25, 2012 in the interview room of the Mount Vernon Police Department was spontaneously and voluntarily made by defendant while the detective was in the middle of reading him his Miranda rights and thus that defendant's motion to suppress this statement should be denied. However, the People submit that after defendant made his allegedly spontaneous statement, the detective continued to speak with him without administering full Miranda warnings, and detectives interviewed the

defendant the next day without administering Miranda warnings. As to these statements, the People consent not to use them on their direct case, but reserve the right to use them on cross examination should the defendant chose to testify at trial.

Defendant's motion is granted to the extent that the Court will conduct a hearing prior to trial to determine if the noticed statement from May 25 was the product of an illegal seizure, whether Miranda warnings were necessary and, if so, whether the defendant was so advised and made a knowing, intelligent and voluntary waiver thereof, or whether the statement was otherwise involuntarily made within the meaning of CPL §60.45.

11. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY

The People noticed one "confirmatory identification" of the defendant from a photograph. Defendant denies that the identification was confirmatory, and seeks a hearing to determine whether the identifications were conducted in an unduly suggestive manner. The People oppose the motion and argue that the identification is confirmatory because the witness was familiar with defendant as a result of being previously acquainted with him. They therefore argue that the witness' prior familiarity with defendant rendered them impervious to suggestion.

The defendant's application is granted only to the extent that a hearing shall be held prior to trial to determine whether the identification was confirmatory, and if not, whether the police procedure employed was unduly suggestive, and, if so, whether an independent source exists for in-court identification.

12. MOTION TO PRECLUDE IDENTIFICATIONS

The defendant moves in advance to preclude the People from introducing any identifications at trial which were not noticed to the defendant pursuant to CPL §710.30.

The People have indicated their awareness of the requirements of CPL §710.30 in regard to the need to show good cause if they intend to serve such a notice after the statutory period. Defendant does not allege that the People have actually served any such notices outside of the statutory time frame. The defendant's motion is therefore denied as moot with leave to renew in the event that the People seek to serve such notices in the future.

13. MOTION FOR A FURTHER BILL OF PARTICULARS

Defendant seeks a further bill of particulars as to "the exact conduct attributed solely to [defendant] regarding Counts 5 through 9." This motion is granted. The People are directed to provide the defendant with a further bill of particulars which more fully describes this defendant's conduct in regard to the tampering with a witness in the third degree and intimidating a victim or witness in the third degree counts of the indictment.

14. MOTION TO CONDUCT PRETRIAL HEARINGS 20 DAYS BEFORE TRIAL

This motion is denied. In accordance with the long standing practice of the Westchester County Court, pre-trial hearings granted on a post-indictment motion to suppress are held immediately prior to trial unless otherwise ordered by the Supervising Judge of the Trial Assignment Part.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
October 5, 2012


BARBARA G. ZAMBELLI
COUNTY COURT JUDGE