

**People v Ogilvie**

2014 NY Slip Op 33768(U)

July 24, 2014

County Court, Westchester County

Docket Number: 13-1237-04

Judge: Barry E. Warhit

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COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

FILED  
AND ENTERED  
ON 7/24 2014  
WESTCHESTER  
COUNTY CLERK

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

-against-

**DECISION & ORDER**

MARK OGILVIE a/k/a MARKIE TYRON,  
TYRON McCALLUM a/k/a YAYO,  
TRAVIS CLARKE, and JASON WHITE  
a/k/a DUTCH,

Indictment No.: 13-1237-04

**FILED**  
JUL 24 2014  
Defendant(s)

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WARHIT, J.

On July 16, 2014, Defendant moved by Notice of Motion, pursuant to CPLR § 2221, to reargue the Decision and Order, filed and entered by this court on June 17, 2014. Through the within application, counsel for Defendant accuses the court of engaging in an ex parte communication and asserts that, due to this alleged breach and this court's decision to exercise its discretion to consider a two-page Sur-reply filed by the People but not a sixteen (16) page Sur-surreply filed by Defendant, this court has misapprehended the meaning of 22 NYCRR § 100.3[B](6) and (7) such that Defendant is entitled to reconsideration of the matters considered and resolved by this court's June 17, 2014 Decision and Order. By Affirmation and Opposition filed on July 21, 2014, the People have opposed Defendant's application in its entirety. Defendant filed a Notice of Reply, Affirmation in Support and Exhibits on July 22, 2014.

### **Relevant Procedural History**

Defendant, Jason White, stands indicted for, on or about March 11, 2012, while aiding, abetting and acting in concert with co-defendants, having committed the crimes of Conspiracy in the second degree and Criminal Possession of a Weapon in the second degree as well as Hindering Prosecution in the first degree and Tampering with Physical Evidence.

Through counsel, on January 13, 2014, Defendant filed a Notice of Omnibus Motion and an Affirmation in Support thereof. On February 4, 2014, the People filed an Affirmation in Opposition together with a Memorandum of Law.

Subsequently, the People provided voluntary discovery to Defendant. This discovery included a search warrant for information concerning cellular telephone number (913) 648-8059. This court granted Defendant's request for time to file a supplemental motion.

On March 25, 2014 Defendant filed a second Notice of Omnibus Motion and Affirmation in support thereof seeking suppression in relation to the above detailed search warrant. In relation to Defendant's second omnibus motion, on April 4, 2004, the People filed an Affirmation in Opposition together with a Memorandum of Law.

Defendant then sought leave to file yet another supplemental motion. The court granted this application as well. Accordingly, on April 23, 2014, Defendant filed a third Notice of Omnibus Motion together with an Affirmation and annexed Exhibits. This motion sought suppression of evidence obtained pursuant to a cell site order, dated April 18, 2013. Defendant claimed the order was not supported by probable cause, that

it was “derived from” information obtained through prior court-authorized electronic surveillance and that the People had contravened CPL § 700.70 and that the affidavit in support of the order contained false information. On May 15, 2014, the People filed an Affirmation in Opposition and Memorandum of Law in relation to Defendant’s third omnibus motion. On May 21, 2014, Defendant filed a Notice of Response together with an Affirmation and annexed Exhibits.

On a date prior to June 2, 2014, the undersigned court’s attorney received a telephone call from an Assistant District Attorney advising that the People wished to submit a Sur-reply to Defendant’s May 21, 2014 submission. The undersigned’s court attorney did not engage in any substantive conversation with the Assistant District Attorney or discuss the content of the anticipated document. The undersigned’s court attorney merely advised the document could be filed. Importantly, the court attorney made no representation whatsoever as to how the court would handle the submission or whether it would be considered.

Subsequent to the above exchange, on June 2, 2014, the People filed a two-page letter. Despite his claims to the contrary, same was served upon counsel for Defendant (cf., Fitzmaurice Affirmation, ¶ 18 (alleging Defendant was without notice that the two-page letter brief had been filed)). Indeed, on June 14, 2014, counsel for Defendant filed a sixteen page Sur-surreply entitled Notice of Response.

By Decision and Order, filed and entered June 17, 2014, this court resolved Defendant’s omnibus motion and the subsequent supplemental suppression motions. During a court appearance of the same date, in response to the undersigned having advised counsel for the defendant that his Sur-surreply should have been preceded by

leave of the court, counsel replied that he was unaware the People had gotten leave of the court to file their Sur-reply and evidenced alarm that the People had sought leave without informing the defense (Fitzmaurice Affirmation, Exhibit 4, Transcript of the Proceedings (hereinafter "Exhibit 4"), June 17, 2014, p. 3, lines 3-4, 7-8 p. 2-3).

The matter was marked ready for trial and transferred to the Trial Assignment Part (Molea, AJSC). On June 26, 2014, the matter appeared on the TAP calendar and counsel indicated his intention to file the within motion which he filed, approximately three weeks later, on July 16, 2014.

Through said Notice of Motion to Reargue, Affirmation in Support thereof and annexed exhibits, Defendant accuses the court of engaging in an ex parte communication and failing to act impartially on grounds that "[n]o notice was ever received by the Defendant that the People intended to file a 'two-page letter brief' or had in fact filed a 'two-page letter brief' with the court" (Fitzmaurice Affirmation, ¶ 18). Upon this alleged breach and upon the court's exercise of its discretion to consider the People's two-page letter brief and Defendant's mistaken belief that the court did not read or consider his sixteen (16) page Sur-surreply thereto, Defendant claims he is entitled to reconsideration of the court's decision which denied suppression and a pre-trial hearing with respect to the April 18, 2013 cell site order.

### **Conclusions of Law**

A motion to reargue is a procedural vehicle by which a movant can seek to establish that the court overlooked or misapprehended matters of fact or law in determining a prior motion (CPLR § 2221[d](2)). A motion to reargue is not intended to

provide an unsuccessful litigant an opportunity to readdress and rehash previously decided issues (see, Foley v. Roche, 68 AD2d 558, 567 [1<sup>st</sup> Dept. 1979]. A motion to reargue must not include any matters of fact not offered on the prior motion (CPLR § 2221[d](2)).

The within application is not a proper motion to reargue. Through the within motion, Defendant claims he is entitled to re-argument on grounds that the People and the court engaged in an improper ex parte communication. This factual allegation was not before the court. Therefore, the court did not consider this issue in relation to the previously decided motion. Accordingly, CPLR § 2221[d](2) is not an appropriate procedural vehicle in which to raise this issue (see, CPLR § 2221[d](2) (a motion for leave to reargue “shall not include any matters of fact not offered on the prior motion).

A motion to renew may “be based upon new facts not offered on the prior motion that would change the prior determination” (CPLR § 2221[e](2)). Nevertheless, the within application cannot be treated as a motion to renew as it is improperly identified as a motion to reargue (CPLR § 2221[e](1)(requiring a motion to renew “shall be identified specifically as such”).

Even assuming, arguendo, that counsel for Defendant had filed the appropriate procedural vehicle, the within application requires dismissal on grounds that it is wholly devoid of merit. Defendant has not raised a matter of fact or law which this court misapprehended or which would change this court’s prior determination.

This court did not fail to perceive the People’s June 2, 2014 Sur-reply to be an ex parte communication. Defendant’s claims he lacked notice that the People “had in fact filed a “two-page letter brief” and that the People “filed a secret “letter brief” without

notifying the Defense” (see, Fitzmaurice Affirmation, ¶ 18; and see, Fitzmaurice Reply Affirmation, ¶ 8). These statements are purposeful distortions.

In fact, counsel is and was well aware of the People's June 2, 2014 written communication to the court. The People served a copy of their letter-brief upon him. Indeed, in the Affirmation annexed to his Notice of Reply in relation to the within application, counsel for Defendant goes so far as to accuse the People of not having mailed the document to him promptly on June 2, 2014 since the postal service did not deliver it to him until June 5, 2014 (Fitzmaurice Reply Affirmation, ¶ 6).

Even absent Defendant's acknowledgment that he received a copy of the People's June 2, 2014 letter, the fact that he filed a Sur-surreply, entitled "Notice of Response to Sur-reply", renders it obvious that counsel was well aware of the People's submission (see, Fitzmaurice Affirmation, Exhibit 2).

Of import to the within application, Defendant's Sur-surreply consists solely of a substantive response to the People's Sur-reply. It is wholly devoid of procedural objections (see, Fitzmaurice Affirmation, Exhibit 2). Despite the fact that the People's two-page letter of June 2, 2014 openly requested that the court "accept [the] letter as a surreply to the defendant's 24-page reply . . . ." , counsel for Defendant did not challenge whether the People had sought leave of the court or question whether the court had permitted the filing (Fitzmaurice Affirmation, Exhibit 1, People's June 2, 2014 Sur-reply (hereinafter "Exhibit 1"); see, CPLR § 2214[c]). Defendant did not contest the filing of the Sur-reply or urge the court to discount it. As such, in the opinion of this court, Defendant waived the right to object to the filing and further waived the opportunity to contest this court's exercising its discretion and considering same (see

generally, Garced v. Clinton Arms Associates, 58 AD3d 506, 509 [1<sup>st</sup> Dept. 2009]).

While it is abundantly evident that prior to filing their Sur-reply, the People did not contact counsel to advise of their intent to do so or seek Defendant's consent, the law does not require that the People contact Defendant's counsel or obtain his consent (see, CPLR § 2214[c]).

Defendant's accusation that this court engaged in an impermissible ex parte contact with the People is also misplaced. Chiefly, Defendant contends he is entitled to reargue the previously determined motion because the People failed to disclose a contact between an Assistant District Attorney and court staff regarding their request for leave to file.

The contact at issue was a brief telephone conversation between the undersigned's court attorney and Assistant District Attorney Matthew McCarty, who did not prepare any of the motion papers in this matter<sup>1</sup>. Of note, this court acknowledged the contact between its staff and the People (Fitzmaurice Affirmation, Exhibit 4).

To the recollection of the undersigned court attorney, Assistant District Attorney McCarty contacted chambers to advise that the People wished to submit a response to Defendant's Reply.<sup>2</sup> The undersigned's court attorney did not engage in any substantive conversation with the Assistant District Attorney or discuss the content of

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<sup>1</sup> To the extent the People did not reference this telephone contact in their Affirmation in Opposition to the present CPLR § 2221 motion, this court declines to adopt counsel's view that the People did so intentionally or with a lack of candor (see, Fitzmaurice Reply Affirmation, ¶ 7). This court presumes that Assistant District Attorney Blanco Buitrago, who prepared the papers, is unaware of her colleague's contact with court staff.

<sup>2</sup> Although the event was not recorded, the undersigned's court attorney recalls the event as having occurred on or about May 29<sup>th</sup> or May 30<sup>th</sup>.

the anticipated document. The undersigned's court attorney merely advised the Assistant District Attorney that the court would accept the letter without making any representation whatsoever regarding how the court would handle the submission. It was understood that the People were required to serve anything they filed upon Defendant.

The clear language of the People's filing confirms that court did not pre-determine whether the People's submission would be considered. Indeed, the People's June 2, 2014 letter, filed subsequent to the above detailed court contact, opens with the following statement: "[t]he People respectfully request that the Court accept this letter as a surreply to the defendant's 24-page reply, dated May 21, 2014, in which the defendant claims, *inter alia*, that the People "attempt[ed] to mislead the court" (see, Affirmation of Mark Fitzmaurice, Exhibit 1)(emphasis added).

Contrary to Defendant's claims, this court did not misapprehend the meaning or act outside the ambit of 22 NYCRR § 100.3[B](6) or (7). Any misunderstanding of the meaning of 22 NYCRR § 100.3[B](6) rests with counsel. Whether purposely or due to carelessness, counsel failed to comprehend sub-section (a) of the regulation which specifically permits ex parte communications "that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond" (22 NYCRR § 100.3[B](6)[a]).

In the within instance, the conversation between the undersigned's court attorney and the People did not affect a substantial right of the Defendant. The People were merely advised they could file a document with the court. The People received no procedural or tactical advantage by virtue of their call to the court. As is evident from the plain language of their filing, the People's request that the court consider its Sur-reply was not granted during the course of the telephone conversation (Fitzmaurice Affirmation, Exhibit 1). The People served Defendant with their Sur-reply. Defendant had the opportunity to respond and could have, but did not, assert a procedural objection to the People's filing.

Further, contrary to counsel's claims, this court did not misapprehend or overlook the meaning of 22 NYCRR § 100.3[B](7). This regulation requires the court to "dispose of all judicial matters promptly, efficiently and fairly". The fact that this court exercised its discretion to consider the People's June 2, 2014 two-page Sur-reply neither abridged Defendant's rights nor is it illustrative of unfair treatment. The record of this case unequivocally demonstrates that, although this court recognized that Defendant's "Notice of Response to Surreply" was legally unauthorized, this court read and considered same. Accord this Court's June 17, 2014 Decision and Order wherein it is stated:

"Neither the Criminal Procedure Law, nor the New York State Civil Practice Law and Rules confer a right upon Defendant to have filed this unauthorized re-argument of his previous motions for suppression of the fruit of the April 18, 2013 Search Warrant/Court Order. Moreover, to the extent Defendant's Sur-Surreply contains legal argument as to the applicability of cases the People referenced in their June 2, 2014 letter, this court does not require Defendant's unauthorized submission to determine the applicability of cases cited to the present matter" (p. 12)."

(Affirmation of Mark Fitzmaurice, Exhibit 3, Decision and Order, dated June 17, 2014 (hereinafter "Exhibit 3") (underlining and handwritten annotations criticizing the court's word choice and legal determinations not included in the original).

22 NYCRR § 100.3[B](7) requires the prompt, efficient and fair administration of justice. It does not require the court to render determinations and decisions in harmony with Defendant's view of the law.

The procedural history of this case amply demonstrates that this court gave counsel for Defendant the opportunity to file supplemental motions and that Defendant had a full and fair opportunity to engage in motion practice. This court gave careful consideration to the legal issues before it and, without misapprehension of the facts or applicable law, meted out justice promptly, efficiently and fairly. To the extent counsel for Defendant asserts a view to the contrary, this court appreciates he is motivated by zealous advocacy on his client's behalf.

Finally, contrary to Defendant's contentions, alleged misapprehensions or misrepresentations by the court of the dates on which the People's Surreply and Defendant's Sur-surreply are irrelevant and do not form the basis for relief pursuant to CPLR § 2221 (Fitzmaurice Reply Affirmation, ¶ 6). The dates of the filings are without legal import. The salient issues are that the People filed a Sur-reply. Defendant received a copy of it and, rather than filing a procedural objection, filed a substantive Sur-surreply. The court received and reviewed both documents prior to rendering its June 17, 2014 Decision and Order. Defendant has fixated on the fact that the court referenced his filing as "legally unauthorized" to the point that he is unable to appreciate

that the court considered his arguments, which consisted primarily of legal analysis of case law, and nevertheless, determined suppression was not warranted. This court stands by its previous legal determinations.

All arguments not specifically referenced herein, but which were raised by counsel, have been read and considered and deemed to be without merit. Based upon the foregoing, Defendant's motion to reargue is denied on both procedural and substantive grounds.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York  
July 24, 2014



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Honorable Barry E. Warhit  
Westchester County Court

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