People v Wheeler
2014 NY Slip Op 34028(U)
March 5, 2014
County Court, Broome County
Docket Number: 13-624
Judge: Joseph F. Cawley Jr

STATE OF NEW YORK
COUNTY COURT : : BROOME COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DECISION AND ORDER
Indictment No. 13-624

Alfred Wheeler, III, a/k/a Alfred Wheeler, a/k/a Damion Williams

Defendant.

JOSEPH F. CAWLEY, J.

The defendant 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 of the grand jury minutes 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. The court is not to weigh the proof or examine its adequacy (People v. Galatro, 84 N.Y.2d 160 [1994]).

Upon examination, the evidence before the grand jury was legally sufficient to establish the commission by the defendant 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 defects in the grand jury proceedings warranting dismissal or reduction.

The defendant's motion to dismiss or reduce is denied.

The defendant has requested Ventimiglia and Sandoval hearings. The People do not oppose said request. Ventimiglia and Sandoval hearings will be conducted prior to jury selection

Defendant seeks preclusion pursuant to CPL 710.30 of any statements attributed to the accused that were not contained within the 710.30 Notice served on defendant at or about the time of his arraignment. The People respond that defendant's "statements were properly noticed". Based upon the papers submitted, there is no indication that statements were made by this defendant to law enforcement that were not adequately and timely identified in the 710.30 Notice and disclosed in police reports provided. As such, defendant's application to preclude is denied at this time with leave to renew. (CPL 710.40(4))

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's request for an audibility hearing is granted.

Defendant alleges that items seized pursuant to a search warrant must be suppressed, arguing that no probable cause existed for the issuance of said warrant, and further that the warrant was illegally executed. The People deny the allegation and have forwarded said warrant and supporting documents for the Court's review. A review of the warrant will be conducted by the Court, and a decision thereon issued.

Defendant seeks both preclusion and suppression of any police arranged identification procedures. The People have responded that no police arranged identification procedures occurred. Defendant's application is denied, with leave to renew.

Defendant seeks preclusion and suppression of "alleged DNA evidence" based upon an alleged unconstitutional taking of his DNA. The People have responded no DNA has been secured from defendant. Defendant's application is denied as moot.

Defendant also seeks severance of Count 1 (Burglary in the Third Degree) from the remaining counts in the Indictment.

Indictment 13-624 charges defendant with Burglary in the Third Degree related to the restaurant/bar Bobbi's Place (count 1); Burglary in the Third Degree related to Nick's Pizza (count 2); Criminal Mischief in the Fourth Degree related to damage at Nick's Pizza stemming from the alleged burglary, *supra*, (count 3); Burglary in the Third Degree related to EZ Mart (count 4); Criminal Mischief in the Fourth Degree related to damage at EZ Mart during the alleged burglary, *supra* (count 5); Grand Larceny in the Fourth Degree, related to the aggregate value of all items taken during the aforesaid burglaries, (less one laptop computer); and Petit Larceny related to the laptop computer allegedly stolen during the burglary of Bobbi's Place (count 7).

Defendant argues that pursuant to CPL200.20(3)(a), proof available with respect to counts 2-6 is substantially less than available under count 1 [and presumably 7], thereby warranting severance.

Count 1 of this indictment alleges that a burglary was committed on February 28, 2013 at Bobbi's Place in the Town of Union, NY, wherein items were stolen that included a black bag and laptop computer. The People allege that the foregoing item(s) were recovered from defendant's residence during a subsequent search, resulting in count 7 of the instant indictment, Petit Larceny .

Offenses are joinable if, among other things, they are based upon different criminal transactions but defined by the same or similar statutory provisions, or if proof on either offense would be material and admissible as evidence-in-chief at the trial of the other offense (CPL 220.20[2][b],[c]). If the offenses were joined in an indictment solely because they were based on similar statutes, a court has discretion to order them separately tried "in the interest of justice and for good cause shown"(CPL 200.20[3]). If the offenses were properly joined on any other basis however, "the court lack[s] statutory authority to sever" (People v. Rogers, 94 AD3d 1246 [3rd Dept. 2012]; People v. Bongarzone, 69 NY2d 892 [1987]; *see* People v. Lane 56 NY2d1 [1982]; *see also* CPL 200.20[3]).

If the People can show that a defendant stole a number of items as part of a common scheme or plan, they are permitted to aggregate the value of stolen items for the purposes of the grand larceny statutes (see People v. Cox, 286 NY 137 [1941]; People v. Rossi 5 NY2d 396 [1959]; People v. Barry, 46 AD3d 1340 [4th Dept 2007]). In such a case, individual thefts , when committed under a single intent and one general fraudulent plan, would not be duplicitous when charged as a single larceny based on aggregate value of stolen property. The "aggregate value" of items stolen during the foregoing burglaries is the basis upon which count 6, Grand Larceny in the Fourth Degree, is charged. Proof of each burglary is therefore admissible and necessary to establish the charge of Grand Larceny.

Further, the facts of each offense are uncomplicated. The proof of each offense may be easily presented and segregated in the minds of the jurors as they evaluate each charge contained within the instant indictment (see People v. Gause, 19 NY3d 390 [2012]; People v. Baker, 14 NY3d 266 [2010]; People v. Ford, 11 NY3d 875 [2008]; People v. Reyes, 60 AD3d 873 [2d Dept 2009], *lv denied* 12 NY3d 920 [2009]; People v. Mathis, 37 AD3d 212 [1st Dept 2007], *lv denied* 8 NY3d 987 [2001]).

Finally defendant asserts in conclusory fashion that proof available relating to counts 2, 3, 4, 5, and 6 are "weak" in relation to the proof available under counts 1 and 7, however these conclusory assertions are insufficient. Defendant has failed to demonstrate that there was substantially more proof of one incident, as compared to the others, and that there was a substantial likelihood that the jury would be unable to consider separately the proof as it related to each incident (*see* CPL 200.20[3][a]; People v. Hall, 169 AD2d 778; People v. Moses, 169 AD2d 786), nor has defendant successfully argued that he has important testimony to give concerning one incident and a need to refrain from testifying as to the other [see CPL 200.20[3][b]).

Offenses charged in the instant indictment were were properly joinable. Defendant's request for severance is denied.

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 compel specific disclosures or to preclude or for other applicable relief.

This constitutes the Decision and Order of the Court.

It is so Ordered.

DATED: March 5, 2014
Binghamton, NY

Hon. Joseph F. Cawley
Broome County Court Judge

Appearances: Gerald F. Mollen, Esq.,
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