

**People v Kiarie**

2014 NY Slip Op 34054(U)

October 6, 2014

County Court, Westchester County

Docket Number: Indictment No. 14-0779

Judge: Barbara G. Zambelli

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FILED  
AND  
ENTERED ON  
Oct. 6 2014  
WESTCHESTER  
COUNTY CLERK

COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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

DECISION & ORDER

- against -

Indictment No.: 14-0779

KAMAU KIARIE,

Defendant.

TR  
OCT 06 2014  
CLERK  
COUNTY OF WESTCHESTER

-----X  
ZAMBELLI, J.

The defendant has been indicted for murder in the second degree and two counts of criminal possession of a weapon in the second degree, allegedly committed on or about April 1, 2014 in the County of Westchester. He now moves by notice of motion with supporting affirmation 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 TO SUPPRESS TANGIBLE PROPERTY

Defendant moves to suppress physical evidence recovered pursuant to a search warrant issued for defendant's residence at 625 Hanover Place, Mount Vernon, New York. The defense is in possession of the search warrant, the affidavit in support and the return on the warrant. Defendant argues that, in executing the warrant, the police exceeded its scope because the warrant authorized the seizure of "[a] photograph which contains the image of [the victim], and paperwork such as mail which connects him to said premises", and defendant submits that the return shows the recovery of evidence that does not fit either description, and thus must be suppressed. The return reflects the recovery of ten items as follows: "1. Two cell phones and one cell charger. 2. One V-Zon HD player. 3. One Acer laptop computer with charger. 4. One box with label "Kamau Kiarie 625 Hanover Place Mt. Vernon NY" containing one additional cell phone. 5. Two bags of alleged marijuana. 6. Assorted mail and personal effects of Kamau Kiarie. 7. Assorted paperwork of Kamau Kiarie 8. Eight ziplocked bags containing alleged marijuana and PCP residue. 9. One empty prescription bottle of Fluoxetine to Kamau Kiarie. 10. One non labeled prescription bottle with two zip lock bags of alleged marijuana residue."

The People oppose the motion. As to items 6, 7 and 9 on the return, the People argue these items were clearly covered by the language of the search warrant. As to items 1 to 4 in the return, the People argue that these items were legally recovered since the police reasonably believed they could contain the social media photographs of the victim, which they were allowed to recover pursuant to the search warrant. The People further note that while they seized these items, the contents of the phones, laptops and portable

video player were not searched and that the police will apply for a search warrant, should they seek to search the same. As to items 5, 8 and 10 as well as “any other items not recovered pursuant to the language of the search warrant”, the People argue that these items were contraband which were properly seized under the plain view doctrine.

Defendant’s motion is granted solely to the extent that a hearing will be held to determine whether the search conducted pursuant to the search warrant exceeded the scope of the warrant, and if so, whether any property seized should be excluded as the product of an unlawful seizure or other violation of the defendant’s rights (Mapp v. United States, 367 US 642; People v. Holmes, 81 NY2d 1056; People v. Selby, 220 AD2d 544).

### 3. MOTION TO SUPPRESS STATEMENTS

The People have served the defendant with five CPL §710.30 notices regarding oral statements. The defendant moves to suppress these statements on the ground that they were involuntarily made within the meaning of CPL §60.45(2)(b)(ii). The People oppose the motion and argue that all statements by the defendant were either spontaneous and voluntary or in response to pedigree questions, and therefore did not require Miranda warnings. They further argue that there was no circumstance where it was likely the defendant’s will to refrain from making a statement was overcome.

Defendant’s motion is granted to the extent that the Court will conduct a hearing prior to trial concerning the noticed statement allegedly made by the defendant for the purpose of determining whether Miranda warnings were necessary and, if so, whether he was so advised and made a knowing, intelligent and voluntary waiver thereof, or whether the statements were otherwise involuntarily made within the meaning of CPL §60.45.

#### 4. MOTION TO DISMISS COUNT TWO OR THREE OF INDICTMENT

Defendant moves to dismiss either count two or count three of the indictment, which each charge him with criminal possession of a weapon in the second degree. While recognizing that each count is charged under separate subsections, defendant argues that these counts are multiplicitous because the possession of the weapon is alleged to have occurred on the same day in the same place regarding the same shotgun and because, he submits, the People will try to prove them by the same evidence. He submits that the People should elect which count they wish to proceed with and the other count should be dismissed. The People oppose the motion.

Defendant's motion is without merit and is denied. Count two of the indictment charges defendant with criminal possession of a weapon in the second degree pursuant to P.L. §265.03(1)(b), which relates to the allegation that defendant, with intent to use the same unlawfully against another, knowingly possessed a loaded firearm, to wit, a loaded and operable shotgun with a barrel less than 18 inches in length; count three charges the same crime pursuant to P.L. §265.03(3), which relates to the allegation that he knowingly possessed said shotgun, and the possession did not take place in his home or place of business. The counts are not multiplicitous because they contain different elements in that count two requires the People to prove that defendant knowingly possessed the shotgun with the intent to use it unlawfully against another, and element not present in count three. Similarly, count three involves the element of the knowing possession not taking place in defendant's home or place of business, which is not present in count two. As there is no single offense charged in more than one count (People v. Alonzo, 16 N.Y.3d 267, 269 (2011)) defendant's motion to dismiss on the ground of multiplicity is denied.

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 FOR BRADY MATERIAL

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. To the extent that defendant seeks disclosure of agreements between the People and witnesses, the application is granted upon the People's acknowledgment of their duty to disclose same (Giglio v United States, 405 US 150).

7. REQUEST FOR ADDITIONAL MOTIONS

The defendant's request for permission to make additional pretrial motions is denied. Additional motions will only be considered upon good cause shown pursuant to CPL §255.20(3).

This Decision constitutes the Order of the Court.

Dated: White Plains, New York  
October 6, 2014

  
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BARBARA G. ZAMBELLI  
COUNTY COURT JUDGE

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