People v Jones
2014 NY Slip Op 34062(U)
October 7, 2014
Supreme Court, Kings County
Docket Number: Indictment 05146/12
Judge: Martin P. Murphy

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY: PART 40

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THE PEOPLE OF THE STATE OF NEW YORK : *Decision and Order*

-against- : Indictment *05146/12*
Gangs' Case

LAWRENCE JONES : *Motion to Controvert*

Defendant

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JUSTICE MARTIN P. MURPHY

The People have designated this matter as a *Gangs'* case.

Under the indictment, *defendant* is charged with murder in the second degree; attempted robbery in the first degree; two counts of criminal possession of a weapon in the second degree and criminal possession of a weapon in the fourth degree.

It is alleged that at approximately *11:00 P.M.* on *May 25, 2012* in the vicinity of *847 Hancock Street* in *Kings* County, the *defendant* pointed a gun in the direction of the *victim* fired the gun, and shot the *victim*, causing his death. A *witness* identified the *defendant* as the *victim's* shooter. Multiple witnesses reported hearing numerous gunshots at the time of the shooting.

As part of his investigation into this shooting death, *Detective Michael Plunkett,* obtained a phone number, allegedly belong to the cell phone of *Lawrence Jones,* the *defendant.*

On *June 13, 2012,* pursuant to *CPL sections 705.10, 710.15* and *710.30, ADA Jannette Lukosky* submitted an application to the court *[Sullivan, J.]* for a *pen register* and a *trap* and *trace device* for phone number *917-937-6970,* obtained by *Detective Plunkett* to assist members of the *NYPD* in locating the *defendant.* That application was based upon information provided by

Detective Plunkett as well that contained in the files of the *NYPD.*

The application also sought an order for past call detail as well as subscriber information. At the time the application was prepared and submitted by ADA Lukosky, it stated that the the phone number had been obtained from the *"target/defendant's Mother".*

Justice Sullivan, finding that there was sufficient "*reasonable suspicion"* for its issuance, granted the People's request for a *pen register* and *trap* and *trace device* on *June 13, 2012.*

The *defendant* was arrested on *June 15, 2012* in front of *77 Schaefer Street* for the *victim's* murder. Following his arrest, the *officers* recovered a cell phone from *defendant* with the calling number of *917-937-6970.*

On *June 18, 2012, Detective Plunkett* obtained a search warrant *[Firetog, J.],* authorizing a forensic search of the subject cell phone.

On *July 2, 2012,* a second search warrant *[Balter, J.]* was obtained by *Detective Plunkett,* authorizing a search of the account attached to cell phone number *917-937-6970.*

On or about *March 27, 2014,* this court signed a protective order authorizing specified redactions to the relevant affidavits, applications and other materials related to the above described *pen register/trap/trace* and *search warrant* orders.

At present, *defendant* moves to controvert the three earlier-issued order/warrants and requests suppression of the information and/or property obtained. Specifically, he contends that the order/warrants were defective in that they relied on material statements that were either false or were made with reckless disregard for the truth. In addition, he maintains that the factual statements were insufficient to establish either reasonable suspicion or probable cause for the order/warrants. As an alternative, *defendant* requests a *Bialostock/Franks/Alfinito* hearing.

The People counter that the order/warrants were properly obtained and requests this court to deny suppression. The People do acknowledge that the initial application contained an error, deemed "harmless" by them, wherein it stated that the subject phone number was obtained from the target's Mother instead of from another witness. In addition, the People maintain that the technology utilized is digital only and is therefore incapable of capturing any oral communications. Finally, while they are opposed to the suppression of any evidence and/or information obtained, and are also opposed to the requested *Bialostock, Franks/Alfinito* hearings, they *will consent* to a *Mapp* hearing.

The Pen Register and Trap and Trace Was Supported by Reasonable Suspicion and was Properly Obtained

As previously indicated, the *defendant* has first moved to controvert the court order for a *pen register trap/trace* as well as the order for call detail records and cell site data.

An application for a *pen register* and *trap and trace* is governed by *CPL sections 705.05, 705.10* and *705.15.* It has been held that such orders are not the same as eavesdropping warrants and thus necessitate different requirements. *Smith v Maryland,* 442 US 735 [1979].

CPL section 705.15 requires that an application for a *pen register* contains the following information:

> (a) The identity of the applicant and the identity of the law enforcement agency conducting the investigation; and
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> (b) A statement of facts and circumstances sufficient to justify the applicant's belief that an order authorizing the use of a pen register or a trap and trace device should be used, including
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> (i) a statement of the specific facts on the basis of which the applicant reasonably suspects that the designated crime has been, is being, or is about to be committed and demonstrating that the trap and trace device is or will be relevant to an ongoing criminal investigation of such designated offense;

(ii) the identity, if known, of the person to whom is leased or in whose name is listed the telephone line to which the pen register or trap and trace device is to be attached;

(iii) the identity, if known, of the person who is the subject of the criminal investigation;

(iv) the number, and if known, the physical location of the telephone line to which the pen register or trap and trace device is to be attached and, in the case of a trap and trace device, the geographic limits of the trap and trace order; and

(v) a statement of the designated crime or crimes to which the information likely to be obtained by the use of the pen register or trap and trace device relates; and

© A statement of the period of time for which the authorization for the use of a pen register or trap and trace device is required; and

(d) A statement of the facts concerning all previous applications, known to the applicant, for an order authorizing the use of a pen register or a trap and trace device involving any of the same persons or facilities specified in the application, and the action taken by the justice on each application.

Upon a review of the application submitted in this case by *ADA Lukosky,* this court finds that all of the statutory requirements were complied with. Moreover, contrary to *defendant's* argument that the application lacked reasonable suspicion , since it referred to the *target's Mother* as the source of the cell phone number, this court finds that single erroneous reference does not lead to such a conclusion. The remainder of the application states that a *witness* identified the defendant as the shooter and that *Detective Plunkett* spoke with a person known to the NYPD who knows the defendant to be the user of that particular phone number and has contacted the defendant several times by dialing that number. That information, standing alone, is more than sufficient to have established the required reasonable suspicion to obtain an order for *defendant's* phone.

Moreover, the *pen register* and *trap and trace order* is not, as *defendant* argues, an eavesdropping warrant. Nor does the fact that he People sought in that same application to obtain call detail records and cell site locations convert the subject order into an eavesdropping warrant. *CPL 700.05 (2)* defines an eavesdropping warrant as "an order of a justice authorizing eavesdropping". *CPL 700.05 (1)* defines eavesdropping as:

> "wiretapping," "mechanical overhearing of conversation," or the " intercepting or accessing of an electronic communication" as those terms are defined in section 250.00 of the Penal Law, but does not include the use of a pen register or trap and trace device when authorized pursuant to article 705 of this chapter.

And in those instances where the technology employed also captured aural communications, courts have held orders for pen register and trap and trace devices to be eavesdropping warrants and subject to a higher lever of review. *See People v Bialostock,* 80 NY2d 738 [1993], *People v Kramer,* 92 NY2d 529 [1998]. However, in the instant case, the technology employed in the device did not capture the substance of calls, messages or data sent to the phone but merely assisted members of the *NYPD* locate and arrest an individual suspected of the crime of murder. Moreover, the call records and cell site information were utilized to ascertain the *defendant's* location. Such information does not constitute eavesdropping within the statutory definition or case law, since the contents of the communications were not obtained. In addition, as noted by the People, it has been held that pen register and trap and trace devices do not raise any State or Federal Constitutional concerns; thus, suppression of this type of evidence then is dependent upon controlling statutory authority. *Smith v Maryland, supra* and *People v Guerra,* 65 NY2d 60 [1985] and *People v Medure,* 190 Misc 2d 167 [Bronx County Sup. Ct. *(Massaro, J.)*, 2001.

Pursuant to *CPL section 710.20 (7),* evidence obtained from a pen register and trap and trace device may be suppressed when an order has not been properly installed or utilized in violation of the provisions of *Article 705* of the *CPL*, *People v Bialostock, supra, People v Medure, supra.* However, even in those cases where such an impropriety was found to exist, evidence derived from the use of that information, *ie.,* derivative-or secondary- evidence will not be suppressed and may be used to show probable cause-or a portion of it- for a search warrant or eavesdropping warrant. *People v Medure, supra, also See Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11 A, CPL 710. 20.*

In this case, this court determines that the application order for a *pen register* and *trap* and *trace device* established more than the required reasonable suspicion for its issuance; that it fully complied with the statutory mandates as contained in *CPL section 705.15 (2)* and that any error in the affiant's initial identification of the witness who provided the phone number was rendered harmless by the entirety of the information contained within the application.

Accordingly, that prong of *defendant's* motion is *DENIED.*

The June 18, 2012 Search Warrant Issued by Judge Firetog Was Based Upon Sufficient Probable Cause

On June 18, 2012, following *defendant's* arrest, *Detective Plunkett* sought and obtained a search warrant for a forensic search of *defendant's* phone the *Hon. Neil-Jon Firetog, J.S.C.*.

In his affidavit, *Detective Plunkett* indicated his lengthy experience with tht *NYPD;* that the phone seized from the *defendant* following his arrest would likely contain evidence relevant to the on-going investigation of a homicide; that *defendant* had been observed by a witness or witnesses to have received a text message shortly before the shooting; that *defendant* had been observed by the same witness or witnesses to be the shooter; that the subject telephone had been

recovered from the *defendant* by means of a judicially issued *pen register* and *trap* and *trace* order whereby the *defendant* was located and arrested.

Defendant argues that the warrant was improperly issued; that the application was not based on sufficient probable cause; that there were material misrepresentations contained in the affidavit, necessitating a *Franks* hearing.

The People disagree with *defendant's* claims.

It has long been held that "where a search warrant has been secured, the *bona fides* of the police will be presumed and the subsequent search upheld". *People v Hanlon, Id.* In providing guidelines to search warrant reviewing courts, the Court of Appeals wrote in *Hanlon:*

> " When considering whether probable cause exists no infallible formula is available; ideally we consider the probabilities as perceived by a reasonable, cautious and prudent police officer and evaluated by an independent Magistrate. However, in the real world, we are confronted with search warrant applications which are generally not composed by lawyers in the quiet of a law library but rather by law enforcement officers who are acting under stress and often within the context of a volatile situation. Consequently, such search warrant applications should not be read in a hyper technical manner as if they were entries in an essay contest. On the contrary, they must be considered in the clear light of everyday experience and accorded all reasonable inferences."

Here, based upon all of the information supplied in the warrant application and affidavit, the issuing magistrate properly concluded that the information was credible, reliable and ample.

Moreover, this court's review of that earlier determination is limited to determining "whether... the issuing *magistrate* could have concluded that probable cause existed. " *People v Castillo,* 80 NY 2d 578 [1992], citing *People v Hendricks,* 25 NY2d 129 [1969]. Great deference

is to be accorded an issuing court's determination of probable cause. *People v Griminger,* 71 NY2d 635 [1988]. This court finds that the determination of probable cause by *Judge Firetog* was reasonable and that the warrant was properly granted *People v Castillo,* 80 NY 2d 578 [1992], *People v Hanlon,* 36 NY 2d 549 [1975].

In the instant case, the warrant was based on information supplied from a citizen informant, whose identity is known to the police but whose identity is subject this court's *March 27, 2014* protective order, an eyewitness to the shooting. That status as a citizen/witness/ informant satisfies the reliability prong of the *Aguilar-Spinelli* test especially because he or she can be prosecuted if the information turns out to be a fabrication. *People v Hetrick,* 80 NY2d 344 [1992], *People v Johnson,* 66 NY 2d 398 [1985], *People v Crespo,* 70 AD2d 661 [2nd Dept., 1979].

In addition, there is no need to establish the basis of his or her knowledge, since it is obvious that the accusations are based upon the individual's personal knowledge. In this case, the individual witnessed the *defendant* receive a text message on his phone just prior to his killing the victim. Accordingly, the "two-pronged test" was sufficiently met in the present case. Based upon all of the information supplied, the issuing magistrate properly concluded that the informant and information was credible.

The July 2, 2012 Search Warrant Issued by Judge Balter Was Based Upon Sufficient Probable Cause

Detective Plunkett sought and obtained a second search warrant on *July 2, 2012* at which time the *Hon. Bruce Balter, J.C.C.* was the issuing magistrate.

This second warrant was based upon the very information contained in the earlier warrant, issued on *June 18, 2012* as well as upon the information obtained from the execution of that

warrant.

This court has determined in this decision that there was legally sufficient probable cause for the issuance of the *June 18, 2012* warrant. Upon its execution and from the information therein contained, *Detective Plunkett* was able to confirm that the phone found in *defendant's* possession was in fact that of *defendant's* and thereafter relayed that information in court under oath to *Judge Balter* on *July 2, 2012.* As a result of that information, *Detective Plunkett* applied for an additional warrant to obtain the cell phone holder's account, which led to recovery of subscriber information , call detail records and text messages. Thus, it was the execution of the first warrant that created a portion of the probable cause for the second warrant by confirming the ownership of the phone recovered from *defendant.* Therefore, the warrant of *July 2, 2012* was also based upon probable cause.

Accordingly, the portion of *defendant's* motion that seeks to controvert the second warrant is also *DENIED.*

Finally, the court has reviewed *defendant's* additional claims regarding the issuance and/or execution of the subject search warrants and finds them to be unpersuasive, including *defendant's* request for a *Franks/Alfinito* hearing.

It is well-established that a *Franks* hearing will be denied where, as here, a *defendant* merely makes conclusory claims concerning an officer's false statements. *People v Williams,* 251 AD2d 266 [1st Dept., 1998] and *People v Gaviria,* 183 AD2d 913 [2nd Dept., 1992]. Moreover, a defendant is not entitled to a hearing based merely on the allegation that the officer made untruthful statements. The Supreme Court held in *Franks v Delaware,* 438 US 154 [1978] that a defendant must first make a substantial preliminary showing that the following factors exist: [1] the false statement made by the officer was intentionally or knowingly made or

was made with a reckless disregard for the truth; and [2] the statement was *material* (emphasis supplied) to the finding of probable cause leading to the issuance of the warrant. To obtain a hearing, a defendant must make a factual showing that establishes those two factors.

In support of his claim, defendant notes nothing more than small inconsistencies between *Detective Plunkett's* warrant application and his application for the initial *pen register/trap and trace* device request. Such discrepancies do not meet the required threshold of "perjurious statements", necessary to grant a *Franks* hearing.

This request for a suppression and/or a hearing must be summarily denied, since the "sworn allegations of fact do not as a matter of law support the ground alleged." *CPL 710.60 (3).* Put another way, the *defendant* has provided no sworn allegations of fact , as required by statute, that would entitle him to a *Franks* hearing.

Defendant's motion to controvert is therefore *DENIED* in its entirety without a hearing.

The foregoing constitutes the *decision* and *order* of the court.

Dated: Brooklyn, New York
October 7, 2014

MARTIN P. MURPHY, A.J. S. C.