

People v Shand

2015 NY Slip Op 33018(U)

September 29, 2015

County Court, Westchester County

Docket Number: Indictment No. 15-0591-02

Judge: David F. Everett

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

FILED

OCT - 2 2015
TIMOTHY C. IDONI
COUNTY CLERK
OF WESTCHESTER

FILED ON
OCTOBER 2, 2015
WESTCHESTER
COUNTY CLERK

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DEAN SHAND and **RICHARD ROPER,**

Omnibus Decision and Order
Indictment No.: 15-0591-02

Defendants.

-----X
EVERETT, J.

Defendant Richard Roper stands accused, under Indictment No.15-0591-02, of one count of reckless endangerment in the first degree while aiding, abetting and acting in concert with codefendant Dean Shand (Penal Law § 120.25), one count of criminal possession of a weapon in the second degree while aiding, abetting and acting in concert with codefendant Dean Shand (Penal Law § 265.03. [3]), one count of criminal possession of a firearm (Penal Law § 265.01-b), and one count of hindering prosecution in the second degree (Penal Law § 205.60). By notice of motion dated August 17, 2015, with an accompanying affirmation, defendant moves for omnibus relief. In response, the People submit an affirmation in opposition dated August 31, 2015, with an accompanying memorandum of law.

The allegations, as set forth in the People’s bill of particulars, are that on March 24, 2015, at approximately 5:07 p.m., in the vicinity of 157 Winthrop Avenue, Elmsford, New York, defendant Roper rendered criminal assistance to defendant Shand by driving Shand to and from the incident location where defendant Shand approached a number of individuals and began shooting with a 9 mm caliber semiautomatic pistol, striking a house and a fence. Defendant Roper is also charged with providing criminal assistance to Shand subsequent to the shooting incident by concealing the semiautomatic pistol, and with possessing the semiautomatic pistol on

March 28, 2015, in the vicinity of 32 Downing Drive in the Town of Greenburgh, New York.

It is further alleged that defendants Roper and Shand aided, abetted and acted in concert with each other when they: (1) knowingly and unlawfully possessed an operable and loaded 9 mm caliber semiautomatic pistol, and that such possession did not take place in either of their homes or places of business; and (2) recklessly engaged in conduct which created a grave risk of death to another person or persons.

According to the People, the police recovered the semiautomatic pistol from the backyard of the residence at 32 Downing Drive. The weapon was wrapped in plastic and covered with leaves. The police also recovered four shell casings and a bullet from the incident scene. Subsequent ballistics testing confirmed the firearm to be operable, and that the shell casings and bullet were fired from the subject weapon.

On or about June 17, June 19 and June 22, 2015, the People presented evidence of defendant Roper's conduct to the grand jury, which returned a true bill on four counts (Penal Law §§ 120.25, 265.03 [3], 265.02 [1], 265.01-b, and 205.60). The People filed an indictment on June 25, 2015, and defendant Roper was arraigned, under Indictment No. 15-0591-02, on July 1, 2015. Defendant's omnibus motion is decided as follows.

A. MOTION TO INSPECT THE GRAND JURY MINUTES AND TO DISMISS AND/OR REDUCE THE INDICTMENT

Defendant moves for an order dismissing the indictment, or counts thereof, on the grounds that the evidence before the grand jury was legally insufficient to establish the offense charged or any lesser included offense, that the evidence was improperly presented, and that the grand jury proceeding was defective, within the meaning of CPL 210.30, and 210.30 (3). On

consent of the People, the Court has conducted an in camera review of the minutes of the proceedings before the grand jury.

Pursuant to CPL 190.65 (1), an indictment must be supported by legally sufficient evidence establishing that the defendant committed the offenses charged. Legally sufficient evidence is competent evidence which, if accepted as true, would establish each and every element of the offense charged and the defendant's commission thereof (*People v Jennings*, 69 NY2d 103, 115 [1986]; CPL 70.10 [1]). "In the context of a grand jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Bello*, 92 NY2d 523, 526 [1998]). In rendering a determination, "[t]he reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of each element of the charged crimes and whether the grand jury could rationally have drawn the inference of guilt" (*People v Ackies*, 79 AD3d 1050, 1056 [2d Dept 2010] [internal citations and quotation marks omitted]).

A review of the minutes reveals that the evidence presented, if accepted as true, would be legally sufficient to establish every element of the offenses charged (*see* CPL 210.30 [2]). Accordingly, the defendant's motion to dismiss or reduce for lack of sufficient evidence is denied.

With respect to the defendant's claim that the grand jury proceeding was defective within the meaning of CPL 210.20 and 210.35, a review of the minutes supports a finding that a quorum of the grand jurors was present during the presentation of evidence and at the time the district attorney instructed the grand jury on the law, that the requisite number of grand jurors voted to indict and had heard all the "essential and critical evidence" (*see People v Collier*, 72 NY2d 298,

300 [1988]; *People v Julius*, 300 AD2d 167 [1st Dept 2002], *lv denied* 99 NY2d 655 [2003]), that the grand jury was properly instructed (*see People v Valles*, 62 NY2d 36 [1984]; *People v Calbud*, 49 NY2d 389 [1980]), and that the proceeding conformed to the requirements of CPL Article 190, in that the integrity of the grand jury proceeding was not impaired and no prejudice to the defendant resulted from the presentation.

In making this determination, the Court does not find that the release of the grand jury minutes or certain portions thereof to the parties was necessary to assist the Court. In the absence of a showing of a compelling and particularized need for disclosure of the minutes of the grand jury proceeding, the defendant's motion for release thereof is denied (*see People v Robinson*, 98 NY2d 755 [2002]).

B. MOTION FOR DISCLOSURE OF BRADY MATERIAL

Defendant's motion is granted to the extent that the People are directed to comply with the continuing duty imposed upon them to disclose "evidence favorable to an accused" at the earliest possible date prior to trial (*see Brady v Maryland*, 373 US 83, 87 [1963] and *Giglio v United States*, 405 US 150 [1972]). Additionally, should the People become aware of any material evidence which is arguably exculpatory, but they are not willing to consent to its disclosure, they are directed to disclose such material to the Court for its in camera inspection and determination as to whether such material will be disclosed to defendant (*see People v Consolazio*, 40 NY2d 446, 452-453 [1976]; *People v Gonzales*, 74 AD2d 763, 765 [1980]).

The People shall also make available to defendant any prior written or recorded statements of a witness who testifies for the prosecution, whether at a hearing or at trial, consistent with *People v Rosario* (9 NY2d 286 [1961]) and CPL Article 240. In all other

respects, the motion is denied.

C. MOTION TO SUPPRESS STATEMENT EVIDENCE

The People have provided notice, pursuant to CPL 710.30, of two (2) statements made by defendant Roper which they intend to introduce at his trial. According to the People, the first noticed statement was made to police on March 26, 2014, at approximately 2:00 a.m., at or near 32 Downing Drive East,¹ Greenburgh, when defendant Roper reportedly gave his consent to search his residence, advised the officers that he has a gun in his bedroom, and that he knew the location of the gun used in the shooting. The second noticed statement was made on March 26, 2014, at approximately 2:30 a.m., when defendant Roper gave a statement to detectives at the Greenburgh Police Department, which was recorded electronically on DVD-R.

The motion to suppress the two statements is granted to the extent that a hearing, pursuant to *People v Huntley*, 15 NY2d 72 [1965]), shall be held prior to trial to determine whether the statements allegedly made by defendant Roper, which have been noticed by the People pursuant to CPL 710.30(1) (a), were involuntarily made within the meaning of CPL 60.45 (see CPL 710.20 [3]; CPL 710.60 [3] [b]; *People v Weaver*, 49 NY2d 1012 [1980]); and/or were obtained in violation of his Fourth and/or Sixth Amendment rights.

D. MOTION TO SEVER

In his omnibus motion, defendant Roper moves, as does defendant Shand in his omnibus motion, for an order severing his trial from that of his codefendant. In this case, both defendants made video statements of the events of March 24, 2015, and both contain references to their

¹ Without explanation or clarification, the address is alternately referred to as “32 Downing Drive East,” and “32 Downing Drive.” The inconsistency is reflected in this decision and order.

codefendant's participation in the criminal conduct which can not be easily redacted.

It is well settled that:

“[w]here the powerfully incriminating extrajudicial statements of a co-defendant who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial, not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice . . . [elects not to] testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed”

(*Bruton v United States*, 391 US 123, 135-136 [1968]).

It is also well settled that “[s]everance is not required solely because of hostility between the parties, differences in their trial strategies or inconsistencies in their defenses. It must appear that a joint trial necessarily will . . . result in unfair prejudice to the moving party and substantially impair his defense” (*People v Mahboubian*, 74 NY2d 174, 184 [1989]).

Here, it must first be determined at a pretrial *Huntley* hearing whether either or both of the codefendants' statements will be subject to suppression, and if not, whether the People intend to offer such statement or statements at trial in order for this Court to determine the extent to which a defendant's out of court statement may be antagonistic and prejudicial to his codefendant, and require severance. Accordingly, defendant Roper's motion to sever is denied without prejudice to renew upon completion of pretrial hearings.

E. MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant Roper seeks suppression of physical evidence recovered by police claiming that such property was seized unlawfully and in violation of his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution, Article 1 §12 of the New

York State Constitution, *Dunaway v New York* (442 US 200 [1979]) and *Mapp v Ohio* 367 US 643 [1961]). According to defendant, the search of the minivan, conducted pursuant to the terms of the warrant, which Judge Delores Brathwaite of the Justice Court Town of Greenburgh did not issue until after the vehicle had been unlawfully seized by police, was improper and is subject to suppression, as is any evidence recovered pursuant to that search.

Defendant also contends that the purported consent to search the premises at 32 Downing Drive, which belongs to his grandparents, was illegally obtained and subject to suppression. He explains that the police appeared at the house and that, on less than probable cause, immediately placed him in handcuffs, and coerced and threatened to “tear his house apart,” and to “lock up his grandparents” if he did not permit them to search the premises and to lead them to the location of the weapon.

Defendant Roper insists that, because all of the physical evidence was obtained as a result of overreaching police conduct, based on neither probable cause nor reasonable suspicion that he had committed a crime, such evidence must be suppressed (*People v De Bour*, 40 NY2d 210, 223 [1976]). In the alternative, he moves for a hearing, pursuant to *Mapp v Ohio* (367 US 643 [1961]), *Dunaway v New York* (442 US 200 [1979]) and *People v De Bour* (40 NY2d 210 [1976]), to determine the admissibility of such evidence.

The People oppose the motion in its entirety. The People point out that the search of the minivan was pursuant to a valid search warrant, a copy of which was annexed to the Consent Order provided by the People on or about July 9, 2015. They further assert that, to the extent defendant did not voluntarily consent to the search of the 32 Downing Drive premises, he lacks standing to object, as the premises, like the minivan, belong to his grandparents.

The motion to suppress evidence recovered as a result of the search of the minivan, for which the police had obtained a valid search warrant, is denied. However, the balance of defendant Roper's motion to suppress physical evidence is granted to the extent that a combined *Dunaway/Mapp* hearing shall be held prior to trial to determine whether the weapon recovered from the premises at 32 Downing Drive was a direct consequence of unlawful police conduct, as claimed by defendant, in order to determine its admissibility at trial.

F. MOTION FOR SANDOVAL/VENTIMIGLIA HEARING

1. *Sandoval* - Upon the People's consent, defendant's motion is granted solely to the extent that a hearing, pursuant to *People v Sandoval* (34 NY2d 371, 374, 376-377 [1974]), shall be held immediately prior to trial at which time:

a. The People must notify the defendant of all specific instances of the defendant's prior uncharged criminal, vicious or immoral conduct of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the defendant (*see* CPL 240.43); and

b. The defendant must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf (*see People v Malphurs*, 111 AD2d 266 [2d Dept 1985], *lv denied* 66 NY2d 616).

2. *Ventimiglia* - The People's papers appear to indicate that they are currently unaware of any specific prior bad acts of the defendant which they intend to introduce at trial. Accordingly, the request for a hearing, pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]), is denied at this time. In the event that the People subsequently determine that they will seek to introduce such evidence, they shall so notify the Court and defense counsel, and a *Ventimiglia* hearing shall

- be held immediately prior to trial to determine whether or not any evidence of uncharged crimes may be used by the People to prove their case in chief (*id.*). The People are urged to make an appropriate decision in this regard sufficiently in advance of trial to allow any *Ventimiglia* hearing to be consolidated and held with the other hearings herein.

G. MOTION FOR LEAVE TO SUBMIT ADDITIONAL MOTIONS

Defendant's motion to reserve his right to make further pre-trial motions is granted to the extent permitted under CPL 255.20, and is otherwise, denied.

H. MOTION TO CONDUCT PRETRIAL HEARINGS PRIOR TO TRIAL:

Defendant's motion to schedule pre-trial hearings prior to trial is granted to the extent that such hearings will be scheduled at a time that is convenient to the Court, upon due consideration of all of its other cases and obligations.

Dated: White Plains, New York
September 29, 2015



HON. DAVID F. EVERETT
COUNTY COURT JUDGE

HON. JANET DiFIORE
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, New York 10601

LAW OFFICES OF MARK J. FITZMAURICE
The Chester House
15 Chester Avenue
White Plains, New York 10601