People v Shand
2015 NY Slip Op 33019(U)
September 29, 2015
County Court, Westchester County
Docket Number: Indictment No. 15-0591-01
Judge: David F. Everett
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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DEAN SHAND and RICHARD ROPER,

Defendants.

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Omnibus Decision and Order
Indictment No.: 15-0591-01

EVERETT, J.

Defendant Dean Shand stands accused, under Indictment No.15-0591-01, of one count of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]), one count of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), of one count of reckless endangerment in the first degree while aiding, abetting and acting in concert with codefendant Richard Roper (Penal Law § 120.25), and one count of criminal possession of a weapon in the second degree while aiding, abetting and acting in concert with codefendant Richard Roper (Penal Law § 265.03 [3]). By notice of motion dated August 15, 2015, with an accompanying affirmation,[1] 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 drove defendant 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 Shand is charged with knowingly and unlawfully

[1] On August 21, 2015, defense counsel sent modified affirmation pages 31-33, containing inadvertently omitted factual information, and requesting that the modified three pages be substituted for the pages initially submitted.

possessing a loaded and operable 9 mm caliber semiautomatic pistol with intent to use it unlawfully against others when he fired it into a group of individuals. Defendant Shand is also charged with committing this crime after having been previously convicted, on September 16, 2010, of the crime of attempted criminal sale of a controlled substance in the third degree (Penal Law § 110/220.39).

It is further alleged that the 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.

The police recovered the firearm, four shell casings and a bullet recovered form the incident scene. Subsequent ballistics testing confirmed the firearm to be operable, and that the shell casings and bullet were fired from that weapon.

On June 17, 19, and 22, 2015, the People presented evidence of defendant's conduct to the grand jury, which returned a true bill on four counts (Penal Law §§ 265.03 [1] [b], 265.02 [1], 120.25, and 265.03 [3]). The People filed an indictment on June 25, 2015, and defendant was arraigned, under Indictment No. 15-0591-01, on July 1, 2015.

Defendant's omnibus motion is decided as follows.

A. MOTION FOR A BILL OF PARTICULARS AND DEMAND TO PRODUCE

The defendant's motion is granted to the extent provided for in CPL Article 240. If any items set forth in CPL Article 240 have not been provided to the defendant, pursuant to the consent discovery order and bill of particulars provided by the People on July 9, 2015, said items

are to be provided forthwith. The People shall 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.

As to defendant's demand for *Brady* material, should the People, who have a continuing duty 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]), 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]). To any further extent, the application is denied as it seeks material and/or information beyond the scope of discovery (*see People v Colavito*, 87 NY2d 423 [1996]; *Matter of Brown v Grosso*, 285 AD2d 642 [2d Dept 2001], *lv denied* 97 NY2d 605 [2001]); *Matter of Brown v Appleman*, 241 AD2d 279 [2d Dept 1998]; *Matter of Catterson v Jones*, 229 AD2d 435 [2d Dept 1996]; *Matter of Catterson v Rohl*, 202 AD2d 420 [2d Dept 1994], *lv denied* 83 NY2d 755 [1994]).

B. 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 190.25, 190.30, 190.32, 190.50,

190.65, and CPL 210.30, and 210.35. 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 has considered all of defendant's arguments and 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]).

C. 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.

D. MOTION TO SUPPRESS STATEMENT EVIDENCE

The People have provided notice, pursuant to CPL 710.30, of a statement made by defendant Shand which they intend to introduce at his trial. The noticed statement, which was recorded electronically on DVD-R, was made on or about March 25 and 26, 2015, at the Greenburgh Police Department Headquarters, 188 Tarrytown Road, White Plains, New York. According to the People, defendant Shand started giving his statement at approximately 8:30 p.m. on the evening of March 25, 2015, and continued into the early morning hours of March 26, 2015.

The motion to suppress the statement 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 statement allegedly made by the defendant, which has been noticed by the People pursuant to CPL 710.30(1) (a), was 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 was obtained in violation of his Fourth and/or Sixth Amendment rights.

E. MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant seeks suppression of physical evidence recovered by police claiming that such property was seized unlawfully and in violation of defendant's 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, any evidence recovered as a direct result of the warrantless search of apartment No. 3, 134 Morningside Place, Yonkers New York, and the warrantless search of an apartment at 76 North Lawn Avenue, Elmsford, New York, for which proper consent to search was not given, must be suppressed. He also seeks suppression of evidence seized as a result of an illegal arrest of his person, which was based on neither probable cause nor reasonable suspicion that he had committed a crime (*People v De Bour,* 40 NY2d 210, 223 [1976]).

In the alternative, defendant 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.

In opposition, the People, who question defendant's standing to challenge aspects of the search, allege that: (1) probable case to arrest defendant was derived from a number of sources, including defendant's own inculpatory statements made to the police, information provided by defendant's girlfriend/mother of his child (Tia Newton), and through police investigation; (2) Tia Newton voluntarily consented to a search of her home at 76 North Lawn Avenue, Elmsford, New York; (3) defendant Shand voluntarily submitted to a gunshot residue swab; and (4) defendant Shand voluntarily consented to a search of his apartment at 134 Morningside Place in Yonkers.

The People also advise defendant and the Court that, despite having obtained the necessary consent, the police never conducted a search of, or recover property from, the 134 Morningside Place apartment. Accordingly, this Court denies that aspect of the suppression motion as moot.

As to the balance of the motion, "[i]t is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is per se unreasonable subject only to a few specifically established and well-delineated exceptions" (*Schneckloth v Bustamonte*, 412 US 218, 219 [1973] [internal quotation marks and citations omitted]). However, "[i]t is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent" (*id.*), and that to challenge a governmental search, a party must have a "legitimate expectation[] of privacy," and therefore, standing (*United States v Chadwick*, 433 US 1, 7 [1977]; *see also Rakas v Illinois*, 439 US 128 [1979]; *Katz v United States*, 389 US 347 [1967]).

In order for defendant Shand to challenge the police search of the 76 North Lawn Avenue apartment, which is allegedly the home of Tia Newton and the defendant's child, he must establish that, at the time of the search, that he had a reasonable expectation of privacy in the premises searched or items seized (*id.*; *People v Ponder*, 54 NY2d 160, 166 [1981]). The fact that defendant Shand may not live at that residence is not conclusive of the issue. In New York, even overnight guests have been found to have a legitimate expectation of privacy in premises that are their own (*see People v Ortiz*, 83 NY2d 840, 842 [1994]; *People v Rodriguez*, 69 NY2d 159, 163 [1987]). Based on assertions that defendant Shand spends time each day at the 76 North Law Avenue apartment caring for his child while the mother of his child is at work, this

Court cannot find, without the benefit of evidence elicited during a suppression hearing, that he does not have the requisite standing (*id.*).

The parties also dispute whether Tia Newton voluntarily consented to the search of the apartment. Like the issue of standing, evidence regarding Tia Newton's purported consent should also be reviewed by the court presiding over the suppression hearing.

Therefore, in the interest of justice, fairness and in the exercise of this Court's discretion, a *Mapp* hearing shall be held prior to trial to determine, as part of that hearing, whether: (1) defendant Shand has standing to challenge the police search and seizure; (2) Tia Newton voluntarily consented to the search of the 76 North Lawn Avenue apartment, obviating the need for a search warrant; and (3) any of the physical evidence seized by police was recovered as a direct consequence of any unlawful police conduct in order to determine its admissibility at trial.

F. 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.

D. MOTION TO SEVER

In his omnibus motion, defendant Shand moves, as does defendant Roper 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 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]).

As applicable 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 Shand's motion to sever is denied without prejudice to renew upon completion of pretrial hearings.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
September 29, 2015

HON. DAVID F. EVERETT
COUNTY COURT JUDGE

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