

**People v Vargas**

2015 NY Slip Op 33020(U)

October 14, 2015

County Court, Westchester County

Docket Number: Indictment No. 15-0624-02

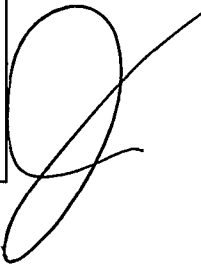
Judge: David F. Everett

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COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

FILED ON  
10/15 2015  
WESTCHESTER  
COUNTY CLERK



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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

BRYANT VARGAS and **CHRISTIAN AGUIRRE**,

Omnibus Decision and Order  
Indictment No. 15-0624-02

Defendants.

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EVERETT, J.

Defendant Christian Aguirre stands accused under Indictment No. 15-0624, of one count of grand larceny in the second degree, while aiding, abetting and acting in concert with codefendant Bryant Vargas (Penal Law § 155.40 [1]); one count of criminal possession of stolen property in the second degree, while aiding, abetting and acting in concert with codefendant Bryant Vargas (Penal Law § 165.52); and one count of criminal mischief in the third degree, while aiding, abetting and acting in concert with codefendant Bryant Vargas (Penal Law § 145.05 [2]). By notice of motion dated September 3, 2015, with an accompanying affirmation and exhibits A and B, defendant moves for omnibus relief. In response, the People submit an affirmation in opposition dated September 24, 2015, with an accompanying memorandum of law.

The allegations, as set forth in the bill of particulars, are that on or about March 8, 2015, at approximately 5:22 p.m., in the vicinity of 23 Hatch Terrace, Dobbs Ferry, New York, defendants Vargas and Aguirre, while aiding, abetting and acting in concert with each other, stole property belonging to victim Marcelo Jimenez having a total value in excess of \$50,000. Among the items stolen from Marcelo Jimenez, accomplished by defendants' removal of such items without permission, are collectible coins worth approximately \$90,000.00; a computer briefcase; an Apple iPad 2, a scanner, a Gemoro Ultratester 2 Diamond Tester, and \$5,000 USC. It is also

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alleged that, on the same date, and at the same time and place, defendants Bryant Vargas and Christian Aguirre, while aiding, abetting and acting in concert with each other, with the intent to damage the property of victim Marcelo Jimenez, did so when they broke the rear passenger window of his minivan in order to steal items inside the vehicle. The damages caused by breaking the window exceed \$250.

According to the People, a witness reported the theft to the Dobbs Ferry Police Department. The witness reported observing a male removing bins from the victim's vehicle and placing them into a white Infiniti vehicle bearing a Connecticut license plate.

On May 14, 2015, the Honorable Susan Cacace issued a warrant authorizing a search of premises in College Point Queens, and a warrant authorizing the search and seizure of a 2008 Nissan Maxima, with vehicle identification number (VIN) 1N4BA41E66C823469. Members of the NYPD, assisted by members of the Dobbs Ferry and Harrison Police Departments, executed the warrants, and among the objects seized were several items which had been reported stolen in connection with the Dobbs Ferry larceny.

On or about May 14, 2015, a felony complaint was filed in Dobbs Ferry Village Court and a warrant was issued for defendant Aguirre's arrest. According to the bill of particulars contained in the consent discovery provided by the People on June 25, 2015, members of the Dobbs Ferry Police Department placed defendant Aguirre under arrest on May 20, 2015, at approximately 2:00 p.m., at the Queens County Criminal Court, Queens, New York.<sup>1</sup>

The People presented evidence of defendants Bryant Vargas and Christian Aguirre's

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<sup>1</sup> The People's affidavit in opposition states that defendant Aguirre was placed under arrest on June 8, 2015 at 5:17 p.m.

criminal conduct, and on or about June 16, 2015, a grand jury voted a true bill, charging each with three counts of criminal conduct in violation of Penal Law §§ 155.40 (1), 165.52, and 145.05 (2). The People filed a sealed indictment, and on June 25, 2015, Christian Aguirre was arraigned under indictment 15-0624-02.

The 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 190.25 (6), CPL 200.30 (1), 200.50 (3), (6); and CPL 210.20, 210.25, 210.30 (3) 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 [1<sup>st</sup> 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 A BILL OF PARTICULARS AND DEMAND FOR DISCOVERY

Defendant Aguirre's motion for a bill of particulars is granted only to the extent that the People, who provided a bill of particulars as part of the consent discovery, are directed to clarify, forthwith, the date and time when defendant Aguirre was placed under arrest. The bill of particulars identifies the date as "5/20/15," and the time as "Approx. 2:00 p.m.," while the affirmation in opposition to defendant Aguirre's omnibus motion identifies the date as "June 8, 2015," and the time as "approximately 5:17 p.m." To any further extent, defendant Aguirre's motion for a bill of particulars is denied as the one already provided by the People on or about June 25, 2015, adequately informs him of the substance of his alleged conduct and in all respects complies with CPL 200.95.

Defendant's motion for discovery 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 in the instant matter, said items are to be provided forthwith.

Should the People, who have a continuing duty to disclose "evidence favorable to an accused" prior to trial (*see Brady v Maryland*, 373 US 83 [1963] and *Giglio v United States*, 405 US 150 [1972]), become aware of any material 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 the defendant. 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]). The People shall also make available to defendant any prior written or recorded statements of a witness who testifies for the prosecution, consistent with *People v Rosario* (9 NY2d 286 [1961]) and CPL Article 240.

C. MOTION TO SUPPRESS PHYSICAL EVIDENCE

Defendant Aguirre's motion for suppression, or in the alternative, for a hearing, pursuant to *Mapp v Ohio* (367 US 643 [1961]), to determine whether there was sufficient probable cause for his arrest and for the seizure of evidence, is denied. Not only were search warrants issued authorizing the use of GPS tracking devices and the search of certain premises and vehicles, but defendant fails to submit sworn allegations of fact in support of his motion (*see People v Mendoza*, 82 NY2d 415, 426 [1993]). Furthermore, a movant's failure to submit sworn allegations of fact can only be excused under circumstances in which a movant lacks access to the necessary information, and here, defendant Aguirre has not made that showing (*id.*).

D. MOTION TO SUPPRESS IDENTIFICATION EVIDENCE

Defendant Aguirre's motion is granted to the extent that a hearing shall be held prior to trial to determine whether or not any of the five identification procedures noticed by the People, pursuant to CPL 710.30, were unduly suggestive or merely confirmatory (*see United States v Wade*, 388 US 218 [1967]; *People v Wharton*, 74 NY2d 921 [1989]). If, after consideration of the evidence presented during the hearing the court finds that any of the procedures were not confirmatory, then the hearing will be expanded to determine the propriety of such identification. Specifically, the court shall determine whether any of the identification procedures utilized were

so improperly suggestive as to taint any in-court identification. In the event one or more of the noticed identification procedures are found to be unduly suggestive, the Court shall go on to consider whether the People have proved, by clear and convincing evidence, that an independent source exists for such witness's proposed in-court identification.

E. SANDOVAL/VENTIMIGLIA HEARING

1. *Sandoval* - 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 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.

F. MOTION FOR LEAVE TO SUBMIT FURTHER MOTIONS

Defendant's application for leave to submit future motions is granted to the extent consistent with this Court's decision on the motion to sever, and to the extent provided under CPL 255.20 (3).

G. MOTION TO SUPPRESS STATEMENT EVIDENCE

Defendant Aguirre's motion to suppress statement evidence is denied, as the People have not provided notice, pursuant to CPL 710.30, of their intent to offer statement evidence at trial, and their affirmation in opposition fails to indicate otherwise.

H. MOTION TO CONTROVERT/SUPPRESS EVIDENCE OBTAINED FROM WARRANTS/AND FOR A HEARING ON THE VALIDITY OF THE SEARCH WARRANTS

Defendant Aguirre moves to controvert the search warrants obtained by law enforcement and to suppress any evidence seized pursuant to such warrants on the ground that the factual allegations contained in the supporting affidavits do not establish probable cause. The People disagree.

A total of 10 search warrants were issued between March 16, 2015 and May 20, 2015, those being: (1) a warrant dated March 16, 2015, authorizing the use of GPS tracking devices on three separate automobiles; (2) four warrants dated April 14, 2015, authorizing the use of GPS tracking devices on four separate automobiles; (3) two warrants dated April 14, 2015, directing T-Mobile/Metro PCS disclose certain information and records pertaining to two different cellular telephone assigned numbers for the period of March 1, 2015 through April 8, 2015; (3) one

warrant dated May 14, 2015, authorizing the search and seizure of a certain automobile; (4) one warrant dated May 14, 2015, authorizing the search of a particular apartment in Queens County, New York; and (5) one warrant dated May 20, 2015, directing T-Mobile/Metro PCS disclose certain information and records pertaining to two different cellular telephone assigned numbers for the period of March 1, 2015 through May 15, 2015.

In opposition, the People insist that the supporting affidavits establish the requisite probable cause for the issuance of each of the warrants, and that defendant's conclusory assertions are insufficient to trigger a hearing. The People assert that, following an in camera inspection of the supporting affidavits, they provided redacted copies to defendant. In that the copies defendant received contain almost no redactions, his lack of detailed allegations in support of his motion is indicative of fact that the warrant affidavits establish the requisite probable cause.

It is well settled that:

“[t]here is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained”

*(Franks v Delaware, 438 US 154, 171[1978]).*

An examination of the motion papers reveals that defendant Aguirre has not made “a substantial preliminary showing that a false statement knowing and intentionally, or with reckless

disregard of the truth, was included by the affiant[s] in the warrant[s], and . . . [that such] statement [was] necessary to the finding of probable cause” (*id.* at 155). His vague and conclusory assertions coupled with his unsupported accusation that the People relied on lies and innuendos in order to obtain the warrants, fall short of the allegations required under *Franks v Delaware*. Defendant fails to show that a false statement knowingly and intentionally or with reckless disregard for the truth was included by any of the affiants, or that the such information was essential to the finding of probable cause.

Also unavailing is defendant Aguirre’s claim that, if his motion papers lack necessary information, such deficiency is the result of limited disclosure by the People at the time of the preparation of the motion. When this Court carefully reviewed, *in camera*, the warrant affidavits, it examined, among other things, the allegations supporting the issuing judge’s finding of probable cause, and then directed that copies be provided to defendants in a manner calculated to ensure adequate disclosure of relevant information prior to the submission of defense motions. The People provided copies of the redacted warrant affidavits to defendant Aguirre pursuant to the Court approved motion schedule. The motion schedule was specifically set in a manner calculated to provide defendant Aguirre and defendant Vargas with adequate time to review the warrant affidavits, as well as the other disclosure, prior to the submission of their respective omnibus motions. Accordingly, there is no merit to defendant Aguirre’s suggestion that a lack of adequate disclosure by the People hindered his ability to include relevant information in his motion, and therefore, his motion to controvert is in all respects denied.

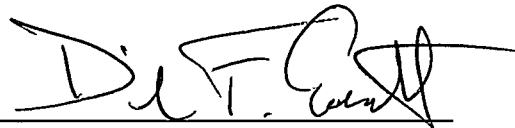
#### I. MOTION TO CONDUCT PRETRIAL HEARINGS PRIOR TO TRIAL

Defendant’s motion to schedule pretrial 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.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
October 14, 2015

A handwritten signature in black ink, appearing to read 'D. F. Everett', written over a horizontal line.

HON. DAVID F. EVERETT, J.C.C.

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