

**People v Cyrille**

2015 NY Slip Op 33023(U)

November 23, 2015

County Court, Westchester County

Docket Number: Indictment No. 15-0854

Judge: David F. Everett

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COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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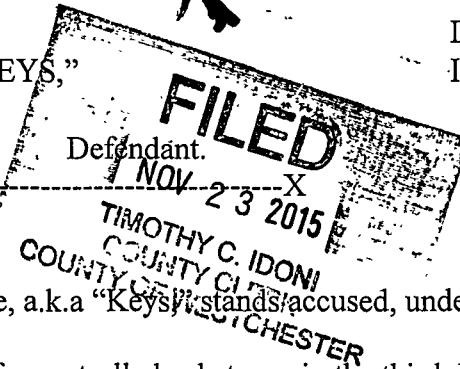
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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

KERVIN CYRILLE, A/K/A "KEYS,"

Decision and Order  
Indictment No. 15-0854

-----X  
EVERETT, J.



Defendant Kervin Cyrille, a.k.a "Keys" stands accused, under Indictment No. 15-0854, of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), and two counts of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03). By notice of motion dated October 22, 2015, with accompanying affirmation and memorandum of law, the defendant moves for omnibus relief. In response, the People have submitted an affirmation in opposition dated November 9, 2015, with an accompanying memorandum of law.

The People's allegations, as set forth in their bill of particulars, are as follows:

As to counts one, three and five, the People allege that, on March 26, 2015, at approximately 2:23 p.m., at the corner, or in the vicinity, of South Columbus Avenue and East Sanford Boulevard in Mount Vernon, New York, defendant entered into a vehicle operated by an undercover police officer. After a brief conversation, defendant handed the undercover officer three Ziploc baggies containing a substance alleged to be cocaine in exchange for \$60 US

currency. Subsequent laboratory testing confirmed the presence of cocaine in the Ziploc baggies recovered from defendant.

As to counts two, four and six, the People allege that, on April 2, 2015, at approximately 4:31 p.m., at the corner, or in the vicinity, of South Columbus Avenue and East Sanford Boulevard in Mount Vernon, New York, defendant entered into a vehicle operated by an undercover police officer and handed the officer two Ziploc baggies containing a substance alleged to be cocaine in exchange for \$40 US currency. Subsequent laboratory testing confirmed the presence of cocaine in the Ziploc baggies recovered from defendant.

The bill of particulars states that an arrest warrant was issued but does not provide information as to the approximate date, time and place of defendant's arrest.

On August 4, 2015, the People presented evidence of defendant's crimes to a grand jury, which returned a true bill. On September 2, 2015, the People filed a sealed indictment and the Honorable Barbara G. Zambelli issued a warrant for defendant's arrest. On September 3, 2015, the indictment was unsealed and defendant was arraigned under Indictment No. 15-0854.

Defendant's omnibus motion is resolved as follows:

A. MOTION FOR DISCOVERY AND INSPECTION

The defendant's motion for discovery and inspection is granted to the extent provided for in CPL Article 240. On or about September 24, 2015, the People provided defendant with consent discovery, including a copy of the arrest warrant, the forensic lab reports, the photograph used as grand jury exhibit no. 1, and a bill of particulars.

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 favorable or 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. 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 are also directed to 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.

B. MOTION FOR 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 together with the other pretrial hearings

C. MOTION TO STRIKE PREJUDICIAL LANGUAGE

Defendant's motion to strike the words "against the peace and dignity of the People of the State of New York," which are contained in the indictment on that basis that such language is prejudicial, is denied. These words merely identify defendant's acts as public, rather than private wrongs, and are therefore, not subject to being stricken on grounds of prejudice (*see People v Gill*, 164 AD2d 867, 876 [2d Dept 1990]).

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

Defendant moves pursuant to CPL 60.20, CPL 190.20 (2) (b) (6), 190.25, 190.25 (b), 190.30 (1), CPL 200.50 (7) (a), and CPL 210.20 (1) (a) and 210.30, to dismiss the indictment, or counts thereof, on the grounds that the evidence before the grand jury was legally insufficient, was improperly presented, and that the grand jury proceeding was defective within the meaning

of CPL 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, defendant's motion to dismiss or reduce for lack of sufficient evidence is denied.

With respect to defendant's claim that the grand jury proceeding was defective within the meaning of CPL 210.35 and CPL 210.35 (5), 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 release of the grand jury minutes or certain portions thereof to the parties is 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, defendant's motion for release thereof is denied (*see People v Robinson*, 98 NY2d 755 [2002]).

E. MOTION TO STRIKE ALIBI DEMAND AND BILL OF PARTICULARS OF ALIBI

This motion is denied. It is well settled that an alibi notice statute is valid so long as it provides for reciprocal disclosure (*see Williams v Florida*, 399 US 78 [1970]; *People v Copicotto*, 50 NY2d 222 [1980]). Contrary to the defendant's contentions, New York's notice statute, set forth in CPL 250.20, is in full compliance with constitutional requirements as it provides for reciprocal disclosure of alibi rebuttal evidence (*see People v Rodriguez*, 3 NY3d 462, 467 [2004]).

F. MOTION TO STRIKE IDENTIFICATION NOTICE OR IN THE ALTERNATIVE TO SUPPRESS IDENTIFICATION EVIDENCE

The People have noticed two identification procedures of defendant, pursuant to CPL 710.30, to wit: (1) on March 26, 2015, at approximately 2:41 p.m., in the City of Mount Vernon, New York, when an undercover police officer identified defendant from a photograph; and (2) on August 4, 2015, at approximately 11:00 a.m., when the undercover police officer appearing

before a grand jury in White Plains, New York, identified defendant from the same photograph. The language in the notice served by the People adequately informs defendant of the time, place and manner in which two identifications of defendant were made, and that the prosecution intends to use such identification evidence at trial (CPL 710.30 [1]; *see People v White*, 73 NY2d 468 [1989]). Accordingly, defendant's motion to strike the identification notice is denied.

However, that aspect of defendant's motion that seeks suppression of the noticed identification evidence is granted to the extent that a hearing shall be held prior to trial to determine whether or not the identification procedures 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 the procedures were not confirmatory, then the hearing will be expanded to determine the propriety of the identification. Specifically, the court shall determine whether the identifications were so improperly suggestive as to taint any in-court identification. In the event the 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.

G. MOTION FOR A BILL OF PARTICULARS

The motion is granted in part, and denied in part. A review of the bill of particulars set forth in the consent discovery order provided to the defendant on or about September 24, 2015, fails to specify the approximate date, time and location of defendant's arrest (*see bill of particulars*, ¶ 21). Defendant is entitled to this information. Accordingly, the People are directed to supplement their bill of particulars to include information as to the approximate date, time and

location of defendant's arrest within seven (7) days of receipt of this order.

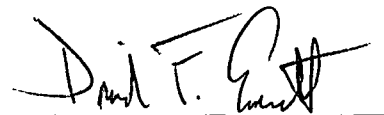
In all other respects, the bill of particulars adequately complies with CPL 200.95, and the balance of defendant's motion for a bill of particulars is denied.

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 its other cases and obligations.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
November 23, 2015



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HON. DAVID F. EVERETT  
COUNTY COURT JUDGE

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