

People v Souza

2015 NY Slip Op 33026(U)

December 11, 2015

County Court, Westchester County

Docket Number: Indictment No. 15-0858

Judge: David F. Everett

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WESTCHESTER
COUNTY CLERK

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

FABIANO SOUZA,

DEC 11 2015
Defendant.

Decision and Order
Indictment No. 15-0858

-----X
EVERETT, J.:

COUNTY OF WESTCHESTER

Defendant Fabian Souza stands accused, under indictment No. 15-0858, 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 and accompanying affirmation in support dated November 9, 2015, defendant moves for omnibus relief. In response, the People have submitted an affirmation in opposition dated November 16, 2015, with an accompanying memorandum of law.

Without indicating which counts in the indictment they are attendant to, the People's allegations, as set forth in their bill of particulars, are as follows:

The People allege that, on March 4, 2015, at approximately 8:52 p.m., near 422 Gramatan Avenue, Mount Vernon, New York, defendant possessed and sold 2 ziploc bags containing a substance alleged to be cocaine for \$80 United States currency. Subsequent laboratory testing confirmed the presence of cocaine in the chunky white substance recovered from defendant.

The People allege that, on March 6, 2015, at approximately 8:11 p.m., near 77 W. Lincoln Avenue, Mount Vernon, New York, defendant possessed and sold 2 ziploc bags for \$80 United States currency. Subsequent laboratory testing confirmed the presence of cocaine.

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 6, 2015, the People presented evidence of defendant's crimes to a grand jury, which returned a true bill the same day. On September 2, 2015, the People filed an indictment and the Honorable Barbara G. Zambelli issued a warrant for defendant's arrest. On September 9, 2015, defendant was arraigned under Indictment No. 15-0855.

Defendant's omnibus motion is resolved as follows:

A. MOTION FOR A BILL OF PARTICULARS

On October 1, 2015, the People provided defendant with a consent discovery order, which contains a bill of particulars with copies of two laboratory reports, five CPL 710.30 notices, defendant's photograph and his criminal history record.

CPL 200.95 (1) (a) requires that a bill of particulars include "items of factual information which are not recited in the indictment and which pertain to the offense[s] charged and including the substance of each defendant's conduct encompassed by the charge which the People intend to prove at trial on their direct case." The bill of particulars provided by the People, with respect to the instant six count indictment, merely tracks the language of the Penal Law, failing to fulfill their obligation to provide adequate information regarding the particulars of defendant's alleged criminal conduct on two separate dates, and the particulars regarding the approximate date, time and place of defendant's arrest (*People v Davis*, 41 NY2d 678, 679-680 [1977]). Additionally, while the bill of particulars references an arrest warrant, a copy of the arrest warrant is not annexed to the consent discovery provided on October 1, 2015. Accordingly, the People are directed to provide defendant with a copy of the arrest warrant and a bill of particulars that

adequately informs defendant as to the time and place of his arrest, in addition to a description of the alleged transactions which constitute the substance of criminal conduct for which he is charged. This includes, but is not limited to, information as to whether either or both of the alleged sales¹ were made to an undercover police officer or to some other individual not affiliated with law enforcement,² and which, in all respects, complies with CPL 200.95, within seven (7) days of receipt of this order.

B. MOTION FOR DISCOVERY AND INSPECTION/BRADY MATERIAL

The defendant's motion for discovery and inspection 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 in the instant matter, said items are to be provided forthwith. The People are directed to 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.

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

¹ The first sentence of the bill of particulars pertaining to the March 6, 2015 possession and sale charges is missing a word after the word "containing."

² Disclosure of the name(s) of such individual(s) is not required at this juncture.

[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]).

C. MOTION TO PRECLUDE STATEMENT EVIDENCE

Defendant's motion to preclude from evidence any statements not properly noticed, pursuant to CPL 710.30, is denied without prejudice should the People seek to introduce such evidence at time of trial.

D. MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF AN UNLAWFUL ARREST

Defendant's motion to suppress physical evidence recovered as a result of his arrest is denied without a hearing. Not only was he arrested pursuant to a valid arrest warrant, but he fails to specify what physical evidence he seeks to have the Court suppress, and his boilerplate challenges to the legality of that arrest are inadequate (*see People v Mendoza*, 82 NY2d 415, 426-428 [1993]; CPL 710.60 [3]).

E. MOTION TO SUPPRESS IDENTIFICATION EVIDENCE

The People have noticed five identification procedures of the defendant pursuant to CPL 710.30, to wit: (1) on March 4, 2015, at approximately 10:52 p.m., by a witness who identified the defendant in person near the scene; (2) on March 6, 2015, prior to 9:45 p.m., by a witness who identified defendant from a photograph at the Mount Vernon Police Department; (3) on

March 6, 2015, at approximately 9:45 p.m., by a witness who identified defendant from a photograph at the Mount Vernon Police Department; (4) on March 6, 2015, at approximately 10:52 p.m., by a witness who identified defendant near the scene; and (5) on August 6, 2015, at approximately 11:30 a.m., by a witness who identified defendant from a photograph in the grand jury.

With respect to the noticed procedures conducted on March 4, and March 6, 2015, a hearing shall be held prior to trial to determine whether any of 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 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 one or more of the identifications were so improperly suggestive as to taint any in-court identification. In the event one or more of 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.

With respect to the viewing of the photograph by a witness at the grand jury, a review of the minutes reveals that the witness merely confirmed that the photograph shown to him/her by the Assistant District Attorney was that of defendant. It was not moved into evidence or displayed to the grand jury. Therefore, the testimony did not constitute an identification as intended under CPL 710.30, notwithstanding notice thereof by the People. Accordingly, and

defendant's motion with respect to this viewing of the photograph at the grand jury is denied (*see People v Twitty*, 233 AD2d 744, 745 [2d Dept 1996], *appeal denied* 88 NY2d 943 [1996]).

F. 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.

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

Defendant moves pursuant to CPL 190.25 (6), and CPL 210.30, 210.30 (2), 210.30 (3), and 210.35, for an order dismissing the indictment, or counts thereof, on the grounds that the evidence before the grand jury was legally insufficient, that it was improperly presented, and that the integrity of the grand jury defective. 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, to the extent defendant moves for an order dismissing or reducing the indictment for lack of sufficient evidence, the motion is denied.

With respect to defendants' claim that the grand jury proceeding was defective within the meaning of CPL 190.25, 210.20, and 210.35 (5), a review of the minutes supports findings 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, and that the requisite number of grand jurors who voted to indict, had heard all the "essential and critical evidence" (*see People v Collier*, 72 NY2d 298, 300 [1988]; *People v Brinkman*, 309 NY 975, 976 [1956]; *People v Julius*, 300 AD2d 167 [1st Dept 2002], *lv denied* 99 NY2d 655 [2003]). The minutes also reflect 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 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, defendant's motion for release thereof is denied (*see People v Robinson*, 98 NY2d 755 [2002]).

H. MOTION FOR LEAVE TO SUBMIT ADDITIONAL MOTIONS

Defendant's application for leave to submit future motions is granted to the extent provided in CPL 255.20 (3), and is otherwise denied.


I. MOTION TO CONDUCT HEARINGS PRIOR TO TRIAL

Defendant's motion to schedule pretrial hearings prior to the commencement of 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
December 11, 2015



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

TO:

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

ROGER KRAMINITZ, ESQ.
Attorney at Law
17 Hillside Avenue
Croton on Hudson, New York 10520