

People v Zangari

2016 NY Slip Op 32946(U)

October 21, 2016

Supreme Court, Westchester County

Docket Number: 16-0702

Judge: Susan M. Capeci

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
AND
ENTERED
ON 10-21-2016
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

ELIZABETH ZANGARI,
Defendant.

-----X

CAPECI, J.,

DECISION & ORDER

Indictment No: 16-0702

FILED 19

OCT 21 2016

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The defendant, having been charged by indictment with six counts of criminal contempt in the first degree (P.L. 215.51 (C)), now makes this motion seeking omnibus relief.

The defendant has submitted an affirmation and memorandum of law from her attorney in support of his omnibus motion, in which she seeks the following relief: 1) motion for discovery and disclosure of Brady material; 2) motion to dismiss the indictment as facially insufficient; 3) inspection of the grand jury minutes by the Court and the defendant, and thereafter, for the dismissal of the indictment and/or reduction of the charges contained therein; 4) a Sandoval/Ventimiglia hearing; 5) motion to suppress statements made by the defendant as set forth in the CPL 710.30 notice, or a Huntley hearing; 6) motion for severance of each of the counts from the others for trial.

The People have submitted an affirmation in opposition in which they consent to a Sandoval hearing, to a Huntley hearing, and to an in camera inspection of the grand jury minutes by the Court to assess legal sufficiency. The People otherwise oppose the motion. The Court now finds as follows.

1. MOTION FOR DISCOVERY AND INSPECTION/ BRADY

The defendant has been provided with consent discovery in this case, and the People have filed an amended bill of particulars as of October 5, 2016. Therefore, the defendant's demand for disclosure of items or information to which she is entitled pursuant to the provisions of CPL 240.20(1) (a) through (k) is granted upon the People's consent. The application is otherwise denied as it seeks items or information which are beyond the scope of discovery and the defendant has failed to show that such items are material to the preparation of her defense (CPL 240.40 (1) (a); People v Bianco, 169 Misc2d 127 (Crim. Ct, Kings Co. 1996)).

The defendant's demand for the production of Rosario material at this time is premature (see CPL 240.45(1); Catterson v Rohl, 202 AD2d 420 (2d Dept 1994)). Further, there is no statutory right to disclosure of all police reports concerning an ongoing investigation (Brown v Grosso, 285 AD2d 642 (2d Dept 2001); see also Pirro v LaCava, 230 AD2d 909 (2d Dept 1996)).

The People have acknowledged their continuing obligation to provide exculpatory information to the defendant (Brady v Maryland, 373 US 83), and are directed to disclose any such information to the defense.

2. MOTION TO DISMISS THE INDICTMENT AS FACIALLY INSUFFICIENT

The defendant contends that the indictment is facially insufficient to charge her with each of the 6 counts of criminal contempt in the first degree, because the special information that was filed to elevate the charge from a criminal contempt second degree to a criminal contempt first degree, failed to establish that the predicate charge involved

the violation of a “stay away” order of protection. The defendant argues that both the present offenses and the predicate offense must involve the violation of an order of protection requiring the defendant to stay away from the person or persons on whose behalf the order was issued. She argues that it is not sufficient to allege that the defendant violated an order of protection by any other means, such as by failing to stay away from the protected parties’ home, school or place of employment, or by other means of contact such as telephone, to establish the offense of criminal contempt in the first degree as charged under P.L. 215.51 (c).

The People respond that the amended bill of particulars makes clear that the present offenses involve defendant’s violation of the stay away order of protection by her failure to stay away from the person of the protected party. They further contend that there is no requirement that the predicate offense have involved the defendant failing to stay away from the person of the protected party, but only that he or she violated a prior order of protection of the types specified in P.L. 215.51 (c) within the last 5 years.

A person is guilty of criminal contempt in the first degree when:

“c) he or she commits the crime of criminal contempt in the second degree as defined in subdivision three of section 215.50 of this article by violating that part of a duly served order of protection, or such order of which the defendant has actual knowledge because he or she was present in court when such order was issued, under sections two hundred forty and two hundred fifty-two of the domestic relations law, articles four, five, six and eight of the family court act and section 530.12 of the criminal procedure law, or an order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, which requires the respondent or defendant to stay away from the person or persons on whose behalf the order was issued, and where the defendant has been previously convicted of the crime of aggravated criminal contempt or criminal contempt in the first or second degree for violating an order of protection as described herein within the preceding five years...” (P.L. § 215.51 (c))

[emphasis added]).

To the extent the defendant contends the indictment is facially insufficient to charge her with the crimes contained in it, her motion is denied. The indictment at issue uses the statutory language to charge the defendant with the elements of P.L. 215.51 (c) as to each of the offenses. The amended bill of particulars also makes clear that the protected party was present at the time the defendant is alleged to have violated the order of protection in each count, thereby establishing the element that the defendant violated an order of protection requiring her to “stay away from the person or persons” on whose behalf the order was issued (see People v Dewall, 15 AD3d 498 (2d Dept 2005)[protected party must be present at time of violation of order of protection under P.L. 215.51(c)]).

The issue then becomes whether the predicate offense of criminal contempt in the second degree as set forth in the special information was required to have involved defendant’s violation of an order to “stay away from the person or persons” on whose behalf the order was issued. The special information filed in this case indicated that the defendant was previously convicted, on September 8, 2015, of the crime of criminal contempt in the second degree (P.L. 215.50 (3)) for violating an order of protection issued under section 530.12 of the Criminal Procedure Law.

The Appellate Division, First Department in People v Taylor (142 AD3d 465 (1st Dept 2016), stated that “it is undisputed that Penal Law §215.51 (c) requires proof that the prior conviction, like the instant offenses charged in the indictment, involved a violation of a stay-away order...” (People v Taylor, *supra*); see also People v Swartout, 7 Misc3d 549 (Sup. Ct, Tompkins Co., 2005) [Under P.L. 215.51(c), the defendant’s

conduct in both the predicate offense and the instant offense must have involved a failure to stay away from the protected party)).

However, the court in People v Taylor (supra at 466) also noted that the element that defendant violated a stay away order was satisfied by reference in both the indictment and special information to the defendant's prior conviction of criminal contempt in the second degree under P.L. 215.50 (3), as a result of his violation of an order of protection issued under CPL 530.12, and by reference to his having violated P.L. 215.51 (c). By reference to these statutes, the necessary elements of the crime of criminal contempt in the first degree are thereby incorporated into the pleadings (Id.; People v Ray, 71 NY2d 849, 850 (1988); People v Cohen, 52 NY2d 584, 586 (1981)).

This is sufficient to comply with CPL 200.50 and to provide the defendant with fair notice of the accusations against her (People v Iannone, 45 NY2d 589 (1978); People ex rel Best v Senkowski, 200 AD2d 808 (3d Dept 1994)). The motion to dismiss the indictment as facially insufficient is therefore denied.

3. MOTION TO INSPECT/DISMISS/REDUCE

This application is granted to the extent that the Court has conducted an in camera inspection of the minutes of the Grand Jury proceedings. Upon review of the evidence presented, this Court finds that all counts of the indictment were supported by sufficient evidence and that the instructions given were appropriate. There was no infirmity which would warrant a dismissal of the instant indictment. Accordingly, that branch of the motion which seeks dismissal of the indictment is denied. The Court further finds no facts which would warrant releasing any portion of the minutes of the grand jury proceedings to the defense (CPL 210.30 (3)). The Court also finds no basis

for dismissal of the indictment pursuant to CPL 210.20.

4. MOTION FOR A SANDOVAL/VENTIMIGLIA HEARING

The defendant's motion for a Ventimiglia hearing is denied at this time since the People do not represent that they are seeking to introduce any of defendant's prior bad acts on their direct case. The defendant's motion may be renewed in the event the People later seek to offer such evidence at trial. The motion for a Sandoval hearing is granted and shall be renewed before the trial Judge.

5. MOTION FOR SUPPRESSION OF STATEMENTS

The People have served the defendant with two CPL 710.30 notices with respect to oral statements alleged to have been made by her to police.

The defendant's motion for suppression of the above statements as set forth in the CPL 710.30 notices is granted to the extent that the Court will conduct a Huntley hearing prior to trial concerning the noticed statements allegedly made by the defendant for the purpose of determining whether Miranda warnings were necessary and, if so, whether she was so advised and made a knowing, intelligent and voluntary waiver thereof, or whether the statements were otherwise involuntarily made within the meaning of CPL 60.45.

The defendant made no factual allegations in her motion with respect to the illegality of her arrest. In the absence thereof, no hearing is warranted on this ground (see People v Mendoza, 82 NY2d 415 (1993); CPL 710.60[3][b]).

6. MOTION TO SEVER/ SEPARATE TRIALS

The defendant seeks to sever each of the 6 counts of the indictment charging her with criminal contempt in the first degree from each other, arguing that it is

unnecessarily prejudicial to her for these offenses to be tried together, and that they occurred on separate dates.

The People oppose the motion to sever, arguing that these offenses are properly joinable in a single indictment pursuant to CPL 200.20 (2)(b) because they involve the same victim, and the commission of each offense would be directly admissible as to each of the other counts as necessary background information of the defendant's and victim's relationship, and to establish motive, common scheme or plan and intent. They further contend the offenses are joinable under CPL 200.20 (2)(c) as the same or similar in law. They further argue the defendant has shown no basis for a discretionary severance of the charges.

Two offenses are "joinable" when, they are based upon the same act or upon the same criminal transaction (see CPL 200.20 (a)), or even though based upon different criminal transactions, "such offenses or the criminal transactions underlying them, are of such nature that either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first" (CPL 200.20(2)(b); see also CPL 100.45(1) [applying CPL 200.20 to misdemeanor informations]).

Two offenses are also "joinable" even though based upon different criminal transactions, and even though not joinable pursuant to CPL 200.20(2)(b), when such offenses are defined by the same or similar statutory provisions and consequently are "the same or similar in law" (CPL 200.20 (2)(c)).


The defendant's motion to sever each of the 6 counts of criminal contempt in the first degree from each other and to hold separate trials is denied.

Evidence of each of these counts of criminal contempt in the first would be admissible upon the trial of the other counts to demonstrate the nature of the parties' relationship, absence of mistake, and to show the intentional violation of the order of protection (see People v Harvey, 5 Misc2d 751 (Crim. Ct, NY Co. 2004); see also People v McCloud, 121 AD3d 1286, 1289 (3d Dept 2014); People v Lee, 275 AD2d 995 (4th Dept 2000)). Each of these incidents involved the same victim, and would require his testimony as to many similar facts and overlapping evidence (see People v Scott, 276 AD2d 380 (2d Dept 2000); People v Paraschiv, 169 AD2d 739 (2d Dept 1991)).

In addition, the 6 incidents set forth in the indictment each charge the defendant with criminal contempt in the first degree pursuant to P.L. 215.51(c), and thus each of the charges are the same or similar in law and are joinable on that basis (see People v Edwards, 160 AD2d 720 (2d Dept 1990)). The defendant's motion for severance is therefore denied.

This decision constitutes the Order of the Court.

Dated: White Plains, New York
October 21, 2016



HON. SUSAN M. CAPECI
A.J.S.C.

To:
Hon. James A. McCarty
Acting District Attorney, Westchester County
111 Dr. Martin Luther King Jr. Blvd.
White Plains, New York 10601
Attn: Wayne A. Williams, Esq.
Assistant District Attorney

Legal Aid Society of Westchester County
Attorneys for Defendant
150 Grand Street, Suite 100
White Plains, New York 10601
Att: Meghan C. Stelzer, Esq.