

People v Rodriguez

2016 NY Slip Op 33239(U)

May 17, 2016

County Court, Westchester County

Docket Number: Indictment No. 15-0707-01

Judge: Barbara G. Zambelli

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 _____ 20__
WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

EDGAR RODRIGUEZ a/k/a HECTOR
HERNANDEZ and AHMAD SAIFIY
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendants.

DECISION & ORDER

Indictment No.: 15-0707-01

-----X
ZAMBELLI, J.

Defendant Edgar Rodriguez, a.k.a., Hector Hernandez has been indicted for the crimes of Burglary in the Second Degree (Penal Law 140.25[2])(six counts); Criminal Possession of Stolen Property in the Third Degree (Penal Law 165.50) (one count); Grand Larceny in the Third Degree (Penal Law 155.35 [1]) (one count); Criminal Possession of Stolen Property in the Fifth Degree (Penal Law 165.40) (six counts); Grand Larceny in the Fourth Degree (Penal Law 155.30[2]) (one count); Attempted Burglary in the Second Degree (Penal Law 110/140.25[2]) (one count); Criminal Impersonation in the Second Degree (Penal Law 190.26 [1]) (one count); and Possession of Burglar=s Tools (Penal Law 140.35) (one count) allegedly committed on or about April 13, 17, 20, 22 and 24 in the County of Westchester.

Defendant initially moved by notice of motion with supporting affirmation and memorandum of law for omnibus relief. The People's response consisted of an affirmation in opposition and a memorandum of law. Thereafter, defendant submitted an additional Notice of Motion to controvert the search warrants dated April 26, 2016, to

which the People responded by an Affidavit in Opposition dated May 3, 2016. Upon consideration of these papers, as well as review of the grand jury minutes and exhibits and the consent discovery order entered in this case, the motion is disposed of as follows:

1. 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, Count 17 (for the charge of Criminal Impersonation in the Second Degree (Penal Law 190.26 [1])) is dismissed with leave to the People to represent it, as the evidence is legally insufficient to establish that defendant Rodriguez impersonated a real person (People v. Sadiq, 236 A.D.2d 638; People v. Alba, 43 Misc. 3d 878).

There was no other infirmity which would warrant a dismissal of the remaining causes of the 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 (see, CPL §210.30[3]).

2. MOTION FOR BILL OF PARTICULARS

This motion is denied. The bill of particulars which was served pursuant to and simultaneously with the consent order was sufficient to adequately inform the defendant Rodriguez of the substance of his alleged conduct and to enable him to prepare and conduct a defense (People v. Byrnes, 126 A.D.2d 735, 736; see also, People v. Watt, 84 N.Y.2d 948; People v. Gargano, 222 A.D.2d 694; People v. Lopez, 175 A.D.2d 267). The information requested by defendant need not be disclosed (People v. Sanchez, 278 A.D.2d 889).

3. MOTION FOR DISCOVERY AND INSPECTION/BRADY MATERIAL

This application is granted to the limited extent of ordering that the People are to provide the defendant Rodriguez with materials and information, the disclosure of which is required pursuant to the provisions of CPL §240.44 and §240.45. As to the defendant's demand for exculpatory material, the People have indicated their awareness of their continuing obligation to disclose any such material immediately upon its discovery. Where a question exists as to whether a particular item should be disclosed, they are directed to submit the material or information to the court, for examination in camera in order to resolve the issue.

Defendant Rodriguez's demand for disclosure of items or information to which he is entitled to pursuant to the provisions of CPL §240.20(1) (a) through (l) 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 his defense (CPL §240.40 [1][a]).

4. MOTION TO SUPPRESS PRIOR BAD ACTS (SANDOVAL AND VENTIMIGLIA)

Granted on consent of the People to the extent that this Court directs that a hearing be held immediately prior to trial. Prior to the commencement of jury selection, the People will disclose to defendant Rodriguez all specific instances of his prior uncharged crimes and bad acts they expect to introduce at trial for impeachment

purposes (CPL §240.43). Defendant must then sustain his burden of informing the Court of the prior convictions and misconduct which might unfairly affect him as a witness in his own behalf (People v. Matthews, 68 N.Y.2d 118, 121-122). In the event that the People seek to introduce defendant Rodriguez's prior bad acts on their direct case, the burden is on the People to seek a Ventimiglia hearing to determine the admissibility of such evidence (People v. Ventimiglia, 52 N.Y.2d 350).

5. MOTION TO SUPPRESS PHYSICAL EVIDENCE/PROBABLE CAUSE

Defendant Rodriguez contends that all of the evidence recovered in this case should be suppressed because it was obtained in violation of his Fourth and Fourteenth Amendment rights. Specifically, defendant argues that co-defendant Sefieh's car was illegally stopped by the Bedford Police Department and that, therefore, as a passenger in a vehicle, defendant has standing to challenge the admissibility of any evidence seized from the vehicle. In addition, the defense asserts that the police had no reasonable suspicion or probable cause to conduct a search of defendant's person and the property that was taken from him was recovered in violation defendant constitutional rights against unlawful search and seizure. "The circumstances of [defendant's] arrest and the extent to which the seizure was properly incident to said arrest remain to be justified by the People. As a result a Mapp Hearing should be granted" [Defense Memo. of Law p.13]. Hence, defendant argues all of the evidence seized from within vehicle and on defendant's person is the "fruit of the poisonous tree" and was therefore obtained in violation of his rights.

The People oppose the motion and argue that probable cause existed for the vehicle stop based upon the identifying information provided by an identified citizen. Based on that information, the People assert, the police had reasonable suspicion to stop the vehicle because defendants and their car matched that description, were within the vicinity of the burglary and the stop was made within minutes of the crime. In addition, the People argue that the police were entitled to order the defendants out of the vehicle after a brief inquiry as the driver could not produce a driver's license. The People next assert that defendant Rodriguez has no standing to contest the search of the vehicle in which he was a passenger. In addition, as to the seizure of the pillowcase that was located in the passenger well at defendant's feet, the People assert that defendant had no expectation of privacy in the pillowcase, it was seized as being in plain view and it was also seized pursuant to the automobile exception of the warrant requirement. The People further argue that, under the totality of the circumstances, the officers had probable cause to believe that evidence of a crime was in the car and could lawfully search the entire vehicle, including the trunk. In addition, the People argue that probable cause to arrest defendant was present at the time of the arrest.

Moreover, to the extent that defendant seeks to suppress the evidence collected from his person, the People submit that the cell phone, metal chisel and pair of black gloves were legally recovered from the defendant Rodriguez's person following a pat-down that was lawful as permissible to insure the police officers' safety and was seized from him as incident to a lawful arrest. The People also argue that, to the extent that

defendant challenges the evidence collected at the golf course and the apartment of Mea Giaimo, defendant lacks an expectation of privacy and therefore standing concerning either location.

As for the evidence obtained from the golf course, this was abandoned property and hence there is no search and seizure issue within the fourth amendment applicable to that evidence (People v. Burkett, 98 A.D.3d 746; People v. Hogya, 80 A.D.2d 621) (where a defendant abandons property, there is no search or seizure). To the extent that defendant Rodriguez seeks to suppress evidence retrieved from the residence of Mea Giaimo, the defendant has not alleged a reasonable expectation of privacy in the item or area searched and has not therefore demonstrated standing (People v. Ramirez, 88 N.Y.2d 99). In addition, to the extent that defendant moves to suppress any additional evidence recovered by police, such as surveillance videos, records kept by phone companies or phones belonging to others, defendant has no expectation of privacy in records maintained by third parties (see People v. DiRaffaele, 55 N.Y.2d 234). As to this evidence, therefore, defendant's motion is denied.

Defendant's motion is granted to the extent that a pre-trial hearing will be held to determine the legality of the stop of the vehicle; the seizure and search of the defendant, and the search of the interior of the vehicle (see, People v. Bell, 121 A.D.2d 455; People v. Ingle, 36 N.Y.2d 413; Mapp v. United States, 367 U.S.642; People v. Holmes, 81 N.Y.2d 1056; People v. Shelby, 220 A.D.2d 544). With regard to the search of the trunk of the vehicle at the scene of the stop of the vehicle, defendant must

establish standing to contest the search of the trunk (see, People v. Tejada, 81 N.Y.2d 861; People v. Gonzalez, 25 A.D.3d 620; People v. Rosario, 64 A.D.3d 1217; People v. Ballard, 16 A.D.3d 697).

6. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY

The People have served the defendant with an identification notice under C.P.L. § 710.30 (1) (b). The defendant argues that the identification was illegal as the tainted fruit of an illegal vehicle stop and arrest. In addition, defendant asserts that the identification was not reliable because it was the product of unnecessarily suggestive identification procedures. The People oppose the motion and argue that the stop and arrest were lawful and the identification was permissible as it was conducted in close proximity to the crime. The People submit that, in any event, the witness has an independent source for the identification of the defendant based on her observations of him at the time of the crime.

The application is granted to that extent that a hearing shall be held immediately before trial to determine whether any police procedures employed were unduly suggestive, and, if so, whether an independent source exists for in-court identification by the witness (see, People v. Pacquette, 17 N.Y.3d 87; People v. McLemore, 264 A.D.2d 858) and whether the show up identification was the product of an unlawful seizure (see Point 5 supra).

7. MOTION TO SEVER SEPARATE OFFENSES

Defendant Rodriguez's motion to sever the separate burglary offenses contained within the indictment is denied. The offenses were properly joined pursuant to CPL § 200.20(2) (b), and the defendant has failed to adequately set forth the manner in which he is prejudiced by trying all the charges together (see People v. Lane, 56 N.Y.2d 1).

8. MOTION FOR SEVERANCE OF TRIAL

This motion is denied as moot as all charges against co-defendant Sefieh were resolved by his plea of guilty on April 15, 2016.

9. MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS

To the extent that defendant requests permission to make additional pretrial motions, that request is denied. Additional motions will only be considered upon good cause shown pursuant to CPL §255.20(3).

10. MOTION FOR A DARDEN HEARING AND CONTROVERT THE WARRANTS

On April 27, 2015 the Town Court, Town of Bedford Court issued a warrant authorizing the requested search warrant (Menken, J.) and sealed the application. On April 28, 2015, officers of the Bedford Police Department executed the search warrant for the seized Toyota and discovered additional items taken during the relevant burglaries.

On May 8, 2015, the Town Court of Town of Bedford, issued an amended search warrant order (Menken, J.) giving the detectives of the Westchester County District

Attorney's Office authority to search the three cellular telephones recovered from defendants. The order was granted and the application sealed. On July 9, 2015, the officers executed the warrant and forensically searched two of the three cellular phones (the black POSH Revel and the black LG flip phone) and were able to recover cell phone numbers on each phone and photographs of property later identified by victims as property stolen from their homes during the relevant burglaries. Thereafter, the application was unsealed and defense counsel was provided with the redacted supporting affidavits.

Defendant moves for a Darden hearing and seeks to controvert the April 27 warrant applicable to the vehicle and that part of the May 8, 2015, warrant as applied to the black POSH Revel cell phone that was recovered from defendant's person. In terms of the vehicle warrant, defendant argues that the affidavit submitted in support of the warrant failed to describe the objects to be seized with sufficient particularity. In addition, defendant asserts that the fact that the police failed to annex a sworn statement from the 911 witness who allegedly saw defendant leave the residence at 4 Dickson Lane carrying a sack and watched him climb into the relevant car undermines the validity of the warrant. In addition, defendant points out that the inventory sheet does not indicate what time the vehicle was searched.

As for the affidavit in support of the warrant for the cell phone found in defendant's pocket, defendant asserts that it fails to provide probable cause to conclude that the search of the cell phone would lead to evidence of the burglaries.

Initially, the People oppose and argue that defendant Rodriguez's application for a Darden Hearing must be denied because no confidential informant was utilized for the investigation of this case or in support of the application for the warrants. In addition, in terms of the warrant to search the vehicle, the People claim that defendant lacks standing to challenge the warrant as a passenger. In addition, the People assert that the description of the objects to be seized from the vehicle was adequately specific under the circumstances. Moreover, although the name of the supporting 911 caller was not stated in the search warrant application, the People assert that, since the caller was an identified citizen who provided a name and address to the police and appeared and personally identified the defendant, her information is presumed to be reliable.

As for the cell phone warrant, the People state that the supporting affidavit explicitly lays out the nexus between the cell phone and the burglary. In addition, the fact that the cellphone was recovered from defendant's person as he was fleeing from a burglary combined with police training and experience (which has shown that individuals committing burglaries often communicate with others via cell phone), the People maintain, supports the reasonable belief that evidence of illegal activity would be present in the area to be searched. Finally, the People contend that, under the circumstances, the search warrant was not overly broad and sets forth with sufficient particularity the areas of the phone to be searched.

The vehicle was impounded and subjected to an undisputedly valid inventory search prior to the issuance search warrant. Defendant has not established standing to

controvert the search warrant for the impounded vehicle (see, People v. Ballard, 16 A.D.3d 697; People v. Williams, 275 A.D.2d 753).

In any event, upon this Court's review of the four corners of the supporting affidavit, which has been provided to defendant, the Court finds that the vehicle search warrant was supported by probable cause (see People v. Keyes, 291 A.D.2d 571). Moreover, after a review of the warrant itself, the Court finds that it particularly described what was to be searched and was not overbroad (see, People v. Durante, 131 A.D.2d 499). As for the reliance on the unnamed 911 caller, the citizen witness, who provided her name and address to police, is presumed reliable (People v. Boykin, 187 A.D.2d 661; People v. Bilski, 170 A.D.2d 517). In addition, the caller's allegations are not conclusory but specific and are therefore sufficient to establish the basis of the citizen's knowledge (see, People v. Parris, 83 N.Y.2d 342; People v. Jenkins, 2016 WL 1532627 (April 7, 2016)).

In addition, the fact that the time that the warrant was executed was not specified on the inventory sheet is insufficient grounds for suppression, especially as the People aver [Chaman affidavit, p.5] that the warrant, issued on April 27, 2015, was actually executed on April 28, 2015 at approximately 9:15 am to 11:30 am. In any event, this failing is akin to a ministerial act and the failure to perform such act does not void an otherwise validly issued warrant (see, People v. Morgan, 162 A.D.2d 723; People v. Pietramala, 84 Misc. 2d 496).

Furthermore, upon this Court's review of the four corners of the cell phone search warrant affidavit, which has been provided to defendant, the Court finds that the warrant was supported by probable cause (see, People v. Keyes, 291 A.D.2d 571; People v. Roberts, 195 A.D.2d 1018). Moreover, the affidavit in support of the warrant appropriately connected the content of the cell phone to the alleged crimes as, in it, the Detective reiterated the co-defendant's statement that he received calls from the defendant's cell to coordinate transportation to and from the scene of the burglary. In addition, as set forth in the affidavit, the policeman's training and experience (which has shown that it is common for individuals involved in burglaries to communicate with each other via cellphone to arrange transport and to text each other during their crimes, as well as, to take photographs of their proceeds with their cell phones), combined with the co-defendant's statement and the fact that the cell phone was recovered from defendant as he was fleeing a burglary, supports a reasonable belief that evidence of illegal activity would be present in the area to be searched (People v. Traymore, 241 A.D.2d 226). Finally, the Court finds that the warrant particularly described what was to be searched and was not overbroad (see, People v. Durante, 131 A.D.2d 499).

Lastly, that part of the motion that seeks a Darden Hearing is denied as moot based upon the People's concession that there are no confidential informants in this case and the fact that a review of the search warrant affidavits revealed that there were no confidential informants involved whose information was used to obtain the issuance


of the search warrants. Accordingly the motion for a Darden hearing and to controvert the warrants is denied.

11. MOTION TO CONDUCT PRETRIAL HEARINGS 14 DAYS BEFORE TRIAL

This motion is denied. In accordance with the long standing practice of the Westchester County Court, pre-trial hearings granted on a post-indictment motion to suppress are held immediately prior to trial unless otherwise ordered by the Supervising Judge of the Trial Assignment Part.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
May 17, 2016



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

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

Jessica Hugel, Esq.
Attorney for Defendant,
Edgar Rodriguez a/k/a
Hector Hernandez
1015 Park Street
Peekskill, New York 10566

Jeffrey P. Chartier, Esq.
Attorney for Defendant,
Ahmad Safieh
2027 Williamsbridge Road
Bronx, N.Y. 10461

Nancy Barry, Esq.
Chief Clerk

--