

People v Dean

2016 NY Slip Op 33241(U)

January 28, 2016

County Court, Westchester County

Docket Number: Ind. No. 2015-855

Judge: Rolf M. Thorsen

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.

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

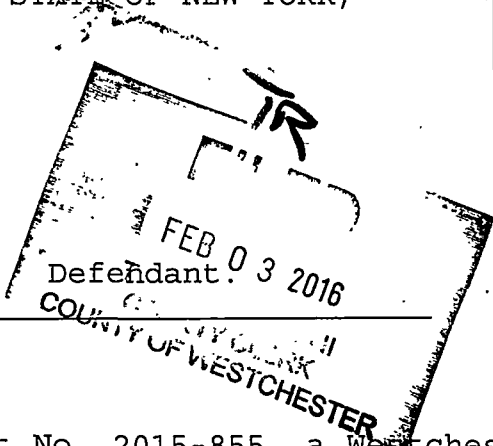
FILED ON
1/27/16
WESTCHESTER
COUNTY CLERK

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

ROBERT DEAN,

THORSEN, J.



DECISION & ORDER

Ind. No. 2015-855

By Indictment No. 2015-855, a Westchester County Grand Jury charged defendant with two counts of Criminal Sale of a Controlled Substance in the Third Degree (P.L. §220.39[1]), two counts of Criminal Possession of a Controlled Substance in the Third Degree (P.L. §220.16[1]), and two counts of Criminal Possession of a Controlled Substance in the Seventh Degree (P.L. §220.03). Defendant has moved for various relief. The Court has considered the following papers on the motion:

1. Notice of Motion and Affirmation;
2. People's Affirmation in Opposition and Memorandum of Law.

The various branches of defendant's motion are decided as hereinafter set forth:

1. & 2. Motion to Inspect Grand Jury Minutes/Dismiss Indictment

Defendant moves to have this Court review the Grand Jury minutes to determine the legal sufficiency of the evidence and

legal instructions and to determine whether the grand jury proceeding was defective. The People consent to an *in camera* review of the minutes. Defendant's motion, in that respect, is hereby granted.

The Court, having reviewed the Grand Jury minutes, *in camera*, hereby denies defendant's motion to dismiss the indictment. On a motion to dismiss an indictment under Criminal Procedure Law Section 210.20(1)(b), the evidence before the Grand Jury is examined for legal sufficiency. See, C.P.L. §190.65(a). Legally sufficient evidence is "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof." C.P.L. §70.10(1); see, People v. Deegan, 69 N.Y.2d 976, 978-979 (1987). The sufficiency of the People's presentation is properly determined by inquiring whether the evidence, viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant a guilty verdict after trial. See, People v. Jennings, 69 N.Y.2d 103, 114 (1986); People v. Galatro, 84 N.Y.2d 160 (1994); People v. Smaragdass, 27 A.D.3d 769 (2d Dept.), app. den., 7 N.Y.3d 763 (2006). The reviewing court's inquiry is limited to determining whether the facts, if proven, and the logical inferences flowing therefrom, supply proof of each element of the crimes charged. People v. Deegan, 69 N.Y.2d at 979. That other innocent inferences could possibly be drawn from the facts is irrelevant on this pleading

stage inquiry, as long as the Grand Jury could rationally have drawn the guilty inference. Id. See also, People v. Bello, 92 N.Y.2d 523, 525-526 (1998). Under that standard of review, all questions as to the quality or weight of the proof should be deferred. People v. Jennings, 69 N.Y.2d at 115; See also, People v. Galatro, 84 N.Y.2d at 164.

The Court fully examined the stenographic minutes of the Grand Jury proceeding and denies dismissal of the indictment or reduction of any of the counts therein. The Court concludes that the evidence was legally sufficient to establish the offenses charged. Moreover, the Grand Jury was adequately instructed on the law with respect to the crimes charged in those counts and the attendant legal concepts. See, People v. Calbud, Inc., 49 N.Y.2d 389 (1980); People v. Hillaire, 270 A.D.2d 359 (2d Dept. 2000).

Lastly, the Court finds that there were no other defects in the grand jury proceeding warranting dismissal of the indictment.

3., 5., 6. & 11. Motion for Court-Ordered Discovery

Defendant moves for a court order directing the People to provide him with a slew of items of discovery that defendant lists in his Notice of Motion. See, Defendant's Notice of Motion at pp. 3-7. The People oppose defendant's motion for additional discovery contending that defendant has already been provided with all of the discovery that he is entitled to pursuant to C.P.L. Article 240.

As a procedural matter, the Court notes that defendant has failed to establish that he previously served a Demand to Produce on the People requesting the specific items of additional discovery that are the subject of the within motion, and that the People refused to respond to said demand. See, C.P.L. §240.10(1) and C.P.L. §240.20. In any event, to the extent that defendant seeks further discovery beyond that which he is entitled to pursuant to C.P.L. §240.20(10)(a), his motion is denied. See, C.P.L. §240.40(1)(a).

With respect to defendant's request for Brady and Giglio material, although the People indicate that they recognize their continuing obligation to disclose such evidence and will do so to the extent such material becomes known and in their possession, the Court finds such response to be inadequate. As defendant has requested specific items alleged to be exculpatory, the People proceed at their own peril in determining whether and when to disclose any such evidence. See, People v. Scott, 88 N.Y.2d 888 (1996).

4. Motion for Court-Ordered Response to Bill of Particulars

Defendant's motion for an order directing the District Attorney to respond to his demand for a Bill of Particulars pursuant to Criminal Procedure Law Sections 200.95 is hereby denied. Pursuant to C.P.L. §200.95(1), a bill of particulars is

defined as follows:

a written statement by the prosecutor specifying, as required by this section, items of factual information which are not recited in the indictment and which pertain to the offense charged and including the substance of each defendant's conduct encompassed by the charge which the people intend to prove on their direct case, and whether the people intend to prove that the defendant acted as principal or accomplice or both....

Having reviewed the defendant's Demand for a Bill of Particulars as set forth in his motion papers and the People's Bill of Particulars as contained in the Consent Order, the Court finds that the People's Bill of Particulars complies with C.P.L. §200.95(1)(a). The remaining items requested by defendant in his Demand for a Bill of Particulars are beyond the scope of the statute.

7. Motion to Strike C.P.L. §710.30 Notice

Defendant moves to strike the People's C.P.L. §710.30 notice that the People served on defendant indicating their intention to offer identification evidence at the trial of the within matter. Specifically, defendant contends that the People's notice was "insufficient and violative of the rights to due process of law and effective assistance of counsel."

Defendant's motion to strike is denied. It is well-settled that once a defendant moves for suppression of the identification testimony and receives a full hearing on the fairness of the identification procedures, any alleged deficiencies in the notice

provided by the People is irrelevant. See, People v. Kirkland, 89 N.Y.2d 903, 905 (1996). Since defendant has moved to suppress the identification procedures and the Court has herein granted a hearing on this issue, defendant's motion must be denied.

8. Motion to Suppress Identification Evidence

Defendant moves to suppress identification evidence on the ground that the identification procedures were unduly suggestive. The evidence at issue are three identifications of defendant made on three separate occasions by the same witness (an undercover detective) through the use of a single photograph. The People oppose the relief sought, both suppression and a hearing, on the ground that the identification procedures were merely confirmatory.

Defendant's motion shall be determined after a Wade hearing is held. See, People v. Adio, 111 A.D.3d 757, 758 (2d Dept. 2013) and People v. Houston, 82 A.D.3d 1122 (2d Dept. 2011) (Hearing courts' findings, *after hearings were held*, that officers' viewings of a single photograph of the defendants shortly after the purchase was confirmatory, are affirmed by the Appellate Division). The determination to be made following the hearing shall be limited to the issue of whether the March 4, 2015 identification procedure was unduly suggestive. See, People v. Adio, 111 A.D.3d at 758.¹

¹ As the February 25, 2015 and August 4, 2015 "viewings" that the People included in their C.P.L. §710.30 notice were not identification procedures "within the intendment of C.P.L. §710.30," no hearing is required. See, People v. Adio, 111 A.D.3d at 758; People v. Twitty, 223 A.D.2d 744 (2d Dept. 1996).

9. **Motion to Preclude Unnoticed Statement and Identification Evidence**

Defendant moves to preclude statement and identification evidence for which notice has not been provided pursuant to C.P.L. §710.30. The People contend that a Court ruling on the relief sought is not warranted as the People are aware of the "good cause" requirement to provide late notice.

Defendant's motion to preclude such evidence is provisionally granted at this time but is subject to any application by the People for leave to file late notice as required by C.P.L. §710.30.

10. **Motion for Production of Informants**

Defendant moves for an order requiring the People to identify and produce any informants that assisted the police. Defendant's motion is denied as defendant has failed to sustain his burden of showing that there are any informants that are involved in the within matter that have evidence that is relevant to defendant's guilt or innocence. See, People v. Goggins, 34 N.Y.2d 163, 168 (1974).

12. **Motion for a Sandoval/Ventimiglia Hearing**

Defendant moves for an Order directing that a hearing be held to determine the extent to which evidence regarding defendant's past immoral, criminal or vicious acts shall be used at trial. See, People v. Sandoval, 34 N.Y.2d 371 (1974). Defendant's motion is

granted and a hearing will be held prior to trial to determine the admissibility of any prior criminal or bad acts which the People seek to use in the cross-examination of the defendant.² Pursuant to Criminal Procedure Law Section 240.43, the People shall notify defense counsel of all specific instances of defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the credibility of defendant. The Court requests that the People provide defendant with such notification as expeditiously as possible so that pre-trial issues such as this one can be addressed by the trial court.

Defendant's motion for a Ventimiglia hearing is denied at this time. It is well-settled that the burden is on the People to obtain a ruling from the Court prior to offering evidence on their direct case of specific instances of defendant's prior uncharged conduct. See, People v. Ventimiglia, 52 N.Y.2d 350 (1981). Thus, should the People seek to introduce such evidence, the People are required to file with the Court and serve a copy on defendant, a written application setting forth the specific acts they seek to introduce, as well as the basis for which they seek to admit such evidence pursuant to People v. Molineux, 168 N.Y. 264 (1901), and its progeny.

² In their Affidavit in Opposition, the People consent to the issuance of an order granting a Sandoval hearing.

13. Motion to Strike Alibi Demand

Defendant moves to strike the People's Demand for Alibi Notice on the ground that C.P.L. §250.20 violates defendant's right to due process of law. Defendant's motion is denied. See, People v. Dawson, 185 A.D.2d 854 (2d Dept. 1992); People v. Peterson, 96 A.D.2d 871 (2d Dept. 1983), appeal den., 60 N.Y.2d 969 (1983).

14. Motion for Leave to File Additional Motions

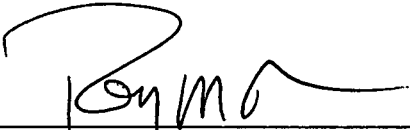
Defendant's motion for leave to make further motions is neither granted nor denied at this time. Should defendant move for additional relief, the Court will decide any such motions at that time and in accordance with Criminal Procedure Law Section 255.20(3).

Any other relief requested by defendant and not specifically addressed herein is denied.

The foregoing constitutes the Decision and Order of this Court.

E N T E R

Dated: January 28, 2016
White Plains, New York


HON. ROLF M. THORSEN, J.C.C.

TO: Anne Bianchi, Esq.
The Legal Aid Society of Westchester County
Attorney for Defendant

Hon. James McCarty
Acting District Attorney, Westchester County
Attn: Susan L. Pollet, ADA