

People v Kirkland

2016 NY Slip Op 33244(U)

February 9, 2016

County Court, Westchester County

Docket Number: Indictment No. 15-0868

Judge: Barbara G. Zambelli

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FILED
AND
ENTERED ON
Feb. 9 2016
WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK DECISION & ORDER

- against -

TARRANCE KIRKLAND,

FILED
FEB 09 2016
Defendant.
COUNTY OF WESTCHESTER

Indictment No.: 15-0868

-----X
ZAMBELLI, J.

The defendant has been indicted for the crimes of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree allegedly committed on or about February 10, 2015 in the County of Westchester and for the crimes of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree allegedly committed on or about February 18, 2015 in the County of Westchester. He now moves by notice of motion with supporting affirmation and memorandum of law with attachment for omnibus relief. The People's response consists of an affirmation in opposition and a memorandum of law. 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 FOR DISCOVERY AND INSPECTION / DISCLOSURE OF MATERIAL INFORMATION / BRADY / ROSARIO / GIGLIO

This application is granted to the limited extent of ordering that the People are to provide the defendant 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, which will conduct an in camera examination to resolve the issue. The demand for witness statements is denied as premature. The People recognize their duty to comply with People v. Rosario, 9 N.Y.2d 286; CPL §240.44, §240.45. To the extent that defendant seeks disclosure of agreements between the People and witnesses, the application is granted upon the People's acknowledgment of their duty to disclose same (Giglio v. United States, 405 U.S. 150).

The defendant's demand for disclosure of items or information to which he is entitled pursuant to the provisions of CPL §240.20(1) (a) through (i) 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]).

2. MOTION TO STRIKE IDENTIFICATION NOTICE

Defendant moves to strike the identification notice in this matter on the grounds that the notice is inadequate. The defendant's motion is denied. The language in the notice served by the People in accordance with CPL §710.30 informed the defendant of the time,

place and manner in which the identifications were made (CPL §710.30[1]; see People v. Lopez, 84 N.Y.2d 425; People v. Hartley, 244 A.D.2d 712.

In the affirmation in opposition, the People contend that the defendant waived his right to challenge the sufficiency of the CPL §710.30 notices by moving in the alternative to suppress the identification and statement. However, a defendant may move in the alternative to suppress without waiving a preclusion claim, so long as the suppression claim is not litigated to a final determination (see People v. Kirkland, 89 N.Y.2d 903; People v. Smith, 283 A.D.2d 189; People v. Figueroa, 278 A.D.2d 139; People v. Heller, 180 Misc2d 160; cf. People v. Smith, 8 Misc3d 441).

3. MOTION TO SUPPRESS IDENTIFICATIONS

The People have served the defendant with five CPL §710.30 notices regarding identifications. As an initial matter, as to the first identification which occurred on February 10, 2015, the People also move to amend the notice to reflect the proper time of the identification as being 7:03pm and not 6:00pm as stated in the notice. Defendant does not oppose the motion. The Court grants the motion to amend the notice as defendant is not prejudiced thereby.

The five identification notices are as follows: 1) an in person identification made on February 10, 2015, which the People advise was made by an officer from the backup surveillance team at 7:03pm; 2) an in person identification made on February 18, 2015 which the People also advise was made by an officer from the backup surveillance team at 6:49pm; 3) a single photo identification that the People advise was made by an officer who located the defendant's photo in the Mount Vernon Police Department computer system on February 18, 2015 at 6:54pm; 4) a single photo identification that the People

advise was made by the undercover officer on February 18, 2015 at 6:58pm, and 5) a single photo identification made on August 13, 2015 before the grand jury. The defendant argues that the identifications were the result of a highly suggestive procedure and were not confirmatory.

The People oppose the motion and argue, as to the first two identifications, that there was no identification procedure that required notice, as the identifications were only an observation of defendant during the alleged crimes. As to the third identification, the People also argue that this was not an identification within the meaning of CPL §710.30, as it only involved an officer retrieving the defendant's photograph. As to the identification made by the undercover, the People submit that the identification was merely confirmatory as it was made by the undercover officer who had viewed the defendant nine minutes earlier during the alleged drug sale, and that the officer was trained to take note of the defendant's appearance. As to the grand jury identification, the People consent to a hearing thereon. The People argue that, in any event, all the witnesses have an independent basis for an in court identification of defendant based upon their observations of defendant and their training.

A hearing shall be held immediately before trial to determine whether the identifications were merely confirmatory (see People v. Rodriguez, 79 N.Y.2d 445), or in the alternative, whether any police procedures employed were unduly suggestive, and, if so, whether any independent sources exist for in-court identifications by the witnesses (People v. Pacquette, 17 N.Y.3d 87; People v. McLemore, 264 A.D.2d 858).

4. MOTION TO INSPECT / DISMISS / REDUCE / DEFECTIVE GRAND JURY PROCEEDING

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 were supported by sufficient evidence and that the instructions given were appropriate. There was no other infirmity which would warrant a dismissal 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 (CPL §210.30[3]).

To the extent that the defendant seeks to dismiss the indictment based upon the approximate eight month delay between the alleged crimes and defendant's arrest, his motion is denied. Defendant alleges that he was prejudiced by the delay which he submits "eliminated any reasonable, remote possibility that he could offer an effective defense" in that he would be unable to establish that he was elsewhere at the time of the occurrence or locate any civilian witnesses for his defense. The People aver that defendant was not arrested immediately after the sale because the alleged drug purchases were part of a broader, ongoing narcotics investigation and the delay protected the safety and anonymity of the undercover police officer involved (Astarita Affirmation, p.2-3). The People further argue that the statute of limitations for these crimes has not yet run.

"(C)ourts will analyze the following factors when determining whether there has been undue delay in prosecution: (1) the extent of the delay, (2) the reason for the delay, (3) the nature of the underlying charge, (4) whether or not there has been an extended period of pretrial incarceration, and (5) whether or not there is any indication that the defense has

been impaired by reason of the delay” (People v. Decker, 13 N.Y.3d 12).

In this case, there is no issue of fact concerning pretrial detention. With regard to the reason for the delay, “[A] determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense” (People v. Singer, 44 N.Y.2d 241, 254; People v. Rosado, 166 A.D.2d 544, 560 N.Y.S.2d 825)” (People v. Evans, 16 A.D.3d 595, 596).

Defendant’s claim of prejudice is conclusory to the extent it is not supported by any facts. Nevertheless, the delay of eight months based on the continuing investigation into drug sales and the need to protect the identity of the undercover is sufficient reason justifying the delay (People v. Smith, 60 A.D.3d 706, 707 (2d Dept. 2009) (12 month delay found reasonable), lv. denied, 12 N.Y.3d 859 (2009); People v. Brown, 262 A.D.2d 419, 420 (2d Dept. 1999) (12 month delay found reasonable); People v. Bryant, 65 A.D.2d 333 (2d Dept. 1978) (seven month delay found reasonable); People v. Evans, supra (four month delay found reasonable); People v. Connor, 137 A.D.2d 701 (2d Dept. 1988), lv. denied, 71 N.Y.2d 967 (seven month delay found reasonable). Moreover, the charges are serious (People v. Singer, supra). Accordingly, the motion to dismiss on the grounds of pre indictment delay is denied.

5. MOTION TO DISCLOSE INFORMANTS

Defendant moves for the production of any informant in this case on the grounds that, as is usual in "drug sweep" cases, an informant must have introduced the undercover to the local population who would otherwise be leery of strangers and that defendant is entitled to know whether he was targeted by a person who bears him personal malice. The

People oppose the motion and argue that defendant has not made a showing that there are any informants involved in this case that have relevant evidence to provide with respect to the defendant's guilt or innocence.

There are no allegations that an informant was present at the time of the alleged crimes. Accordingly, the defendant's guilt or innocence of the crimes charged does not hinge on the testimony of any informant, and thus to the extent that an informant exists, the informant's identity need not be disclosed (People v. Goggins, 34 N.Y.2d 163, 168 (1974)).

6. MOTION FOR A SANDOVAL/VENTIMIGLIA HEARING

Prior to the commencement of jury selection, the People will disclose to defendant 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 NY2d 118, 121-122). In the event the People seek to introduce defendant'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 NY2d 350).

7. MOTION TO STRIKE ALIBI DEMAND

This motion is denied. There is no merit to the defendant's contention that CPL §250.20 is unconstitutional (see, People v. Dawson, 185 A.D.2d 854; People v. Cruz, 176 AD2d 751; People v. Gil, 164 A.D.2d 867; People v. Peterson, 96 A.D.2d 871).

8. MOTION FOR A BILL OF PARTICULARS

Defendant notes that the bill of particulars served upon him by the People indicates

that the dates of the crimes were February 10, 2015 and March 18, 2015. As to the March 18, 2015 date, the defense assumes that this was a clerical error and that the date should be February 18, 2015. The Court's review of the grand jury minutes (as well as the indictment) makes clear that the correct date is, in fact, February 18, 2015. The People are directed to immediately file an amended bill of particulars which indicates the correct dates for the crimes.

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
February 9, 2016


BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

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