

People v McIntosh

2016 NY Slip Op 33248(U)

November 9, 2016

County Court, Westchester County

Docket Number: Indictment No. 15-00870-01

Judge: Anne E. Minihan

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FILED
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ON 11-16 2016
WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

FILED

NOV 16 2016

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION & ORDER
Indictment No.:15-00870-01

KARL MCINTOSH,

-----X
MINIHAN, J.

Defendant, KARL MCINTOSH, having been indicted on or about July 21, 2016 for Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39 [1]) (five counts), Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16 [1]) (five counts) and Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law § 220.03) (five counts) has filed an omnibus motion which consists of a Notice of Motion and an Affirmation in Support. In response, the People have filed an Affirmation in Opposition together with a Memorandum of Law.

Upon consideration of these papers, the stenographic transcript of the grand jury minutes and the Consent Discovery Order entered in this case, this court disposes of this motion as follows:

A.

MOTION for DISCOVERY, DISCLOSURE and INSPECTION
CPL ARTICLE 240

The parties have entered into a stipulation by way of a Consent Discovery Order consenting to the enumerated discovery in this case. Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 240. If there any further items discoverable pursuant to Criminal Procedure Law Article 240 which have not been provided to defendant pursuant to the Consent Discovery Order, they are to be provided forthwith.

As to the defendant's demand for exculpatory material, the People have acknowledged their continuing duty to disclose exculpatory material at the earliest possible date upon its discovery (*see Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]). The People have also acknowledged their duty to comply with *People v Rosario*, (9 NY2d 286 [1961]). In the event that the People are or become aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to the defendant, they are directed to immediately disclose such material to the court to permit an *in camera* inspection and determination as to whether such must be disclosed to the defendant.

Defendant's motion for a further Bill of Particulars is denied. The Bill of Particulars set forth in the Consent Discovery Order provided to the defendant has adequately informed the defendant of the substance of her alleged conduct and in all respects complies with CPL 200.95.

Except to the extent that the defendant's application has been specifically granted herein, it is otherwise denied as seeking material 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]; *Matter of Brown v Appelman*, 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]).

B.

MOTION for SANDOVAL and VENTIMIGLIA HEARINGS

Defendant has moved for a pre-trial hearing to permit the trial court to determine the extent, if at all, to which the People may inquire into the defendant's prior criminal convictions, prior uncharged criminal, vicious or immoral conduct. The People have consented to a *Sandoval* hearing. Accordingly, it is ordered that immediately prior to trial a hearing shall be conducted pursuant to *People v Sandoval* (34 NY2d 371[1974]). At said hearing, the People shall be required to notify the defendant of all specific instances of his criminal, prior uncharged criminal, vicious or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach the defendant's credibility if he elects to testify at trial (CPL 240.43).

At the hearing, the defendant shall bear the burden of identifying any instances of his prior misconduct that he submits the People should not be permitted to use to impeach his credibility. The defendant shall be required to identify the basis of his belief that each event or incident may be unduly prejudicial to his ability to testify as a witness on his own behalf (*see People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

Defendant's application for a hearing, pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]) is denied since the People have not indicated an intention to use evidence of any prior bad act or uncharged crimes of the defendant during its case in chief (*see People v Molineaux*, 168 NY2d 264 [1991]). If the People move to introduce such evidence, the defendant may renew this aspect of his motion.

C.

MOTION to STRIKE PREJUDICIAL LANGUAGE

The Defendant moves to strike certain language from the indictment on the grounds that it is surplusage, irrelevant or prejudicial. The language concluding the indictment merely identifies the Defendant's acts as public, rather than private wrongs and such language should not be stricken as prejudicial. This motion is denied (*see People v Gill*, 164 AD2d 867 [2d Dept 1990]; *People v Winters*, 194 AD2d 703 [2d Dept 1993]; *People v Garcia*, 170 Misc. 2d 543 [Westchester Co. Ct. 1996]).

D. & E.

MOTION to INSPECT, DISMISS and/or REDUCE
CPL ARTICLE 190

The court grants the defendant's motion to the limited extent that the court has conducted, with the consent of the People, an *in camera* inspection of the stenographic transcription of the grand jury proceedings. Upon such review, the court finds no basis upon which to grant defendant's application to dismiss or reduce the indictment. Defendant's request to dismiss the indictment in the interests of justice is denied.

The indictment contains a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's commission thereof with sufficient precision as to clearly apprise the defendant of the conduct which is the subject of the indictment (CPL §200.50). The indictment charges each and every element of the crimes, and alleges that the defendant committed the acts which constitute the crimes at a specified place during a specified time period and, therefore, is sufficient on its face (*People v Cohen*, 52 NY2d 584 [1981]; *People v Iannone*, 45 NY2d 589 [1978]).

The grand jury was properly instructed (*see People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]). The evidence presented, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]). Additionally, the minutes reveal a quorum of the grand jurors was present during the presentation of evidence, that the Assistant District Attorney properly instructed the grand jury on the law, and only permitted those grand jurors who heard all the evidence to vote the matter.

Based upon the *in camera* review, since this court does not find release of the grand jury minutes or any portion thereof necessary to assist it in making any determinations and as the defendant has not set forth a compelling or particularized need for the production of the grand jury minutes, defendant's application for a copy of the grand jury minutes is denied (*People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

F.

MOTION to STRIKE IDENTIFICATION NOTICE and to SUPPRESS IDENTIFICATION
PURSUANT TO CPL ARTICLE 710

The motion to strike the identification notice is denied. Said notices are in conformity with the statutory requirements of CPL 710.30.

Defendant's motion to suppress identification testimony is denied. The procedures which are contained in the People's notices are not identifications which are subject to suppression as the viewing of single photographs by police in this case were merely confirmatory and an integral part of the investigation and do not raise an issue of suggestiveness (*People v Gee*, 99 NY2d 158 [2002]; *People v Wharton*, 74 NY2d 921 [1989]; *People v Adio*, 111 AD3d 757 [2d Dept 2013]). This is not the kind of potentially suggestive police procedure which would require a suppression hearing and thus, raise no

Wade issues (*People v Wharton*, 74 NY2d 921 [1989]); *People v Gissendanner*, 48 NY2d 543 [1979]; *People v Morales*, 37 NY2d 262 [1975]). In any event, the witness has an independent basis for any in-court identification based on the witness' opportunity to observe the defendant during the undercover drug transaction (*People v Dell*, 11 AD3d 631, 632 [2d Dept 2004]).

G.

MOTION to CONDUCT PRE-TRIAL HEARINGS 20 DAYS in ADVANCE of TRIAL

The defendant's motion to schedule pre-trial hearings twenty days prior to trial is denied. The hearings will be scheduled at a time that is convenient to the court, upon due consideration of all of its other cases and obligations.

The foregoing constitutes the opinion, decision and order of this court.

Dated: White Plains, New York
November 9, 2016



Honorable Anne E. Minihan
Westchester County Court Justice

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