

People v Kenny

2017 NY Slip Op 33001(U)

November 14, 2017

County Court, Westchester County

Docket Number: 16-1096

Judge: Anne E. Minihan

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
AND ENTERED
ON 11-16 2017
WESTCHESTER

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

-against-

LOUIS KENNY,

Defendant.

-----X
MINIHAN, J.

DECISION & ORDER
Indictment No. 16-1096

FILED

NOV 17 2017

THE HONORABLE
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant, LOUIS KENNY, having been indicted on or about August 9, 2017 for Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16 [1]) (three counts); Criminal Possession of a Controlled Substance in the Fourth Degree (Penal Law § 220.09 [1]) (two counts); Criminal Possession of a Controlled Substance in the Fifth Degree (Penal Law § 220.06 [5]) Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law § 220.03) (nine counts); Unlawful Possession of Marijuana (Penal Law § 221.05) (four counts); Vehicle and Traffic Law violation § 1163 [a] (failure to use a signal) (two counts); Vehicle and Traffic Law § 1101[1] [a] (failure to obey police officers commands); Vehicle and Traffic Law § 1172 [a] (failure to stop at a stop sign); Vehicle and Traffic Law § 1229 [c][3] (failure to wear a seat belt); Vehicle and Traffic Law § 402 [1] (failure to display front license plate); Vehicle and Traffic Law § 1202 [a] [1] [a] (stopping, standing or parking in prohibited specific areas); and Vehicle and Traffic Law § 1202 [b] [2] (parked within fifteen feet of a fire hydrant) 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 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.

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 defendant, who bears the burden of refuting with substantial evidence the presumption of regularity which attaches to official court proceedings (*People v Pichardo*, 168 AD2d 577 2d Dept 1990]), has offered no sworn factual allegations, in support of his argument that the grand jury proceedings were defective. 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 (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]). "Courts assessing the sufficiency of the evidence before a grand jury must evaluate whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted--and deferring all questions as to the weight or quality of the evidence--would warrant conviction" (*People v Mills*, 1 NY3d 269, 274-275 [2002]). Legally sufficient evidence means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof (CPL 70.10[1]; see *People v Flowers*, 138 AD3d 1138, 1139 [2d Dept 2016]). "In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Jessup*, 90 AD3d 782, 783 [2d Dept 2011]). "The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference. That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry as long as the Grand Jury could rationally have drawn the guilty inference" (*People v Bello*, 92 NY2d 523, 526 [1998]).

Defendant's request to dismiss the indictment in furtherance of justice is denied. The defendant has cited no persuasive or compelling factor, consideration or circumstances under CPL 210.40 warranting dismissal of this indictment. In reaching a decision on the motion, the court has examined the factors listed in CPL 210.40, which include, in relevant part, the seriousness and circumstances of the offense; the extent of harm caused by the offense; the evidence of guilt; the history, character and condition of the defendant; any exceptionally serious misconduct of law enforcement personnel; the purpose and effect of imposing upon the defendant a sentence authorized for the charged offenses; the potential impact of a dismissal on public confidence in the judicial system; the potential impact of dismissal upon the safety and welfare of the community; and other relevant facts suggesting that a conviction would not serve a useful purpose. Having done so, the court has discerned no compelling factor, consideration or circumstance which clearly demonstrates that further prosecution or conviction of the defendant would constitute or result in injustice.

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]).

Defendant's claim that unidentified exculpatory evidence should have been shown to the Grand Jury is not grounds for dismissal of the indictment as the People maintain broad discretion in presenting their case to the Grand Jury and need not seek evidence favorable to the defendant or present all of their evidence tending to exculpate the accused (*People v Mitchell*, 82 NY2d 509 [1993]). So too, defendant's claim that the proceeding was defective because the People presented all three incidents to the Grand Jury is similarly not so prejudicial to impair the integrity of the proceedings and not a ground to dismiss the indictment. A prosecutor is not required to present evidence of joinable crimes to separate Grand Juries (*see People v Simon*, 187 AD2d 740 [2d Dept 1992]). Here, the crimes were joinable pursuant to CPL 200.20 (2) and could properly be presented to one Grand Jury (*see Matter of Hynes v Tomei*, 238 AD2d 591 [2d Dept 1997]).

B.

MOTION to SUPPRESS PHYSICAL EVIDENCE

This branch of the defendant's motion is granted solely to the extent of conducting a *Mapp* hearing prior to trial to determine the propriety of any search resulting in the seizure of property (*see Mapp v Ohio*, 367 US 643[1961]). The hearing will also address whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

C.

MOTION to SUPPRESS NOTICED STATEMENTS

This branch of the defendant's motion seeking to suppress statements on the grounds that they were unconstitutionally obtained is granted to the extent that a *Huntley* hearing shall be held prior to trial to determine whether any statements allegedly made by the defendant, which have been noticed by the People pursuant to CPL 710.30 (1)(a), were involuntarily made by the defendant within the meaning of CPL 60.45 (*see CPL 710.20 (3); CPL 710.60[3][b]; People v Weaver*, 49 NY2d 1012 [1980]), obtained in violation of defendant's Sixth Amendment right to counsel, and/or obtained in violation of the defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

D.


MOTION for a SANDOVAL HEARING

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).

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

Dated: White Plains, New York
November 14, 2017


Honorable Anne E. Minihan
Westchester County Court Judge

To:

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