

People v Keitt-McCall
2017 NY Slip Op 33010(U)
January 24, 2017
County Court, Westchester County
Docket Number: 16-1121
Judge: Barbara G. Zambelli
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FILED ^{TR}

JAN 25 2017

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COUNTY CLERK
COUNTY OF WESTCHESTER

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DONELL KEITT-MCCALL,

Defendant.

-----X

ZAMBELLI, J.

DECISION & ORDER

Indictment No.: 16-1121

The defendant has been indicted for criminal possession of a weapon in the second degree (Penal Law §265.03(03)). Defendant is charged with allegedly committing this crime on July 16, 2016, in Yonkers, New York in a place that was not his home or business. He now moves by notice of motion with supporting affirmation 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 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, 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]).

2. MOTION FOR DISCOVERY AND INSPECTION / 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 the defendant seeks disclosure of agreements between the People and witnesses, the application is granted upon the People's acknowledgment of their duty to disclose the 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 (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]).

3. MOTION FOR A BILL OF PARTICULARS

This motion is denied. The amended bill of particulars and the indictment were sufficient to adequately inform the defendant 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; People v. Young, 289 A.D.2d 866; see also, People v. Watt, 84 N.Y.2d 948; People v. Galgano, 222 A.D.2d 694).

4. MOTION TO SUPPRESS IDENTIFICATION/WADE

The People served and filed Notices of Identification pursuant to CPL §710.30.

According to the People, at 3:05 a.m. on July 16, 2016, in front of 31 School Street in Yonkers, New York, the victim engaged in a verbal altercation with defendant and they fired loaded firearms at each other. Both the victim and defendant were hit. The victim collapsed at the scene and defendant fled. The People claim that video surveillance footage recovered after the incident shows defendant and the victim shooting at each other and the victim collapsing on the street.

The victim was transported to the Westchester Medical Center and was diagnosed with a gun shot injury which resulted in his being permanently paralyzed below his chest. Defendant went to the hospital where he was admitted for treatment for a bullet wound to his abdomen.

Witness #1 was shown a photo array which contained defendant's photograph along with five other photos on July 16, 2016, at approximately 12:08 p.m. at the Police

Headquarters. According to the People, Witness #1 identified defendant in the photo array as the person who shot the victim but stated, in sum and substance, that he/she was not sure if the man chosen was the shooter. Witness #1 did, however, identify defendant as someone who was at the scene of the crime.

Witness #2 viewed the photo array on the same date at approximately 12:57 p.m. at Police Headquarters and identified defendant as the person who shot the victim. According to the People, Witness #2 also stated, in sum and substance, that he/she was not sure if the man chosen was the shooter.

On July 18, 2016, at approximately 2:00 p.m. at Westchester Medical Center the victim was shown the same photo array and the victim identified defendant as the person who shot him.

Witness # 3 viewed the photo array on July 19, 2016, at approximately 1:10 p.m. at Police Headquarters. According to the People, Witness #3 did not see defendant shoot the victim but identified him as someone who was present at or near the time of the crime and who was physically aggressive with the victim.

Defendant was arrested at the Westchester Medical Center on July 19, 2016.

All of the witness identification procedures were captured on video and were noticed pursuant to CPL §710.30. Defendant now moves to suppress the noticed identifications on the grounds that the identification procedures were unduly suggestive.

As for the identifications of defendant from the photograph array, the People argue that the identifications, subsequent to the crime, were not unduly suggestive as the array consisted of one photograph of defendant and five photographs of similar looking males. The photographs, the People contend, were not unnecessarily

suggestive as all of the photographs were taken under similar lighting and backgrounds with the same portion of each subject's body depicted. Moreover, all subjects were of the same race and had similar hair length and nothing in the composition of the arrays was suggestive or singled out defendant for identification. Nor did police engage in any suggestive conduct during the administration of the photo array procedure. Nor does the fact that the victim was hospitalized during the identification procedure undermine the legitimacy of the identification.

Furthermore, the People contend, Witness #3 is defendant's cousin and as such was impervious to suggestiveness and the identification was merely confirmatory (see, People v. Rodriguez, 79 N.Y.2d 445). In any event, the People argue, the victim and witnesses have an independent source for their in-court identification because they had an opportunity to fully view defendant in close proximity for a substantial amount of time before and during the shooting while they were on the street.

Defendant's motion is granted to the extent that a hearing shall be held immediately before trial to determine whether police identification procedures were employed, and if so, whether they were unduly suggestive, and, if so, whether any independent sources exist for in-court identification by the witnesses (People v. Pacquette, 17 N.Y.3d 87; People v. McLemore, 264 A.D.2d 858).

5. 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 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 the 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 N.Y.2d 350; People v. Molineux, 168 N.Y. 264).

6. REQUEST FOR ADDITIONAL MOTIONS

The defendant's request for permission to make additional pretrial motions is denied. Additional motions will only be considered upon good cause shown pursuant to CPL §255.20(3).

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
January 24, 2017


BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

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