

People v Gaynor

2017 NY Slip Op 33052(U)

September 21, 2017

County Court, Westchester County

Docket Number: 17-0458-02

Judge: Barbara G. Zambelli

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FILED 

SEP 21 2017

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
-----X

THE PEOPLE OF THE STATE OF NEW YORK

DECISION & ORDER

- against -

Indictment No.: 17-0458-02

WILLIE JAMES EDWARDS, A/K/A "MAGIC",
BYRON GAYNOR, A/K/A "BUZZY", GEORGE
JAMISON, BERNARD PEASE, A/K/A "BAE",

Defendants.

-----X
ZAMBELLI, J.

The defendant has been indicted for as acting in concert with his co-defendant Edwards to commit criminal possession of a controlled substance in the third degree allegedly committed on or about March 17, 2017 in the County of Westchester; defendant is also charged as acting in concert with his co-defendants to commit the crimes of conspiracy in the fourth degree to commit the crime of criminal sale of a controlled substance in the third degree, and conspiracy in the fourth degree to commit the crime of criminal possession of a controlled substance in the third degree allegedly committed on or about and between May 4, 2016 and May 3, 2017 in the County of Westchester. He now moves by notice of motion with supporting affirmation for omnibus relief. The People's response consists of an affirmation in opposition, a memorandum of law, and exhibits 1-5 (exhibit 5 is a compact disc) as well as the May 2, 2017 search warrant and supporting affidavit, which is an unnumbered exhibit. 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. Contrary to defendant's argument, the quorum requirements were met and a sufficient number of grand jurors heard all of the evidence and voted the indictment. 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 TO SUPPRESS PHYSICAL EVIDENCE

Defendant seeks suppression of the physical evidence recovered from defendant in this case (38 glassines of alleged heroin) on the grounds that he was illegally arrested and searched by the police officers who were acting without a warrant, consent or reasonable suspicion or probable cause that he had committed a crime. Defendant argues that he was merely walking through the Galleria Mall from the White Plains train station when he was arrested by the police; defendant denies that the police saw him commit any criminal activity or observed him in a drug transaction. He therefore submits that his arrest was without probable cause. He also argues that any abandonment of property was a direct and spontaneous reaction to the unlawful, stop, search and seizure. Defendant further argues that his arrest was the fruit of the poisonous tree of the allegedly unlawfully issued eavesdropping warrants, as well as the warrants/orders issued for GPS tracking,

pen registers and trap and traces and the May 2, 2017 search warrant issued in this matter.

The People oppose the motion and argue that it should be summarily denied for failure to allege facts in support thereof. They argue that, in any event, probable cause existed for defendant's arrest based upon the fact that on the day of defendant's arrest, the police intercepted calls over co-defendant Edwards phone which indicated that defendant was returning from a trip to the Bronx where he purchased several bundles of heroin from a supplier at Edwards' request and that police properly arrested defendant when they saw him walking in and around the Galleria Mall. The People also submit that defendant abandoned the 38 glassines.

To the extent that defendant argues that his arrest is the fruit of the poisonous tree of the eavesdropping, GPS tracking, pen registers and trap and trace warrants/orders, or the May 2, 2017 search warrant, his motion is summarily denied for the reasons set forth in sections 3 and 4, infra. However, defendant's motion is otherwise granted to the extent that a pre-trial hearing will be held to determine whether property seized subsequent to the stop and seizure of defendant's person should be excluded as the product of an unlawful seizure or other violation of the defendant's rights, including whether defendant abandoned any evidence (Mapp v. United States, 367 US 642; People v. Holmes, 81 NY2d 1056; People v. Selby, 220 AD2d 544).

3. MOTION TO CONTROVERT THE MARCH 2, 2017 SEARCH WARRANT

Defendant seeks the production and unsealing of the March 2, 2017 search warrant and supporting affidavit, alleging that he is not in possession of same because it was not included in consent discovery. He also seeks to reserve his rights to move to controvert

the same once he has received it.

Defendant's motion is summarily denied. As an initial matter, while the search warrant affidavit was not included in consent discovery, it was produced to the defense by the People on July 12, 2017, approximately two weeks prior to counsel submitting this motion. Furthermore, defendant lacks standing to challenge the recovery of the evidence pursuant to the search warrant, which was issued as to, inter alia, co-defendant Edwards' person, residence and a safe therein¹, and the person and vehicle of co-defendant Pease, and defendant has failed to establish any expectation of privacy in these areas. In any event, this Court has reviewed the warrant and the supporting affidavit therefor and upon the review of the four corners of the affidavit the Court finds that the warrant was supported by probable cause (see People v. Keyes, 291 AD2d 571 (2d Dept. 2002); People v. Iannello, 156 A.D.2d 469 (2d Dept. 1989), lv. denied, 75 N.Y.2d 920 (1990)). Moreover, defendant's arrest, which occurred on March 17, 2017, could not be the fruit of the poisonous tree of a search warrant issued approximately 6 weeks later.

4. MOTION TO CONTROVERT EAVESDROPPING WARRANTS, PEN REGISTER AND TRAP & TRACE AND TO SUPPRESS EVIDENCE OBTAINED PURSUANT TO SAID WARRANTS & FOR DARDEN HEARING

Defendant seeks suppression of all evidence obtained by means of the eavesdropping warrants, GPS orders, pen registers and trap and traces issued in this case (which warrants and supporting affidavits have all been provided to the defense with redactions which were approved by the Court pursuant to protective orders issued on June

¹Based upon the same affidavit, search warrants were also issued as to the persons, residences and/or vehicles of five additional individuals who are not involved in this case.

22 and July 12, 2017²). As to the eavesdropping warrants and their extensions, defendant alleges that the evidence should be suppressed because he submits that 1) there was no probable cause for their issuance, 2) that the People failed to demonstrate that they properly minimized the intrusion on defendant's communications, 3) that the People failed to demonstrate that "normal investigative procedures" were not sufficient in this case. As to the pen registers and trap and trace, defendant argues that the orders authorizing them were not supported by probable cause. To the extent that the warrant applications indicate that a confidential informant was used, defendant argues that the warrant fails to comply with the Agüilar–Spinelli test. The People oppose the motion and argue, as an initial matter that defendant lacks standing to challenge the January 13, 2017 warrant issued for GPS, cell site information and historical call data information on his co-defendant Edwards phone. They argue that in any event, that the warrants were properly issued as demonstrated by the supporting affidavits which, they submit, set forth probable cause for their issuance, and further argue that the eavesdropping was properly conducted in accordance with those warrants.

Defendant's motion is denied. As to the January 13 warrant issued for GPS, cell site information and historical call data information on Edwards phone, defendant lacks standing to challenge the issuance of the same in that he lacks any expectation of privacy in his co-defendant's phone. In any event, the Court has reviewed all of the warrants for eavesdropping, GPS, pen registers and trap and traces and the supporting affidavits therefor and upon the review of the four corners of the affidavits the Court finds that the

²While defendant alleges that he is not in possession of the warrants and supporting affidavits, his detailed references to the same in his motion demonstrate to the contrary.

warrants were supported by probable cause (see People v. Keyes, 291 AD2d 571 (2d Dept. 2002); People v. Iannello, 156 A.D.2d 469 (2d Dept. 1989), lv. denied, 75 N.Y.2d 920 (1990)). Moreover, to the extent confidential informants (CIs) were used, contrary to defendant's contention, the Aguilar - Spinelli test was met (see Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969)) as the application for the warrants demonstrated both the reliability of the informant(s), and the basis of the informant(s)' knowledge. Additionally, probable cause supported the issuance of the warrant even without the CI(s)' statements and in any event, the existence of CI-1 was confirmed by the fact that on five occasions, that person's calls to defendant were recorded; thus defendant's related request for a Darden hearing is also denied (People v. Crooks, 27 N.Y.3d 609, 613 (2016)). The Court further finds that the warrants were also issued, executed, and reported in accordance with all statutory requirements. A review of the eavesdropping, pen register and trap and trace warrant affidavits submitted by the Detective, assigned assistant(s) and the District Attorney himself, reveals that the issuing courts were apprised in detail of the purpose of the investigation, as well as how communications intercepted pursuant to the initial warrants led to the widening of the investigation to include defendant. The affidavits address in detail the inadequacy of traditional police tactics in obtaining information and how the sole reliance upon these traditional techniques could jeopardize the investigation. As to defendant's argument that the applications were insufficient because they describe as "ineffective" the CIs who provided information to support the warrants' issuances, defendant misconstrues the point of the People's allegation. The People were arguing that using the CIs' to make individual purchases of small amounts of heroin from co-defendant Edwards would not further the

goal of the investigation in regard to uncovering and prosecuting a conspiracy to possess and distribute heroin. The affidavits set forth that, as an initial matter, proceeding with only the CIs would also require their testimony against defendant at trial, and that the CIs have all expressed a fear for their physical well being if forced to do so. The affidavits further state while individual CIs may have had the ability to occasionally access some of the inner workings of co-defendant Edwards alleged drug trafficking conspiracy, no current CI had any knowledge of how many suppliers Edwards had or who they were, which was information that was able to be obtained through eavesdropping only. They also indicate that even if the police were to develop a new CI, either one who would willing give information or through cooperation stemming from an arrest, that it was reasonably unlikely that such a CI would be able to do more than purchase small amounts of drugs from Edwards, and, like the other CIs, would not have information regarding suppliers, stash houses or the precise details of the operation. Moreover, the affidavits detail that, even though the police and FBI were able to obtain some limited information regarding Edwards' operation through the CIs information and the pen register for defendant's phone, they were still unable to determine which phone numbers belonging to Edwards' suppliers, which was information that they could obtain only through eavesdropping. The affidavits also set forth that using an undercover would not be feasible, as an undercover would also likely not be able to obtain the needed details regarding the conspiracy, and further note that when an undercover was used for a drug purchase, Edwards attempted to have him sniff the drugs in his presence, although he ultimately relented upon the undercover's protest. Thus, the warrant applications made the kind of particularized showing that is necessary pursuant to the statute (see People v. Giraldo, 270 A.D.2d 97, 98 (1st Dept.

2000), lv. denied, 95 N.Y.2d 934 (2000)).

As to minimization, despite the fact that the defendant has been provided with every call intercepted by the wire taps, he fails to offer any specifics as to his allegation that the calls were improperly recorded or that the eavesdropping was insufficiently minimized. His motion is summarily denied on that basis alone (People v. Griffin, 9 A.D.3d 841, 844 (4th Dept. 2004)). In any event, the warrant affidavits set forth that the warrant was to be executed in a manner designed to minimize the interception of non-relevant and privileged information and specifically provided that the Assistant District Attorneys assigned to the case would personally supervise the personnel involved, would maintain a daily log of information intercepted, would provide oral and written instruction in regard to proper minimization of calls, and make daily reports to insure minimization instructions were followed (see People v. Floyd, 41 N.Y.2d 245 (1976); People v. Adeola, 12 A.D.3d 452, 453 (2d Dept. 2004)). Accordingly, defendant's motion to suppress the evidence recovered pursuant to the eavesdropping warrants is denied.

5. MOTION TO SEVER COUNTS

Defendant moves to sever the count 5 of the indictment, which charges him with criminal possession of a controlled substance in the third degree from counts 18 and 19, which charge him with conspiracy in the fourth degree. Defendant argues that the only ground for consolidation of these counts is that they are defined by the same or similar statutory provisions. He argues that severance is necessary because trying these matters together would prejudice him and deprive him of a fair trial in that the cumulative effect of the evidence would mask the weaknesses of the People's case in each incident and prevent defendant from mounting a viable defense because the jury would be unable to

separate out the evidence. The People oppose the motion.

The defendant's motion to sever the separate offenses contained within the indictment is denied. Contrary to defendant's argument, the offenses were properly joined pursuant to CPL §200.20 (2)(a), because they are based upon the same criminal transaction and also were properly joined pursuant to CPL §200.20 (2)(b), as proof of count five would be material and admissible as to the conspiracy counts; indeed, count 5 is alleged to be part of the conspiracy and is listed as an overt act therefor. Counts properly joined under CPL §200.20 (2)(a) and (b) are not severable pursuant to CPL §200.20(3). In any event, defendant has failed to adequately set forth the manner in which he is prejudiced by trying all the charges together (People v. Lane, 56 NY2d 1). The defendant also failed to make a convincing showing that he has both important testimony to give concerning one incident, and a strong need to refrain from testifying with regard to the other incidents (see People v. Lane, supra at 8).

6. MOTION TO SEVER CASE FROM THOSE OF HIS CO-DEFENDANTS

Defendant argues that he will be unduly prejudiced if he is tried jointly with his co-defendants because he is charged with only three counts in this 19 count indictment and submits that he and his co-defendants have antagonistic defenses and there will be Bruton issues. He argues that the severity, number of acts and nature of the charges against his co-defendants would cause a reasonable person to infer defendant's guilt if he were tried with his co-defendants. He also argues that Sandoval rulings as to his co-defendants may be deleterious to him at a joint trial, as he notes that co-defendant Edwards has an extensive criminal history. The People oppose the motion and argue that the charges were properly joined as all being part of the same criminal transaction and defendant's motion

is premature given no Sandoval rulings have been made in this case. They also argue that defendant's claims are speculative and that a limiting instruction directing the jury to separately consider the proof as to each crime charged would eliminate any prejudice to defendant.

The defendant's claims are conclusory and do not rise to the level of the compelling reasons required to mandate severance at this time (see People v. Mahboubian, 74 NY2d 174). Defendant's motion is denied with leave to renew before the trial judge.

7. DEMAND FOR EXCULPATORY INFORMATION / GIGLIO / ROSARIO

The People are reminded of the continuing obligation to provide exculpatory information to the defendant (Brady v. Maryland, 373 U.S. 83). Exculpatory information includes any information that would be "favorable to the defense, material either to guilt or punishment, or affecting the credibility of prosecution witnesses" (People v. Baxley, 84 N.Y.2d 208, 213). The People are directed to disclose any such information to the defense. 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. 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 US 150). With regard to witness names and statements the defendant's application for same at this stage of the proceedings is denied. The People recognize their duty to comply with People v. Rosario, 9 N.Y.2d 286; CPL §240.44, §240.45.

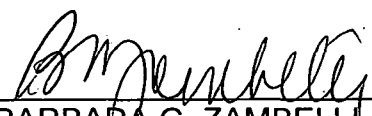
8. MOTION TO SUPPRESS PRIOR BAD ACTS (SANDOVAL AND VENTIMIGLIA)

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 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).

This Decision constitutes the Order of the Court.

Dated: White Plains, New York
September 21, 2017


BARBARA G. ZAMBELLI
COUNTY COURT JUDGE

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