

People v McDermott

2017 NY Slip Op 33287(U)

October 22, 2017

County Court, Dutchess County

Docket Number: 1929/2017

Judge: Peter M. Forman

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STATE OF NEW YORK: COUNTY OF DUTCHESS
COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

- against -

KWAME MCDERMOTT,

Defendant.

DECISION AND ORDER

Indictment No. 113/2017

William V. Grady,
District Attorney
Michael W. Brady, Esq.

Paul C. Brite, Esq.
Counsel for Defendant

HON. PETER M. FORMAN, County Court Judge

The following papers were read and considered in deciding this motion:

PAPERS NUMBERED

NOTICE OF OMNIBUS MOTION.....	1
AFFIRMATION.....	2
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Defendant stands accused by the Grand Jury of the County of Dutchess of one count of Burglary in the First Degree, a Class B Violent Felony, in violation of §140.30(3) of the Penal Law; two counts of Burglary in the First Degree, a Class B Violent Felony, in violation of §140.30(2) of the Penal Law; one count of Attempted Assault in the First Degree, a Class C Violent Felony, in violation of §110.00/120.10(1) of the Penal Law; two counts of Assault in the Second Degree, a Class D Violent Felony, in violation of §120.05(2) of the Penal Law; and one count of Criminal Possession of a Weapon in the Third Degree, a Class D Felony, in violation of §265.02(1) of the Penal Law.

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By Omnibus Motion, Defendant seeks various forms of relief, which the Court addresses as follows.

LEGAL SUFFICIENCY OF THE INDICTMENT

With respect to Defendant's motion for inspection of the Grand Jury minutes and dismissal or reduction of the indictment, the same is granted to the extent that the Court has reviewed such minutes for the purpose of determining Defendant's motion to dismiss or reduce the charges to a lesser included offense upon the grounds that said inspection would allegedly show that the evidence upon which the indictment was based was legally incompetent, insufficiently corroborated or otherwise inadmissible. [CPL §190.65(1)]. In assessing the legal sufficiency of the evidence, it is noted that the applicable standard of review is proof of a *prima facie* case, not proof beyond a reasonable doubt. [*People v. Gordon*, 88 N.Y.2d 92 (1996)].

"In the context of a motion to dismiss an indictment, the sufficiency of the People's presentation 'is properly determined by inquiring whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury.'" [*People v. Galatro*, 84 N.Y.2d 160, 163 (1994), quoting *People v. Jennings*, 69 N.Y.2d 103, 114 (1986)]. "The People are required to make out a *prima facie* case that the accused committed the crime charged by presenting legally sufficient evidence establishing all of the elements of the crime." [*Id.* at 164]. "The inquiry of the reviewing court is limited to ascertaining the 'legal sufficiency' of the evidence, and does not include weighing the proof or examining its adequacy at the grand jury stage." [*People v. Jensen*, 86 N.Y.2d 248, 252 (1995)]. CPL §70.10 defines "legally sufficient evidence" as 'competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof.'

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Having examined the minutes of the testimony before the Grand Jury of Dutchess County, this Court determines that, viewing this evidence in the light most favorable to the People, the indictment is based upon evidence which is legally sufficient to establish that Defendant committed the offense as set forth therein and competent and admissible evidence before the Grand Jury provides reasonable cause to believe that Defendant committed that offense [CPL §190.65; People v. Jensen, 86 NY2d 248 (1995); People v. Jennings, 69 N.Y.2d 103 (1986); People v. Swamp, 84 N.Y.2d 725(1994); People v. Haney, 30 N.Y.2d 328 (1972)].

GRAND JURY PROCEEDINGS

“A grand jury proceeding is defective warranting dismissal of the indictment [pursuant to CPL 210.35(5)] only where the proceeding fails to conform with the requirements of CPL article 190 to such degree that the integrity thereof is impaired and prejudice to the defendant may result.” [People v. Burch, 108 A.D.3d 679, 680 (2d Dept. 2013). See also People v. Moffitt, 20 A.D.3d 687, 688 (3d Dept. 2005)]. “The exceptional remedy of dismissal under CPL 210.35(5) should be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury.” [People v. Miles, 76 A.D.3d 645, 645 (2 Dept. 2010), quoting People v. Huston, 88 N.Y.2d 400, 409 (1996). See also People v. Reed, 71 A.D.3d 1167, 1168 (2d Dept. 2010); People v. Ramirez, 298 A.D.2d 413 (2d Dept. 2002)].

This Court finds nothing that would render this indictment defective. Accordingly, Defendant’s motion to dismiss the indictment on the grounds that the Grand Jury proceedings were defective is denied.

GRAND JURY INSTRUCTIONS AND MINUTES

This Court has also reviewed the instructions given by the Assistant District Attorney to the Grand Jury and finds that the same satisfy the applicable standards [*People v. Calbud, Inc.*, 49 NY2d 389(1980)]. Accordingly, Defendant's motion to dismiss or reduce the indictment is denied.

Defendant's motion to be provided with a copy of the Grand Jury minutes is denied in the exercise of discretion. Defendant's motion to be provided with a copy of the legal instructions given to the Grand Jury is also denied in the exercise of discretion.

BILL OF PARTICULARS

"The sole function of a bill of particulars is to define more specifically the crime or crimes charged in the indictment, or, in other words, to provide clarification of certain matters set forth in the pleading. A bill of particulars serves to clarify the pleading; it is not a discovery device." [*People v. Davis*, 41 N.Y.2d 678, 679-80 (1977)]. See also [*People v. Zurita*, 64 A.D.3d 800, 801 (2d Dept. 2009)]. While a bill of particulars must apprise defendant of the theory to be advanced at trial, there is no requirement that the bill of particulars provide information as to the evidence that will be used to prove that theory. [*People v. Earel*, 220 A.D.2d 899 (3d Dept. 1995), *aff'd* 89 N.Y.2d 960 (1997); *Preisser*, McKinney's Practice Commentaries to CPL §200.95, citing [*People v Fitzgerald*, 45 N.Y.2d 574 (1978)]. Stated differently, "the bill of particulars is meant to provide what the People intend to prove, not show how they intend to do so." [*People v. Young*, 289 A.D.2d 866, 868 (3d Dept. 2001)].

The Court has reviewed the Bill of Particulars and concludes that it provides Defendant with fair notice of the charges against him, adequately apprising Defendant of the theory to be

advanced at trial and specifies the substance of Defendant's conduct that the People intend to prove at trial, and contains the information that is necessary for Defendant to adequately prepare and conduct a defense. [*People v. Ribowsky*, 77 N.Y.2d 284, 290 (1991); *People v. Byrnes*, 126 A.D.2d 735, 736 (2d Dept. 1987); *People v. Wideman*, 195 A.D.2d 582, 583 (2d Dept. 1993)].

DISCOVERY

Defendant's motion for discovery is granted to the extent that the District Attorney is directed to make available to Defendant's attorney any and all property and information required to be disclosed pursuant to CPL 240.20.

The search warrant, application and inventory return receipt are discoverable pursuant to CPL §240.20(1)(h). Therefore, unless the People move for a protective order pursuant to CPL §240.50, the People shall provide Defendant's counsel with copies of the search warrant, the warrant application and the inventory return receipt no later than two weeks after the date of this Decision and Order.

BRADY AND IMPEACHING MATERIAL

Defendant's motion to be provided with all *Brady* and impeaching material is granted to the extent that the People shall provide Defendant with any evidence in their possession or control which is favorable to him as provided in *Brady v. Maryland*, 373 US 83 (1963) and *United States v. Bagley*, 473 US 667 (1985). The People are reminded of their continuing obligation pursuant to *Brady* with respect to the delivery of any materials now in their possession and/or control or which may hereafter come into their possession and/or control or which may tend to exculpate Defendant or which is otherwise favorable to Defendant. This obligation

includes any “evidence of a material nature favorable to the defense which, if disclosed, could effect the ultimate decision on a suppression motion.” [*People v. Williams*, 7 N.Y.3d 15, 19 (2006), quoting *People v. Geaslen*, 54 N.Y.2d 510 (1981)].

Defendant’s motion for production of exculpatory information also includes a request for information regarding any cooperation agreements that any witnesses have entered into, or may enter into, with the District Attorney’s Office. Any cooperation agreement relating to the testimony that a witness will provide at Defendant’s trial is *Brady* material. [*People v. Steadman*, 82 N.Y.2d 1 (1993)]. Therefore, in the event that any such agreement exists or is entered into during the pendency of this matter, the People shall disclose the full terms of that agreement to Defendant sufficiently in advance of the cooperating witness’ testimony so as to provide Defendant with a meaningful opportunity to use the allegedly exculpatory material to cross-examine the cooperating witness. [*People v. Leavy*, 290 A.D.2d 516 (2d Dept. 2002)].

SUPPRESSION OF STATEMENTS

Defendant’s motion to suppress statements alleged to have been made by Defendant as contained in the CPL §710.30 notice served by the People is granted solely to the extent that a *Huntley* hearing will be held prior to trial [*People v. Huntley*, 15 NY2d 72 (1965)].

SUPPRESSION OF PHYSICAL EVIDENCE

Defendant moves to suppress all physical evidence that was seized in this case. However, the People have not yet disclosed copies of the search warrant, search warrant application and the inventory return receipt. Once the People disclose those documents, Defendant is granted leave

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to move to controvert the search warrant. Defendant shall file this motion with the Court no later than two weeks after receiving copies of the search warrant, search warrant application and the inventory return receipt.

SANDOVAL

The Court grants Defendant's motion for a Sandoval hearing to the extent that a hearing is ordered which will be held immediately prior to trial to determine which, if any, bad acts or convictions may be used as impeachment in the event that the Defendant elects to testify at trial. See People v. Sandoval, 34 NY2d 371 (1974). The District Attorney has provided Defendant's attorney with a true copy of Defendant's Division of Criminal Justice Services Summary Case History. The Court orders the District Attorney to disclose to Defendant's attorney any and all acts upon which it intends to impeach Defendant, including without limitation all prior instances of Defendant's alleged prior uncharged criminal, vicious or immoral conduct that the People intend to use at trial for the purposes of impeaching Defendant's credibility. [CPL §240.43].

VENTIMIGLIA

Defendant has requested that the People to supply Defendant with notice of all specific instances of prior uncharged conduct which the People will seek to offer against Defendant at trial upon its direct case.

The People have not made any application to offer evidence of any specific instances of uncharged crimes which they intend to offer in their direct case pursuant to People v Ventimiglia, 52 N.Y.2d 350 (1981). If the People intend to make an application pursuant to People v Ventimiglia, they should do so prior to the Sandoval hearing ordered herein.

LEAVE TO FILE ADDITIONAL MOTIONS

Defendant's request for leave to file additional motions is also granted to the extent that Defendant may file a supplemental motion to controvert the search warrant no later than two weeks after the People disclose the search warrant, search warrant application and inventory return receipt as ordered herein.

Leave to file additional motions beyond the statutory 45-day time limit will only be granted upon an application that meets the requirements of CPL §255.20(3).

So Ordered.

Dated: Poughkeepsie, NY
October 27, 2017



PETER M. FORMAN
COUNTY COURT JUDGE

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