

People v Perkins

2017 NY Slip Op 33290(U)

June 6, 2017

County Court, Dutchess County

Docket Number: 8/2017

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,

DECISION AND ORDER
Ind. No. 8/2017

Plaintiff,

William V. Grady,
District Attorney
By: Joelle P. Morabito-Cruz, Esq.

- against -

SHANE PERKINS,

Richard A. Berube, Esq.
Counsel for Defendant

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 IN SUPPORT.....	2
ANSWERING AFFIRMATION.....	3

Defendant stands accused by the Grand Jury of the County of Dutchess of one count of Criminal Contempt in the First Degree, a Class E Felony, in violation of §215.51(c) of the Penal Law; eleven counts of Aggravated Family Offense, a Class E Felony, in violation of §240.75(1) of the Penal Law; and one count of Tampering with a Witness in the Fourth Degree, a Class A Misdemeanor, in violation of §215.10(b) of the Penal Law.

By Omnibus Motion, Defendant seeks various forms of relief of which this Court will address as follows:

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GRAND JURY MINUTES AND 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 presented, 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.'

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 offenses as set forth therein, and the competent and admissible evidence before the Grand Jury provides reasonable cause to believe that Defendant committed those offenses [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 remaining counts of 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 remaining counts of 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 appraises 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 solely 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.

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)].

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.

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. [CPL§710.60[4]; **People v. Huntley**, 15 N.Y.2d 72 (1965)]. To the extent that Defendant's motion arguably seeks to suppress the alleged statements on the grounds that he was arrested unlawfully and without probable cause, that motion is denied. Defendant has failed to set forth factual allegations sufficient to warrant such a hearing. [CPL §710.60(4). **People v. Mendoza**, 82 N.Y.2d 415 (1993); **People v. Wright**, 54 A.D.3d 695, 863 N.Y.S.2d 253 (2 Dept. 2008)].

SUPPRESSION OF IDENTIFICATION

The People have served a CPL §710.30 notice stating that, on September 10, 2016, one witness, Donna Vivinetti, made a positive identification.

Defendant has moved to prevent that witnesses from making an in-court identification on the grounds that the out-of-court identification procedures used by law enforcement authorities were unduly suggestive. Defendant's motion is granted solely to the extent that a hearing pursuant to **People v. Rodriguez**, 79 NY2d 445 (1992) will be held to determine whether the identification was confirmatory or if a **Wade** hearing is necessary. [**People v. James**, 48 A.D.3d 698 (2d Dept. 2008)].

The CPL §710.30 notice also states that, on September 10, 2016, three additional witnesses positively identified Defendant at various times between 8:10 PM and 11:51 PM.

Defendant has moved to prevent those witnesses from making in-court identifications on the grounds that the out-of-court identification procedures were unduly suggestive. That motion is granted solely to the extent that a **Wade** hearing will be held prior to trial. [CPL§710.60[4]; **People v. Boyer**, 6 N.Y.3d 427, 431 (2006)].

LEAVE TO FILE ADDITIONAL MOTIONS

Defendant's request for leave to file additional motions is granted to the extent that Defendant may file any motion that Defendant deems fit within the forty-five (45) day time limit. Subsequent to the forty-five (45) day time limit, Defendant may make further motions only upon a showing of good cause.

So Ordered.

Dated: Poughkeepsie, NY
June 6, 2017



PETER M. FORMAN
COUNTY COURT JUDGE

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