People v Mccarty
2017 NY Slip Op 33313(U)
June 30, 2017
Supreme Court, Orange County
Docket Number: 0962/2017
Judge: Robert H. Freehill

ORIGINAL

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

THE PEOPLE OF THE STATE OF NEW YORK

-against-

HENRY MCCARTY,

Defendant.
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Indictment No. 2017-075

Index No. 0962/2017

AMENDED DECISION AND ORDER

FREEHILL, ROBERT H., J.C.C.

Defendant is charged in this indictment with the crimes of Criminal Possession of a Weapon in the Second Degree, Attempted Burglary in the First Degree (3 counts), Attempted Burglary in the Second Degree, Menacing in the Second Degree, Criminal Possession of a Firearm and Assault in the Third Degree.

By this omnibus motion the defendant has moved for certain pretrial relief which the Court decides, having considered: 1.) the defendant's notice of motion and affirmation; 2.) the People's affirmation in response; and 3.) the transcript of Grand Jury proceedings. This is an amended Decision and Order. The Court erroneously signed and filed a draft which is corrected by this Amended Decision and Order.

Motion to Inspect Grand Jury Minutes
Motion to Dismiss or Reduce Indictment

On January 11, 2017, defendant is alleged to have attempted to enter a dwelling at 140 North Miller Street, Newburgh, Orange County, New York. The evidence presented to the grand

jury indicates that defendant attempted to push his way into the dwelling. The defendant ran towards the door and the victim felt defendant push against the door as she tried to latch it with a lock. After she locked the door, defendant told the victim to give him clothes. The victim refused and defendant "ran off next door." The victim opened the door again to lock the screen door and then closed the door again. She looked through the window in the door and saw the defendant standing in the sidewalk approximately ten to twelve feet away pointing a silver and black gun at her. She had observed the gun on his person before and had seen photographs of the gun on defendant's Facebook page. She ran up the stairs in her residence and called 911. After she ran upstairs, she heard four to five gunshots.

While the defendant was attempting to effect entry he did not threaten the use of a dangerous instrument as charged in the indictment nor did he threaten the use of a deadly weapon nor did he display a pistol or revolver. This alleged conduct occurred after he attempted to gain entry into the house when it is alleged that he returned to the sidewalk outside of the victim's home and displayed a handgun. There is no indication in the record of the grand jury proceedings that the victim knew that defendant possessed a handgun until after he attempted and failed to gain entry into her home. Accordingly, the third and fourth count of the indictment are not supported by any proof that he threatened the use of a handgun or displayed a handgun.

The Court has reviewed the minutes of the Grand Jury and finds that the remaining counts of the indictment are based upon legally sufficient evidence and that the Grand Jury was properly instructed with respect to the applicable law.

Motion to Controvert the Search Warrant
Motion to Suppress Physical Evidence

The Court has reviewed the warrant, the applications and the related documents and determines that the warrant is sufficient and the allegations in the application set forth reasonable cause for the search of the designated property at the designated location. When reviewing this warrant, the court considered the presumption of reliability that attaches to the facts alleged in support of the warrant (*see, People v. Parris*, 83, NY2d 342 [1994]; *People v. Salgado*, 207 AD2d 918 [2nd Dept, 1994]). The Court is mindful that "Search warrant applications should not be read in a hyper technical manner but rather must be considered in the clear light of everyday experience and accorded all reasonable inferences" (*People v. Hanlon*, 36 NY2d 549, 559 [1975]).

The allegations of fact must provide probable cause for the issuance of the warrant. "To establish probable cause, a search warrant application must provide sufficient information "to support a reasonable belief that evidence of a crime may be found in a certain place *(People v McCulloch*, 226 AD2d 848, 849; see *People v Paccione*, 259 AD2d 563, 564)" *People v Murray* 136 AD3d 714 [2d Dept 2016]. Search warrants, which generally are not composed by lawyers but rather by police officers, should not be read hypertechnically and may be "accorded all reasonable inferences" (*People v Hanlon*, 36 NY2d 549, 559).

In paragraph 8. the application for the search warrant seeks to locate evidence of Assault in the First Degree and Assault in the Second Degree that occurred at the target premises. At best, the allegations set forth in paragraphs 6 and 7 of the application indicate that defendant possessed a single handgun. In paragraphs 8a through 8e, the warrant application requests to search for body fluids and other biological material (8a), forensic evidence such as fingerprints, fiber evidence that may identify persons at the scene of the crime (8c), personal property that

could be traceable to persons at the scene of the crime (8d) and documentary evidence including computers, writings and other indicia of identity of the perpetrator and identifying the identity of occupants of the target premises. In paragraph 8b, the application requests to search for weapons of any type, including firearms, knives or other deadly weapons or dangerous instruments.

It appears that the requested items sought in the application were erroneously cut and pasted to the application without regard to the facts of the crime alleged by the complaining witness. The corresponding search warrant includes all of the items requested in the application and adds an additional paragraph f permitting the search for evidence of various controlled substances, paraphernalia and records.

In addition to the issue with the errors on the face of the application, defendant argues that the warrant is insufficient because it is based upon information provided by a person of no known reliability. Information obtained by police from an identified citizen informant is sufficient to provide probable cause for issuance of a search warrant (*see, People v Corr*, 28 AD3d 574 [2d Dept 2006]; *People v Allen*, 209 AD2d 425 [2d Dept 1994]). The reporting of false information to authorities carries the potential for criminal sanctions even if the report is not reduced to writing and sworn to in an affidavit (*see, People v Chipp,* 75 NY2d 327 [1990]). Accordingly, defendant's argument regarding the reliability of the complainant is without merit.

The defendant also alleges that there are not facts alleged in the search warrant application to establish reasonable cause to believe a gun could be found at the defendant's residence at 48 Farrington Street in Newburgh. Defendant argues that the fact that defendant was observed with a handgun at 140 North Miller Street in Newburgh, New York does not indicate that he placed the gun in his home at 48 Farrington Street, Newburgh, New York, a short while

later. In *People v Paccione*, 259 AD2d 563 [2d Dept 1999]), the Second Department upheld a finding by the Kings County Supreme Court that probable cause existed to search a defendant's home when he was identified as one of the perpetrators of a robbery where over $150,000.00 in cash had been stolen. In *Paccione*, the application for the warrant set forth the detective's experience which included his experience that perpetrators of robberies secrete evidence of the crime in and around their residences.

In the application before this Court there is no language related to the experience of the police officer. However, decisions following *Paccione* do not require language reciting the experience of the officer and rely instead upon the factual situation alleged in the application to support a search of the home of an alleged perpetrator of an offense (*see, People v Murray*, 136 AD3d 714 [2d Dept 2016]; *People v Harvey*, 298 AD2d 527 [2d Dept 2002]); *People v Brown*, 269 AD2d 809 [4th Dept 2000]). In these cases, there is no indication that the applicants based the application for the search warrant on prior experience and, instead, it appears that the circumstances and nature of the crime itself may establish reasonable cause to believe contraband or stolen property would be found in the residence of the perpetrator of the crime.

From the facts alleged in the application it is known that a call came to the Newburgh Communications Dispatcher on January 11, 2017. No time is alleged for the call. The call came around the same time that the victim was putting her child on a school bus. Again no time is given for the time defendant appears at the victim's residence. After the police arrive, they travel to 48 Farrington Street where the defendant lives. The police meet with a woman and they ask if defendant is at home. Defendant emerges from the apartment and is taken into custody. Again, no time is alleged. This chain of events is incorporated into the search warrant application that

was signed before a Newburgh City Court Judge at 9:55 a.m.

If the search warrant application is interpreted in a common-sense manner as required by *Hanlon*, it is not unreasonable to expect that, since defendant was found in his own house within approximately four hours of the time he was alleged to have threatened the victim with a handgun, the handgun he used to threaten the victim would also be found in his residence, as well. Even though the application does not give any basis for this conclusion upon the prior police experience and training of the applicant, the facts of the alleged crime and the location of where defendant was taken into custody as set forth in the application as a whole are sufficient to establish reasonable cause to believe that the handgun displayed by defendant would be found in his apartment.

Unfortunately, the items sought to be seized in the application and the items directed to be seized as set forth in the search warrant itself do not list the black and silver semiautomatic handgun referred to by the complainant in her report to the police. The application seeks permission to search for "weapons of any type, including firearms, knives or other deadly weapons..." (Application paragraph 8b, warrant paragraph b.). According to the return, which was prepared only after the Court had requested a copy for itself and defense counsel, the police recovered a Smith and Wesson 40 caliber pistol, a box of cornflakes from which the pistol was recovered, a black gun holster and eight 40 caliber rounds of ammunition as a result of the execution of the search warrant.

Defendant raises no claims regarding the particularity of the warrant even though much of the property authorized to be seized in warrant is either overbroad or unsupported by probable cause. In particular, property listed in paragraphs lettered a, c, d, e, and f are not supported by

probable cause. The only paragraph relevant in any way to the factual allegations in the application are contained in paragraph b of the warrant which authorizes the seizure of :

> weapons of any type, including firearms, knives or other deadly weapons or dangerous instruments which may have been used in the commission of offenses surrounding the incident to threaten individuals or inflict any wounds to the bodies of any of the participants; gunshot residue, firearms projectiles, wadding, shell casings, unexpended ammunition or pieces of firearms which may identify firearm(s) used in the commission of the crime;

This paragraph is also overbroad and the question that must be answered is whether any portion of this paragraph is sufficiently particularized to support seizure of the items set forth in the return (*see, People v. Brown*, 96 NY2d 80 [2001]). In addition, deficiencies in a warrant, overbroad on its face, may be cured by referring to supporting documents (*People v Telesco,* 207 AD2d 920 [2d Dept 1994]). Notwithstanding the broad nature of the directives of the warrant, the items seized by the police when executing the warrant were directly related to the probable cause set forth in the factual allegations of the search warrant application which specifically related to defendant's use of a semiautomatic pistol to threaten the complainant (*see, People v. Burke*, 287 AD2d 512 [2d Dept 2001]).

In *People v Brown*, the Court of Appeals reviewed a case where specific items of evidence and an overbroad directive to search for "any other property the possession of which would be considered contraband" (*Brown* at 84,85). The Court of Appeals upheld the severance of the specific property from catchall phrase "any other property the possession of which would be considered contraband." Here, when irrelevant information is redacted from paragraph b in the warrant, the facts recited in the application established probable cause to search for firearms used in the commission of offenses surrounding the incident to threaten individuals, firearms

projectiles, wadding, shell casings, unexpended ammunition or pieces of firearms which may identify firearm(s) used in the commission of the crime (redacting paragraph b of the warrant). The police recovered a firearm and related items that are supported by probable cause and those items set forth in the return are admissible at trial.

Finally, the description of the subject premises is sufficient. The City of Newburgh police officers observed defendant exit the apartment that was later searched. The warrant itself was directed to City of Newburgh Police who went to the described location in the City of Newburgh. Under these circumstances, the description as is existed in the warrant and the application did not result in the police searching an incorrect residence (*see, Steele v United States,* 267 US 498 [1925]; *People v Nieves*, 36 NY2d 396 [1975]; *People v Mitchell*, 57 AD3d 1232 [3d Dept 2008]; *People v Carpenter*, 51 AD3d 1149 [3d Dept 2008]).

Although there are deficiencies in the warrant, when it is reviewed in the manner required by case law and applying a presumption of reliability, the evidence seized during the execution of the search warrant is admissible at trial.

Motion for a *Sandoval* Ruling

The motion is granted to the extent that a hearing is hereby 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. The Court further orders the District Attorney to disclose to defendant's attorney any and all bad acts and convictions which will be used to impeach defendant three days prior to the commencement of trial in accordance with CPL §240.43.

Motion to Suppress Statements

The motion is granted to the extent that a hearing is hereby ordered pursuant to CPL 710.60(4) to determine the admissibility of any statements allegedly made by the defendant.

The foregoing constitutes the Decision and Order of the Court.

Dated: Goshen, New York
June 30, 2017

ENTER:

HON. ROBERT H. FREEHILL
County Court Judge

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