

People v Burks
2017 NY Slip Op 33412(U)
January 19, 2017
County Court, Broome County
Docket Number: Indictment No. 16-367
Judge: Kevin P. Dooley
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STATE OF NEW YORK
COUNTY COURT :: COUNTY OF BROOME

THE PEOPLE OF THE STATE OF NEW YORK

-v-

CHARLES W. BURKS & JENNIFER L. BURKS,
Defendants.

KEVIN P. DOOLEY, J.

On August 18, 2016, a Broome County Grand Jury handed up Indictment 16-367, charging the above-named defendants, acting in concert with each other, with Manslaughter in the Second Degree, a class C felony, Assault in the First Degree, a class B felony, Criminal Sale of a Controlled Substance in the Third Degree, a class B felony, two counts of Assault in the Second Degree, class D felonies, and one count of Endangering the Welfare of a Child, a class A misdemeanor. The charges contained in the six-count indictment alleged that on May 14-15, 2015, the defendants recklessly caused serious physical injury to their (then) four year old son by giving him methadone, and on May 6-7, 2016, the defendants recklessly caused their son's death by giving him oxycodone.

The defendants were arraigned in Broome County Court on August 23, 2016. On November 9, 2016, defendant Jennifer L. Burks filed with the Court an Omnibus Motion seeking certain Orders and relief in connection with the indictment filed against her. The Omnibus Motion of defendant Charles W. Burks was filed on November 11, 2016. The People's responses to both motions were filed on December 16, 2016. The following constitutes the Decision and Order of the Court.

GRAND JURY MOTIONS

The defendants each move for an Order, pursuant to CPL 210.30, for inspection of the stenographic minutes of the Grand Jury proceeding for the purpose of determining whether the evidence before the Grand Jury was legally sufficient to support the charges contained in the indictment, and/or whether the Grand Jury proceedings were defective within in the meaning of CPL 210.35. The People have no objection to the Court examining the Grand Jury minutes and provided a copy of the same for the Court's review on November 28, 2016. Upon examination

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SUPREME/COUNTY COURT
CLERKS OFFICE

DECISION AND ORDER

Indictment No. 16-367

of the minutes, the Court finds that release of the minutes to the defense is not necessary to assist the Court in making its determination of the motion. Accordingly, the defendants' request for release of the Grand Jury minutes is denied.

In reviewing the legal sufficiency of the evidence presented, the Court must view the evidence in a light most favorable to the People and determine whether the evidence, if unexplained or uncontradicted, would be sufficient to support a guilty verdict after trial. The Court's inquiry is limited to assessing whether the facts, if proven, and the logical inferences flowing therefrom, provide proof of every element of the crimes charged and the defendants' commission of those crimes. Its inquiry does not include weighing the proof or examining its adequacy, or determining whether there was reasonable cause to believe the accused committed the crimes charged, as the resolution of such questions is exclusively the province of the Grand Jury. *People v. Jensen*, 86 NY2d 248 (1995).

Upon examination, the evidence presented to the grand jury was legally sufficient to establish the commission by the defendants of the offenses charged in the indictment or lesser included offenses thereof. In addition, there were no defects in the grand jury proceedings within the meaning of CPL 210.20 (1) (c). Therefore, the defendants' motion to dismiss the indictment is denied.¹

MOTIONS FOR DISCOVERY AND OTHER PRE-TRIAL DISCLOSURES

As part of their Omnibus Motions, each defendant filed a Motion for Discovery. The prosecutor responds that "The People have turned over a number of items in this case," including the following items on the following dates:

- On August 30, 2016, five CDs containing audio recordings and transcripts of the same, a CD containing a video-recorded interview of Jennifer L. Burks, and a CD containing eight recorded conversations with the defendants

¹ Defendant Charles W. Burks' motion to dismiss the indictment on the ground "the police had no probable cause" is denied, as this is not a ground for dismissal under CPL 210.20.

- On September 6, 2016, a 39-page report by Endicott Police Det. Michael McEwan, which includes the sum and substance of the statements and admissions of the defendants.
- On September 7, 2016, six CDs of audio recordings (five of which had been previously provided on August 30, 2016), five e-mail messages of Charles W. Burks, an audio-recorded interview of Charles Burks from August 11, 2015, and CDs with three videos.
- On October 27, 2016, the autopsy report (by e-mail transmission).
- On November 2, 2016, a DVD containing the medical records for the victim from Upstate University Hospital from May 2015 through July 2015.
- On November 7, 2016, medication lists from the Department of Health and Upstate Medical Center (by e-mail transmission).
- On December 2, 2016, a laboratory report concerning the stomach contents of the victim (by e-mail transmission).

The prosecutor also responds that she will provide, under separate cover, copies of the Endicott Police Department property lists, the photographs taken by the police, and the recorded 911 calls, and will make any physical evidence available for inspection and review. The prosecutor further responds that “(t)here are voluminous medical reports in this case from multiple hospitals, private providers, at-home nurses, and EMS,” which will also be made available for inspection and review.

The prosecutor also proposes providing the Court with a copy of the materials from the Department of Social Services contained in the prosecutor’s case file, for the Court to review and determine what documents, if any, should be disclosed to the defendants. The Court declines to engage in an initial, wholesale review of the DSS records obtained and possessed by the prosecutor in this case. It is the responsibility of the prosecutor to review those records, and to disclose to the defendant, at the appropriate time, any records or documents required to be disclosed pursuant to CPL Sections 240.20, 240.44, and 240.45, *Brady v. Maryland*, 373 US 83

(1963), *Giglio v. United States*, 405 US 150 (1972), and/or *People v. Rosario*, 9 NY2d 286 (1961). If the prosecutor believes that discovery of certain documents, records or information should be denied, limited, conditioned, delayed or otherwise regulated, a motion for a protective order should be made pursuant to CPL 240.50.

The prosecutor further responds that she is aware of her obligation under CPL 240.45 to provide *Rosario* material after a jury is sworn and prior to the prosecution's opening statement. Although not specifically acknowledged in her responsive papers, the prosecutor is also required provide the defendants, at trial after the jury is sworn, with all written or recorded statements, including any grand jury testimony of any persons she intends to call as witnesses, as well as information known to her relating to any criminal convictions or pending charges of those witnesses.

The defendants both move for Orders requiring the prosecutor to furnish a Bill of Particulars and to disclose any and all exculpatory *Brady* material. The prosecutor provided responses to the requests for Bills of Particulars. She also responds that she is aware of her obligation under *Brady v. Maryland, supra*, to provide any and all exculpatory or favorable information to the defendants and "know(s) of no such material which has not heretofore provided" to the defense.

If either defendant believes he or she has not received discovery materials to which he or she is entitled, the defendant can move for an Order to compel specific disclosure, preclude evidence, or other applicable relief.

REQUESTS AND MOTIONS FOR PRE-TRIAL HEARINGS

Motion for Preclusion or Suppression of Statements

Both defendants move for an Order precluding any statements and admissions attributed to them for which timely notice under CPL 710.30 was not given. In response, the prosecutor states that a police report containing the sum and substance of the defendants' statements and admissions and CDs containing all recorded statements of the defendants that the People intend to offer at trial, were provided within fifteen days of the defendants' arraignment on August 23, 2016. Therefore, the defendants' motion to preclude these statements is denied.

The defendants also move for an Order suppressing all statements and admissions attributed to them that were made to law enforcement officers on the grounds the statements were involuntarily made or obtained in violation of their constitutional rights. The prosecutor has no objection to the Court conducting a hearing pursuant to *People v. Huntley*, 15 NY2d 72 (1965). Therefore, a pre-trial hearing will be conducted on January 25, 2017, at 9:30 a.m.

Motion to Redact Recorded Statements

Defendant Charles W. Burks moves for an Order redacting from the videotape recording of the defendant any statements as to the defendant's "prior offenses, statements made in violation of the Defendants (*sic*) 6th Amendment rights and unduly prejudicial statements."² The defendant must specify for the prosecution and the Court at the pre-trial hearing to be conducted on January 25, 2017, at 9:30 a.m., those statements he seeks to have redacted from the recording.

Motion for Audibility Hearing

Defendant Jennifer L. Burks moves for an Order precluding the prosecution from offering any audiotapes of her "conversations" with the police that are inaudible or indistinct, or contain statements or comments from a third party which are "unduly suggestive of incriminatory involvement by the defendant." The defendant must specify for the prosecution and the Court at the pre-trial hearing to be conducted on January 25, 2017, at 9:30 a.m., the specific portion or portions of any recordings she seeks to have precluded at trial as inaudible, indistinct or otherwise inadmissible.

Motion to Suppress Physical Evidence

Defendant Charles W. Burks moves to suppress any evidence obtained as "the fruit of an unlawful arrest without probable cause," and any evidence obtained "by means of an unlawful search and seizure."³ Defendant Jennifer L. Burks moves to suppress evidence, consisting of

² It appears from the prosecutor's response to the defendant's discovery motion that there are only *audio-taped* interviews of the defendant. If so, the defendant should be prepared to specify what statements he seeks to have redacted from those recordings as well as any video-taped statements of which he is aware.

³ The defendant also moves for suppression of "the video specifically used to electronically record the Defendant's conduct while interviews/interrogations/interviews," and "identification of the Defendant." The Court assumes these are drafting errors as there is no indication the defendant's conduct was video-recorded or the defendant was identified in a police-arranged procedure.

fentanyl prescribed to the defendants, a driver's license in the name of James Donovan Patrick (with defendant Charles W. Burks' photograph displayed), a black wallet with miscellaneous credit cards and miscellaneous paperwork and notebooks, seized from the defendants' trailer pursuant to a search warrant. She moves for a hearing to determine the "legal sufficiency of the warrant" and whether the warrant application contains any statements made by her, which were obtained in violation of her constitutional rights.

The prosecutor responds that she is unable to respond in any meaningful way to the defendants' motions because, "despite being in possession of the police reports in this case, the defendant(s') motion papers fail to set forth any factual issues entitling (them) to the relief requested." She submits that the defendants' motions should be summarily denied.

Criminal Procedure Law Section 710.60 provides that a motion to suppress physical evidence must state the ground or grounds for the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. In determining the sufficiency of the allegations made in support of a suppression motion, the Court must consider (1) the face of the pleading; in other words, whether the defendant alleges facts, rather than conclusions; (2) the factual allegations in context with the prosecution's theory of the case; and (3) the defendant's access to information necessary to support the motion. *People v. Mendoza*, 82 NY2d 415, 426 (1993). In this case, the defendants were provided with 39 page police report, which includes a description of the defendants' arrests on August 11, 2016 and the execution of a search warrant at the defendants' trailer on August 12, 2016.⁴

Given the information provided, defendant Charles W. Burks is in possession of sufficient facts to determine what evidence, if any, was obtained as a result of his arrest and what facts, if any, he could allege in support of a motion to suppress that evidence to suppress such evidence as the fruit of an illegal arrest. Therefore, his motion to suppress any evidence obtained as a result of his arrest is summarily denied.

As for any evidence obtained as a result of the execution of a search warrant on August 12, 2016, the Court notes that the defendants were not provided, through voluntary disclosure, or in response to a discovery motion, with copies of the search warrant and warrant application, even though these documents are discoverable under CPL 240.20. *People v. Velez*, 147 Misc2d 865 (Supreme Court, New York County, 1990); *People v. Brown*, 104 Misc2d 157 (Queens

⁴ The police report was attached as Exhibit D to the Omnibus Motion of defendant Jennifer L. Burks.

County, 1980). The police report simply recites that members of the Endicott Police Department conducted a search on the Dutchman travel trailer registered to the defendants, which had been towed to the police impound unit, and a key to the trailer had been provided to the investigators by Chief Investigator Jason Ellis of the Broome County District Attorney's Office.

In order to determine the defendants' motion to suppress physical evidence, the prosecutor is directed to provide to the defendants and to the Court copies of the search warrant and warrant application, no later than January 20, 2017. The Court will conduct an *in camera* review of the search warrant application to determine whether probable cause existed for the issuance of warrant.

A pre-trial hearing will be conducted on January 25, 2017, at 9:30 a.m., to determine whether the application for the search warrant was based, in whole or in part, on unlawfully obtained evidence, and if so, whether the lawfully acquired information is sufficient to provide probable cause for the warrant, and is untainted by and independent of any unlawfully acquired information. *People v. Harris*, 62 NY2d 706 (1984); *People v. Richardson*, 9 AD3d 783 (3d Dept., 2004).

Request for Sandoval/Ventimiglia Hearing

The defendants each request that the Court conduct a pre-trial hearing to determine the admissibility at trial, either as part of the People's direct case, or for the purpose of cross-examining each defendant, should he or she elect to testify, of the defendant's prior criminal convictions and/or uncharged criminal conduct. The prosecutor has no objection to the Court conduct such a hearing. Therefore, a *Sandoval* hearing will be conducted on January 25, 2017, at 9:30 a.m. At the hearing, the prosecutor must set forth any of convictions of the defendants and underlying facts she seeks to use, and any *Molineux* evidence she seeks to introduce in the People's case-in-chief against either or both defendants.

SEVERANCE MOTION

The defendants each move for an Order, pursuant to CPL 200.20 (3), directing that counts five and six of Indictment No. 16-367, which allege the crimes of Assault in the Second Degree and Endangering the Welfare of a Child, committed on May 14-15, 2015, be severed for trial from the first four counts of the indictment, which allege the crimes of Manslaughter in the Second

Degree, Assault in the First Degree, Criminal Sale of a Controlled Substance in the Third Degree, and Assault in the Second Degree, committed on May 6-7, 2016. The defendants argue that the offenses contained in counts five and six were improperly joined, because they are not based upon the same criminal transaction alleged in counts one through four, and proof of the criminal transaction on May 14-15, 2016, criminal transaction is not material or admissible as evidence of the crimes alleged in counts one through four. The defendant also argue that severance should be granted in the interest of justice and for good cause shown.

CPL 200.20 (2) (b) provides that two offenses are “joinable” when, although based upon different criminal transactions, such offenses or the criminal transactions underlying them, are of such nature that proof of the first offense would be material and admissible as evidence in chief upon the trial of the second, or *vice versa*. Here, evidence that the defendants had given methadone to their (then) four year old son in May 2015, and thereby caused serious physical injury to him, would be material and admissible evidence that in May 2016, they acted recklessly by giving oxycodone to him; in other words, given the injury they recklessly caused their son in May 2015, the defendants were aware of and consciously disregard the substantial and unjustifiable risk that their conduct in May 2016 could result in death or serious physical injury to their son. For this reason, counts five and six were properly joined with counts one through four. Because the counts were properly joined pursuant to CPL 200.20 (2) (b), there is no statutory authority permitting severance of the counts for trial. *CPL 200.20 (3); People v. Abdullah*, 133 AD3d 925 (3d Dept., 2015); *People v. Rodney*, 79 AD3d 1363 (3d Dept., 2010). Therefore, the defendants’ motion for a separate trial for counts five and six is denied.

DISCLOSURE OF POTENTIAL CONFLICTS OF INTEREST

As part of her Omnibus Motion, defendant Jennifer L. Burks requests an Order directing the prosecutor to disclose any and all potential witnesses she intends to call at trial, so that any potential conflicts of interest can be addressed prior to trial, if any of the potential witnesses were represented by the Public Defender’s Office in the past. The defendant concedes that no date, it does not appear that any conflicts of interest exist with any of the potential witnesses and does not provide any authority for the Court to order disclosure.

Should either the prosecutor or defense counsel become aware of any potential conflict of interest with any person who may be called as a witness at any pre-trial hearing or at trial, they should bring such potential conflict to the attention of the Court as soon as practicable.

DEMAND FOR RECIPROCAL DISCOVERY

As part of her response to each of the defendant's Omnibus Motion, the prosecutor served a Demand for Reciprocal Discovery pursuant to CPL 240.30. The defendants are directed to file a response to the Demand by January 31, 2017.

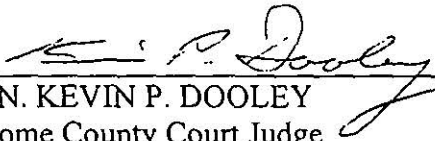
MOTION FOR FURTHER RELIEF

Criminal Procedure Law Section 255.20 provides that absent a showing of good cause, all pre-trial motions must be filed at the same time and within 45 days of arraignment. Therefore, good cause must be established before the Court will consider granting the defense leave to renew or make further motions.

The above constitutes the Decision and Order of Court.

It is so Ordered.

Dated: January 19, 2017
Binghamton, New York


HON. KEVIN P. DOOLEY
Broome County Court Judge