

People v Limbert
2018 NY Slip Op 33529(U)
March 12, 2018
County Court, Westchester County
Docket Number: 17-0645-02
Judge: Anne E. Minihan
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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

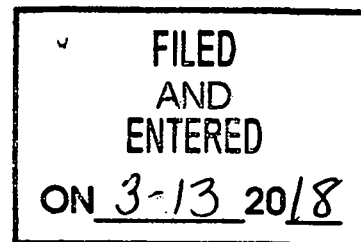
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

MANUEL LIMBERT,

Defendant.
-----X

MINIHAN, J.



DECISION & ORDER
Indictment No.: 17-0645-02

FILED 

MAR 13 2018

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant, MANUEL LIMBERT, having been indicted on or about August 14, 2017, acting in concert with ERICK GRIGOROFF is charged with Assault in the First Degree (Penal Law § 120.10 [1]). Defendant is charged individually with Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01 [2]) and Intimidation of a Witness in the Third Degree (Penal Law § 215.16 [02]) has filed a motion pursuant CPLR 2221 seeking an order granting renewal and reargument of the decision and order of this court (Minihan, J.) dated November 16, 2017 to the extent that it seeks to vacate the decision denying dismissal and/or reduction of the indictment as to the charge of Assault in the First Degree (Penal Law § 120.10 [1]). The defendant's motion also seeks, for the first time, a *Wade* hearing, based on an identification that was noticed on February 2, 2018, after the omnibus motion was filed. The People oppose the motion as procedurally flawed and without merit.

According to the People, on February 18, 2017, at approximately 2:15 A.M., at Fulgum's Bar in the Town of Cortlandt, County of Westchester, defendant and co-defendant were engaged in a physical altercation with several people which started inside the bar and ended with the defendant allegedly stabbing the victim, Belliveau, in the torso. Defendant and co-defendant were observed entering an automobile before leaving the scene. Defendant was later observed, via surveillance video, going into a gas station in the Town of Cortlandt. On June 6, 2017, the Grand Jury returned a true bill and a sealed indictment was filed in Westchester County Court. On August 14, 2017, defendant was arrested, the indictment was unsealed and he was arraigned before this court.

On October 10, 2017, defendant moved for omnibus relief and the People opposed the motion in its entirety with the exception to the request for a *Sandoval* hearing. On November 16, 2017, this Court (Minihan, J.) issued a Decision and Order and denied that part of the motion that sought to dismiss or reduce the indictment as to all the charges and this court further determined that the evidence presented legally established every element of each offense charged including the Assault in the First Degree charge while properly instructing the grand jurors.

On January 29, 2018, the victim, Belliveau, met with the District Attorney's Office and a New York State Police Investigator where the victim watched the surveillance video and identified the defendant as the individual that was lifted off of him after the stabbing. The People forwarded a letter dated February 1, 2018 to defendant's counsel and this court as to the identification and attached a CPL 710.30 notice related to the identification. On January 11, 2018, the People turned over the grand jury minutes to the defendant's counsel. The defendant

personally appeared with counsel for a conference on February 8, 2018 and the court (Warhit, J.) granted the defendant an opportunity to make a motion with regard to the People's CPL 710.30 notice.

By the instant motion, defendant seeks to renew and reargue that part of the motion seeking dismissal of the indictment or in the alternative a reduction of count two from Assault in the First Degree (Penal Law § 120.10 [1]) to Assault in the Second Degree (Penal Law § 120.05). Defendant also seeks for the first time preclusion of a post-indictment identification of defendant, or in the alternative, that this court order a hearing to determine whether the identification procedure was suggestive. The People oppose the application in its entirety.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d] [2]; *see Ahmed v Pannone*, 116 AD3d 802, 805 [2d Dept 2014]; *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]). "While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d at 820 [2d Dept 2011] [citations and internal quotation marks omitted]).

Aside from the procedural flaws, as the initial motion papers relied upon by this court are not annexed to this motion and despite having failed to identify separately and support each item of relief sought individually (CPLR 2221 [f]), the motion to renew/reargue is granted, and after renewal/reargument the motion is denied on the merits and the court adheres to its initial determination dated November 16, 2017 as to the denial to dismiss or reduce count two.

Defendant's claim that this court overlooked or misapprehended the facts or the law establishing serious physical injury, an element of the crime of Assault in the First Degree (see Penal Law § 120.10 [1]) is unavailing. Serious physical injury is defined as, "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00 [10]). To that end, legally sufficient evidence to indict defendant required competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof (Penal Law §§ 70.10, 190.65 [1]).

A review of the grand jury minutes reveals that defendant and his cohort were at the bar where the defendant was observed with a knife in his hand and that his sneakers were covered in blood. This testimony coupled with the other evidence legally established that the defendant shared his co-defendant's intent to cause serious physical injury by means of a deadly weapon or a dangerous instrument to the defendant (*see People v Guerrero*, 150 AD3d 883 [2d Dept 2017]). The victim's testimony including that he suffered extreme pain and excessive blood loss coupled with the evidence that the defendant underwent surgery requiring five staples to repair the internal injury to his liver from the stabbing constituted serious physical injury. The fact that defendant could return to work and perform light duty does not minimize the seriousness of the physical injury. Furthermore, the hospital records demonstrate that the victim was admitted to

the hospital for one week and missed eight weeks of work further supporting a finding of serious physical injury (*see People v McLawrence*, 114 AD3d 964 [2d Dept 2014]; *People v Wright*, 221 AD2d 577, 578 [2d Dept 1996]; *People v Moreno*, 233 AD2d 531, 532 [2d Dept 1996]; *see also People v Blauvelt*, 156 AD3d 1333 [4th Dept 2017]). To that end, the cases cited by the defendant are unavailing including *People v Mazariego*, (117 AD3d 1082 [2d Dept 2014]), where the court found no serious physical injury due in part to the victim's testimony that he was stabbed and required no stitches nor did he undergo surgery.

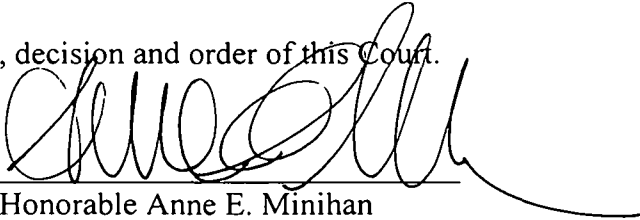
Notably, after an *in camera* inspection of the minutes, this court in its decision dated November 16, 2017, found that defendant failed to demonstrate that the Grand Jury proceedings were rendered defective. The court noted in its decision that the evidence presented, if accepted as true, was legally sufficient to establish every element of each offenses charged (CPL 210.30[2]). Since the defendant fails to present any new facts not offered in his prior motion or a change in the law that would change this court's prior determination, necessary for a motion to renew, this aspect of his motion is denied (CPLR 2221 [e]; *Ellner v Schwed*, 48 AD3d 739, 740 [2d Dept 2008]).

Turning to the request for a *Wade* hearing as to the CPL 710.30 identification noticed on February 2, 2018. The People oppose both procedurally and on merits claiming that it is not an "identification procedure" contemplated in CPL 710.30, and thus, defendant's motion should be denied. The People argue that the defendant has not complied with the express statutory language of CPLR 2221, and has failed to put forward any new facts not offered in his previous motion.

The court is aware that the omnibus motion did not seek to suppress the noticed identification procedure and is aware that defendant did not have notice of such identification at the time he made his motion. This court (Warhit, J.) adjourned the matter so that defendant could bring a motion. As such, the court grants defendant's motion to preclude identification testimony to the limited extent of conducting a hearing prior to trial to determine whether the identifying witnesses had a sufficient prior familiarity with the defendant as to render them impervious to police suggestion (*People v Rodriguez*, 79 NY 2d 445 [1992]). In the event the court finds that there was not a sufficient prior familiarity with the defendant on the part of the witness, the court will then consider whether or not the noticed identifications were unduly suggestive (*United States v Wade*, 388 US 218 [1967]). Specifically, the court shall determine whether the identifications were so improperly suggestive as to taint any in-court identification. In the event the identifications are found to be unduly suggestive, the court shall then go on to consider whether the People have proven by clear and convincing evidence that an independent source exists for such witness' proposed in-court identification.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
March 12, 2018


Honorable Anne E. Minihan
Acting Supreme Court Justice

To:

HON. ANTHONY A. SCARPINO, Jr.
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, New York 10601
BY: Kevin Jones, Esq.
Assistant District Attorney

CLARE J. DEGNAN, ESQ.
The Legal Aid Society of Westchester County
150 Grand Street, Suite 100
White Plains, New York 10601
By: Katie D. Wasserman, Esq.