

People v Rickard

2018 NY Slip Op 33681(U)

May 23, 2018

County Court, Westchester County

Docket Number:17-1035

Judge: George E. Fufidio

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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-

DECISION & ORDER
Indictment No.: 17-1035

DAMIEN RICKARD a/k/a MELO,

FILED

MAY 23 2018

Defendant. TIMOTHY C. IDON
COUNTY CLERK
COUNTY OF WESTCHESTER

Richardson

FUFIDIO, J.

Defendant, DAMIEN RICKARD, having been indicted on or about October 3, 2018 for criminal sale of a controlled substance in the third degree (Penal Law § 220.39(1)) and criminal possession of a controlled substance in the third degree (Penal Law § 220.16(1)) has filed an omnibus motion which consists of a Notice of Motion, an Affirmation in Support and a Memorandum of Law. In response, the People have filed an Affirmation in Opposition together with a Memorandum of Law. Upon consideration of these papers, the stenographic transcript of the grand jury minutes and the Consent Discovery Order entered in this case, this Court disposes of this motion as follows:

A. MOTION for DISCOVERY, DISCLOSURE and INSPECTION
CPL ARTICLE 240

The parties have entered into a stipulation by way of a Consent Discovery Order consenting to the enumerated discovery in this case. Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 240. If there any further items discoverable pursuant to Criminal Procedure Law Article 240 which have not been provided to defendant pursuant to the Consent Discovery Order, they are to be provided forthwith.

As to the defendant's demand for exculpatory material, the People have acknowledged their continuing duty to disclose exculpatory material at the earliest possible date upon its discovery (*see, Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]). In the event that the People are, or become, aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to the defendant, they are directed to immediately disclose such material to the court to permit an *in camera* inspection and determination as to whether the material must be disclosed to the defendant.

Except to the extent that the defendant's application has been specifically granted herein, it is otherwise denied as seeking material or information beyond the scope of discovery (*see, People v Colavito*, 87 NY2d 423 [1996]; *Matter of Brown v Grosso*, 285 AD2d 642 [2d Dept 2001]; *Matter of Brown v Appelman*, 241 AD2d 279 [2d Dept 1998]; *Matter of Catterson v Jones*, 229 AD2d 435 [2d Dept 1996]; *Matter of Catterson v Rohl*, 202 AD2d 420 [2d Dept 1994]).

B. & C. MOTION to INSPECT, DISMISS and/or REDUCE

The court grants the defendant's motion to the limited extent that the court has conducted, with the consent of the People, an *in camera* inspection of the stenographic transcription of the grand jury proceedings. Upon such review, the court finds no basis upon which to grant defendant's application to dismiss or reduce the indictment.

The grand jury was properly instructed (*see People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]). The evidence presented, if accepted as true, is legally sufficient to establish every element of each offense charged (CPL 210.30[2]). "Courts assessing the sufficiency of the evidence before a grand jury must evaluate whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted--and deferring all questions as to the weight or quality of the evidence--would warrant conviction" (*People v Mills*, 1 NY3d 269, 274-275 [2002]). Legally sufficient evidence means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof (CPL 70.10[1]; *see People v Flowers*, 138 AD3d 1138, 1139 [2d Dept 2016]). "In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Jessup*, 90 AD3d 782, 783 [2d Dept 2011]). "The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference. That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry as long as the Grand Jury could rationally have drawn the guilty inference" (*People v Bello*, 92 NY2d 523, 526 [1998]).

Additionally, the minutes reveal a quorum of the grand jurors was present during the presentation of evidence, that the Assistant District Attorney properly instructed the grand jury on the law, and only permitted those grand jurors who heard all the evidence to vote the matter.

Based upon the *in camera* review, since this court does not find release of the grand jury minutes or any portion thereof necessary to assist it in making any determinations and as the defendant has not set forth a compelling or particularized need for the production of the grand jury minutes, defendant's application for a copy of the grand jury minutes is denied (*People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

Furthermore, the portion of the defendant's motion requesting dismissal of the indictment for facial insufficiency under CPL 200.50(7)(a) is also denied. The indictment contains a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's commission thereof with sufficient precision as to clearly apprise the defendant of the conduct which is the subject of the indictment (CPL 200.50). In reading the language of the indictment on its own and in conjunction with the bill of particulars given to the defendant in consent discovery, it is clear that the indictment charges each and every element of the crimes and further meets the requirement that the defendant be given notice of the charges against her with respect to the time, place and manner in which the People allege the crimes were committed (*People v Albanese*, 45 AD3d 691 [2d Dept 2007], *People v Iannone*, 45 NY2d 589 [1978]).

D. MOTION for DISCLOSURE of BRADY MATERIAL

The People recognize their continuing duty to disclose exculpatory material at the earliest possible date (*see Brady v Maryland*, 373 US 83 [1963]; *Giglio v United States*, 405 US 150 [1972]). If the People are or become aware of any material which is arguably exculpatory, but they are not willing to consent to its disclosure, they are directed to disclose such material to the Court for its *in camera* inspection and determination as to whether such material will be disclosed to the Defendant.

E. MOTION for SANDOVAL and VENTIMIGLIA HEARINGS

Defendant has moved for a pre-trial hearing to permit the trial court to determine the extent, if at all, to which the People may inquire into the defendant's prior criminal convictions, prior uncharged criminal act, and vicious or immoral conduct (*see, People v Sandoval*, 34 NY2d 371[1974]). The People have consented to, and it is now ordered that immediately prior to trial the court will conduct a *Sandoval* hearing.

At the hearing, the People are required to notify the defendant of all specific instances of her criminal, prior uncharged criminal acts and vicious or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach the defendant's credibility if she elects to testify at trial (CPL 240.43). The defendant shall then bear the burden of identifying any instances of her prior misconduct that she submits the People should not be permitted to use to impeach her credibility. The defendant shall be required to identify the basis of her belief that each event or incident may be unduly prejudicial to her should she decide testify as a witness on her own behalf and thereby prevent her from exercising this right (*see, People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

Defendant's application for a *Ventimiglia* hearing is denied as premature, because the People have not indicated an intention to use any evidence of prior bad act or uncharged crimes of the defendant in its case in chief (*see, People v Molineaux*, 168 NY2d 264 [1901]; *People v Ventimiglia*, 52 NY2d 350 [1981]). The People have stated that if they do intend to use any *Molineaux* evidence that they will inform the defense and the court of their intention and at that point the defendant may renew this aspect of her motion.

F. MOTION to SUPPRESS PHYSICAL EVIDENCE

The defendant's motion is granted solely to the extent that *Mapp* and *Dunaway* hearings are directed to be held prior to trial to determine the propriety of any search resulting in the seizure of property (*see, Mapp v Ohio*, 367 US 643 [1961]) and whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (*see, Dunaway v New York*, 442 US 200 [1979]).

G. MOTION TO DISMISS ON DUE PROCESS GROUNDS

Defendant has moved to have his case dismissed because the People allowed approximately 15 months to pass between the alleged date of the crime and the filing of the instant indictment. This type of pre-accusatory delay is framed as a due process violation and thus generally requires a showing of actual prejudice before relief may be granted. Additionally, in cases where there has been a lengthy delay, the People must show good cause for such a delay (*People v Singer*, 44 NY2d 241 [1975]). Acknowledging that

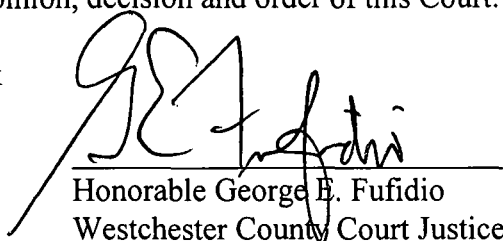
there is no specific length of time after which a dismissal is required, the Court of Appeals has developed a 5 part test to determine whether or not a defendant's due process rights were violated by the People's inaction (*People v Taranovich*, 37 NY2d 442 [1975]). The factors to be considered are 1. Length of delay, 2. Reasons for the delay, 3. Nature of the underlying charges, 4. Extent of pretrial incarceration and 5. Prejudice to the defendant.

Applying these factors to the instant case, it appears as though the People have met their burden. While the People have a wide berth in deciding when to bring charges against a defendant, they are necessarily restricted by the statute of limitations pertaining to the individual charges, however, under special circumstances, a shorter time period may impair a defendant's right to a fair trial (*People v Fuller*, 57 NY2d 152 [1982]; CPL 30.10). The People are well within the statute of limitations and while any delay has the potential to cause prejudice to the defendant, appellate courts have held that a four and a half year delay in bringing a criminal possession of a weapon in the third degree charge (*People v Johnson*, 134 AD3d 1388 [4th Dept 2015]) and a three and a half year delay in bringing a burglary in the second degree charge (*People v Velez*, 78 AD3d 867 [2nd Dept 2010]) were not unreasonably long, indeed, the Court of Appeals has even found no prejudice in a 15 year delay in bringing murder charges against a defendant (*People v Decker*, 13 NY3d 12 [2009]).

The reason offered by the People as to why they did not charge the Defendant shortly after they identified him as suspect is that they were "consistently" engaged in investigating this case which consists of two drug sales to a police cooperator on October 20, 2016 and November 3, 2016. This reasoning seems a bit thin given how events transpired in the People's recitation of facts. However, deficiency in this factor alone is not enough to warrant dismissing the case. Criminal sale and possession of a controlled substance in the third degree are serious crimes and that cuts towards the severity of the offense factor (*People v Chance*, 105 AD3d 758 [2nd Dept 2013]) and according to the Defendant's motion, he was living and working in Yonkers while the investigation was ongoing implying that the Defendant was never incarcerated for this offense until he was arraigned on the indictment. He was not previously arrested nor arraigned on this particular charge, unlike the defendant in *Taranovich*. Finally, and most importantly, the Defendant has made no concrete showing of prejudice by being charged 15 months after the alleged incident, he merely speculates that there may be some prejudice as a result. Should he discover at some point in preparation for trial that he has suffered an actual prejudice as a result of this delay, he is free to attempt to reopen this portion of his motion. Until that day, however, this branch of the defendant's motion is denied.

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

Dated: White Plains, New York
May 23, 2018



Honorable George E. Fufidio
Westchester County Court Justice

To:

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