

People v Potter

2018 NY Slip Op 33751(U)

July 2, 2018

County Court, Westchester County

Docket Number: 17-1086

Judge: Anne E. Minihan

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
AND ENTERED
ON 7-2-2018
WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

FILED X

JUL - 2 2018

-against-

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION & ORDER
Indictment No. 17-1086

DAVID POTTER and DONALD POTTER,

Defendants.

-----X
MINIHAN, J.

Defendant DONALD POTTER, by Westchester County Indictment No. 17-1086, is charged, acting in concert with the codefendant (David Potter), with Burglary in the third degree (Penal Law § 140.20), Grand Larceny in the third degree (Penal Law § 155.35[1]), Criminal Mischief in the second degree (Penal Law § 145.10), and Possession of Burglar's Tools (Penal Law § 140.35), and has filed this omnibus motion consisting of a Notice of Motion, and an Affirmation in Support. The People 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 dated April 10, 2018, the court disposes of this motion as follows:

A.

MOTION to INSPECT, and to DISMISS or REDUCE
CPL ARTICLE 190

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 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 that a quorum of the grand jurors was present during the presentation of evidence, and 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 (*see People v Calbud*, 49 NY2d 389 [1980]; *see also People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]). Based on the foregoing, the defendant’s challenge to the propriety of the grand jury proceeding and the sufficiency of the evidence presented to the grand jury is baseless.

Upon the *in camera* review, this court does not find that release of the grand jury minutes or any portion thereof is necessary to assist it in making any determinations, and defendant has not set forth a compelling or particularized need for the production of the grand jury minutes. Thus, 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]).

B.

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 are 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 defendant’s demand for exculpatory material, the People have a 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]). If the People are, or become aware of, any material which is arguably exculpatory and they are not willing to consent to its disclosure to defendant, they are directed to immediately disclose such material to the Court to permit an *in camera* inspection and determination as to whether such material must be disclosed to defendant.

Defendant’s motion for a further Bill of Particulars is denied. The Bill of Particulars set forth in the Consent Discovery Order provided to the defendant has adequately informed the defendant of the substance of his alleged conduct and in all respects complies with CPL 200.95.

Except to the extent that 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]).

C.

MOTION for SANDOVAL and VENTIMIGLIA HEARINGS

Defendant moves for a pre-trial hearing to determine whether, at trial, the People may cross-examine him, if he elects to testify, about his prior criminal convictions, and prior uncharged criminal, vicious, or immoral conduct. On the People's consent, the motion for a *Sandoval* hearing is granted (see *People v Sandoval*, 34 NY2d 371 [1974]). At the hearing, the People must notify defendant of all specific instances of his criminal, and prior uncharged criminal, vicious or immoral acts of which they have knowledge and which they intend to use to impeach defendant's credibility if he testifies at trial (CPL 240.43). At the hearing, defendant shall bear the burden of identifying any instances of his prior misconduct which he submits the People should not be permitted to use to impeach his credibility. Defendant shall be required to identify the basis of his belief that each event or incident may be unduly prejudicial to his ability to testify as a witness on his own behalf (see *People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266, 269 [2d Dept 1985]).

To the extent that defendant's motion seeks a hearing pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]), that branch of the motion is denied as premature because the People have not indicated an intention to use in their case in chief any evidence of prior bad acts or uncharged crimes by defendant (see *People v Molineux*, 168 NY 264 [1901]). If the People move to introduce such evidence, defendant may renew that branch of the motion.

D.

MOTION to SUPPRESS PHYSICAL EVIDENCE

This branch of defendant's motion is granted solely to the extent of conducting a *Mapp* hearing prior to trial to determine the propriety of any search resulting in the seizure of property otherwise retrieved (not pursuant to the search warrants) (see *Mapp v Ohio*, 367 US 643 [1961]). The hearing shall include determining whether the defendant has standing to challenge the suppression of the bag (and its contents) and the clothing at the crime scene that was dropped by the defendant and/or co-defendant and whether the abandonment was precipitated by unlawful police conduct (*People v Martinez*, 80 NY2d 444 [1992]). The hearing will also address whether any evidence was obtained in violation of defendant's Fourth Amendment rights (see *Dunaway v New York*, 442 US 200 [1979]).

E.

MOTION to TO SUPPRESS NOTICED STATEMENTS

Defendant does not move to suppress any statements and there are no notice statements as to him however since his codefendant was granted a *Huntley* hearing, a *Huntley* hearing is ordered just to the limited extent it is necessary for judicial economy purposes.

F.

MOTION to CONTROVERT SEARCH WARRANTS

Defendant's motion to suppress physical evidence seized pursuant to the search warrants is denied. The results of a search conducted pursuant to a facially sufficient search warrant are not subject to a suppression hearing (*People v Arnau*, 58 NY2d 27 [1982]). The Fourth Amendment to the U.S. Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I § 12 of the New York State Constitution contains identical language. Consistent with these constitutional provisions, CPL 690.45(4) requires that when a search warrant authorizes the seizure of property, the warrant must include "[a] description of the property which is the subject of the search." "To meet the particularity requirement, the warrant must be specific enough to leave no discretion to the police" (*see People v Cahill*, 2 NY3d 14, 41 [2003]). Upon review of the four corners of the search warrant affidavits, the warrants were adequately supported by probable cause, and sufficiently particular as to the place to be searched and the things to be seized (*see People v Keyes*, 291 AD2d 571 [2d Dept 2002]; *see generally People v Badilla*, 130 AD3d 744 [2d Dept 2015]; *People v Elysee*, 49 AD3d 33 [2d Dept 2007]).

The defendant offers no sworn facts demonstrating that the search of the vehicle occurred prior to the application for a search warrant, thus, defendant's challenge to the search and seizure of the car and whether he even has standing to challenge same, since he has not demonstrated ownership or an expectation of privacy, is denied. Accordingly, defendant's motion to suppress physical evidence obtained as a result of the search warrants for the car and the cell phone is denied.

G.

MOTION for a SEPARATE TRIAL

Defendant moves pursuant to CPL 255.10(g) to sever his trial from that of codefendant, arguing that a joint trial would be highly prejudicial because if codefendant's statements are admitted into evidence and inculcate defendant, and codefendant chooses not to testify, defendant would be unable to cross-examine the codefendant and would, thus, be deprived of the right of confrontation provided by the Sixth Amendment to the U.S. Constitution (*see Bruton v United States*, 391 US 123 [1968]; *Cruz v New York*, 481 US 186, 189-190 [1987]). Defendant also argues that a joint trial would prejudice him because his codefendant's counsel would not be bound by any *Sandoval* ruling favoring defendant and would, thus, be able to cross examine defendant about prior convictions and prior uncharged criminal, vicious or immoral acts (*see People v McGee*, 68 NY2d 328, 333 [1986]). Additionally, defendant claims that a joint trial greatly impacts his decision whether to testify, and creates the risk that the jurors might convict him on the evidence against codefendant.

Whether to grant a separate trial is a matter vested to the sound discretion of the trial court (*People v Mahboubian*, 74 NY2d 174, 183 [1989]). Where, as here, the defendants are charged with acting in concert, and proof against the defendants is supplied by the same evidence, only the most cogent reasons warrant a severance (*see People v Bornholdt*, 33 NY2d 75, 87 [1973]). "Severance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt" (*People v Mahboubian*, 74 NY2d at 184). The court agrees with the

People's position that defendant's motion for a severance should be denied as premature as to the issue of the right of confrontation (*see Bruton v United States*, 391 US 123). Defendant fails to show that severance is warranted on the other grounds asserted. Defendant's speculation that a co-defendant would pursue an antagonistic defense is an insufficient basis to proceed with separate trials (*People v Chaplin*, 181 AD2d 828 [2d Dept 1992]). Defendant has failed to show good cause for severance (CPL 200.40 [1]). After pretrial hearings as to the admissibility of codefendant's statements, defendant may renew this branch of the motion on the *Bruton* issue.

H.

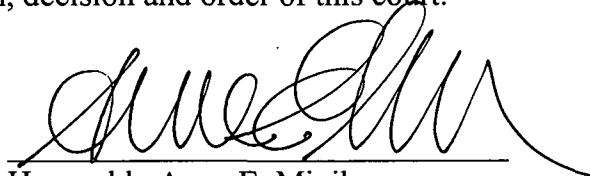
MOTION for LEAVE to FILE FUTURE MOTIONS

This motion is denied. Should defendant intend to bring further motions for omnibus relief, he must do so by order to show cause setting forth reasons as to why his motion was not and could not have been brought in conformity with CPL 255.20 (1).

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

Dated: White Plains, New York

~~June~~ July 2, 2018



Honorable Anne E. Minihan
Acting Justice of the Supreme Court

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