

People v Kenny

2018 NY Slip Op 33764(U)

November 6, 2018

County Court, Westchester County

Docket Number: 17-1146

Judge: Anne E. Minihan

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
AND ENTERED
ON 11-7-2018
WESTCHESTER

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Ind No.: 17-1146

LOUIS KENNY,

FILED

Defendant.

NOV - 7 2018

-----X
MINIHAN, J.

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant, by Westchester County Indictment No. 17-1146, is charged with Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (three counts) and Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (three counts).

Defendant has filed an omnibus motion consisting of a Notice of Motion, an Affirmation in Support, and a Memorandum of Law. In response thereto, 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 to INSPECT and to DISMISS and/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 defendant, who bears the burden of refuting with substantial evidence the presumption of regularity which attaches to official court proceedings (*People v Pichardo*, 168 AD2d 577 [2d Dept 1990]), has offered no sworn factual allegations in support of his argument that the grand jury proceedings were defective. The minutes reveal 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]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]).

The evidence presented to the grand jury, 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]).

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]).

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 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]). The People have also acknowledged their duty to comply with *People v Rosario* (9 NY2d 286 [1961]). 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 such must be disclosed to the defendant.

As to the defendant's demand for scientific related discovery, the People have acknowledged their continuing duty to disclose any written report or document concerning a physical or mental examination or test that the People intend to introduce, or the person who created them, at trial pursuant to CPL 240.20(1)(c).

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. The court denies defendant's demand to identify in the Bill of Particulars the name of the undercover officer, to protect that officer's identity and safety during on-going investigations (*see People v Hinton*, 31 NY2d 71 [1972]; *People v White*, 170 AD2d 629 [2d Dept 1991]).

The People recognize their continuing duty to disclose the terms of any deal or agreement made between the People and any prosecution witness at the earliest possible date (*see People v Steadman*, 82 NY2d 1 [1993]; *Giglio v United States*, 405 US 150 [1972]; *Brady v Maryland*, 373 US 83 [1963]; *People v Wooley*, 200 AD2d 644 [2d Dept 1994]).

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 to SUPPRESS IDENTIFICATION TESTIMONY
CPL 710

The People served CPL 710.30 notice of two separate identifications of defendant from a single photo, one by "the buyer" and one by "Det. Jones". Defendant moves to suppress any testimony as to those identifications arguing that the use of a single photo in an identification procedure is unduly suggestive. The People argue that the identifications were confirmatory.

Defendant's motion to suppress identification testimony is granted to the extent that a pre-trial hearing shall be held as to whether the identifying witness had a sufficient prior familiarity with defendant as to render the witness impervious to police suggestion (*see People v Rodriguez*, 79 NY2d 445 [1992]). If the court finds that there was not a sufficient prior familiarity with defendant on the part of the witness, the court will then consider whether or not

the noticed identification was unduly suggestive (*United States v Wade*, 388 US 218 [1967]). Specifically, the court shall determine whether the identification was so improperly suggestive as to taint any in-court identification. If the identification is 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 court notes that while defendant also moves to suppress identification testimony as to a photo array, the People did not serve 710.30 notice of a photo array.

D.

MOTION to SUPPRESS UNNOTICED STATEMENTS &
UNNOTICED IDENTIFICATION TESTIMONY

Defendant moves to preclude the People from introducing at trial any statements and identification testimony for which the People failed to provide 710.30 notice. In particular, defendant states that while he was provided with a copy of a photograph labeled Grand Jury Exhibit 1, the People did not provide notice of any Grand Jury testimony identifying him from a photograph. The court has reviewed the Grand Jury transcript and notes that there was no testimony identifying defendant from a photograph. The court agrees with the People, that defendant's motion to suppress any unnoticed statements and identification testimony should be denied as premature. The People acknowledge the statutory requirements of CPL 710.30.

E.

MOTION for SANDOVAL and VENTIMIGLIA HEARINGS

Defendant moves for a pre-trial hearing to permit the trial court to determine the extent, if at all, to which the People may inquire into defendant's prior criminal convictions, prior uncharged criminal, vicious or immoral conduct. On the People's consent, the court directs that a pre-trial hearing be conducted pursuant to *People v Sandoval* (34 NY2d 371 [1974]). At said hearing, the People shall be required to notify defendant of all specific instances of his criminal, prior uncharged criminal, vicious or immoral conduct of which they have knowledge and which they intend to use in an attempt to impeach defendant's credibility if he elects to testify at trial (CPL 240.43).

At the hearing, defendant shall bear the burden of identifying any instances of his prior misconduct that 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 [2d Dept 1985]).

To the extent that defendant's application is for a hearing pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]), it is denied since the People have not indicated an intention to use evidence of any prior bad act or uncharged crimes of defendant during its case in chief (see *People v Molineaux*, 168 NY 264 [1901]). If the People move to introduce such evidence, defendant may renew this aspect of his motion.

F.

MOTION for DISCLOSURE of INFORMANTS

Defendant fails to demonstrate grounds for a *Darden/Goggins* hearing, to disclose and produce any confidential informants involved in this case (see *People v Darden*, 34 NY2d 177 [1974]; *People v Goggins*, 34 NY2d 163 [1974]; *People v Rivera*, 98 AD3d 529, 530 [2d Dept 2012]). Defendant surmises that the three alleged drug sales were precipitated by an "uncharged introductory buy with a confidential informant" who introduced defendant to the undercover officer. Defendant argues that he is entitled to know the name of that informant because the "photographic array identification [which] took place some six months after the last alleged sale" shows that defendant's identity is at issue. The People argue that they intend to prove that defendant made three drug sales to the same undercover officer, and that that undercover officer identified defendant from a single photo within about one hour after the first alleged sale. The People did not serve CPL 710.30 notice of any photo array identification in this case. Under the circumstances, the court denies defendant's request for a *Darden/Goggins* hearing, finding that defendant failed to show that any informant's testimony would be relevant to the issue of defendant's innocence or guilt (see *People v Crooks*, 27 NY3d 609 [2016]; *People v Rivera*, 98 AD3d at 530).

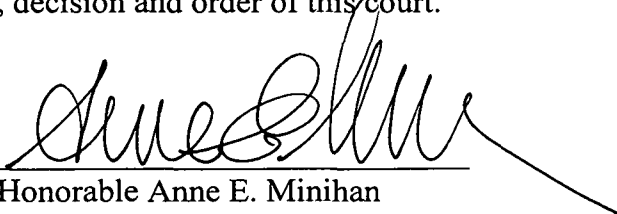
G.

MOTION for LEAVE to FILE FUTURE MOTIONS

To the extent that defendant's motion seeks to reserve the right to make future motions, that branch of the motion is denied. Any future motion must be brought by way of order to show cause setting forth reasons as to why said motion was not brought in conformity with CPL 255.20.

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

Dated: White Plains, New York
November 6, 2018


Honorable Anne E. Minihan
Acting Supreme Court Justice

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