

People v Brown

2018 NY Slip Op 33908(U)

July 10, 2018

County Court, Westchester County

Docket Number: 18-0326

Judge: Anne E. Minihan

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
-----X
THE PEOPLE OF THE STATE OF NEW YORK

FILED
AND ENTERED
ON 7-11 2018.
WESTCHESTER

-against-

DECISION & ORDER
Ind No.: 18-0326

CYNELL BROWN

Defendant.

FILED
JUL 12 2018

-----X
MINIHAN, A. J.

TIMOTHY C. IDONI
COUNTY CLERK

Defendant, CYNELL BROWN, having been indicted on or about April 25, 2018 for the crimes of Murder in the Second Degree (Penal Law § 125.25[1]) (two counts); Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[3]); Criminal Possession of a Controlled Substance in the Fourth Degree (Penal Law § 220.09[1]), Criminal Possession of Marijuana in the Fifth Degree (Penal Law § 221.10[2]), and Tampering with Physical Evidence (Penal Law § 215.40[2]) (two counts) has filed an omnibus motion consisting of a Notice of Motion, an Affirmation in Support thereof, 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 dated May 15, 2018, 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.

Notably, the People have a 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]).

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).

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]).

C.

MOTION to PRECLUDE IDENTIFICATION TESTIMONY
CPL 710

Defendant's motion is granted to the limited extent of conducting a hearing prior to trial to determine whether the identifying witness 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 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. In the event 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.

D.

MOTION to SUPPRESS PHYSICAL EVIDENCE

Defendant moves to suppress any property seized from his person at the time of arrest, and from the area of the crimes, on the grounds that there was no probable cause for his arrest and he did not consent to any search. As defendant offers no sworn allegations of fact in support of his conclusory statement of illegal arrest, his motion is summarily denied on this ground (*see People v France*, 12 NY3d 790 [2009]; *People v Jones*, 95 NY2d 721 [2001]; CPL 710.60[3][b]; *see also People v Scully*, 14 NY3d 861 [2010]).

Notwithstanding, the motion is granted to the extent that a hearing will be held to determine if defendant has standing to seek suppression of any physical evidence. "Property which is abandoned is outside the protection of constitutional provisions, since a purposeful divestment of property, which is not precipitated by unlawful police conduct, forfeits any expectation of privacy in the property" (*People v White*, 153 AD3d 1369 [2d Dept 2017]). Defendant has not set forth any facts to suggest that he had a legitimate expectation of privacy in the places or items searched (*see Rakas v Illinois*, 439 US 128 [1978]; *People v Ramirez-Portoreal*, 88 NY2d 99 [1996]; *People v Ponder*, 54 NY2d 160 [1981]; *People v White*, 153 AD3d 1369 [2d Dept 2017]; *People v Hawkins*, 262 AD2d 423 [2d Dept 1999]). Consequently, a hearing should be held to determine whether defendant has standing to challenge the suppression of any physical evidence recovered around the scene of the crimes, i.e., evidence from the victim's apartment, the suitcase recovered near the bus stop, the gun retrieved from the garbage can, and the drugs discarded from the window of the tax cab (*see People v Oliver*, 39 AD3d 880 [2d Dept 2007]). If it is determined that defendant has standing then a *Mapp/Dunaway* hearing will be conducted prior to trial to determine the propriety of the search resulting in the seizure of the property (*see Mapp v Ohio*, 367 US 643 [1961]). 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 SUPPRESS NOTICED STATEMENTS

The branch of defendant's motion seeking to suppress noticed statements is denied as academic since the People concede that while they served a 710.30 notice of a recording of defendant's interview with police they are not seeking to admit the interview since defendant invoked his right to remain silent and gave no statement.

F.

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, vicious or immoral conduct. The People have consented to a *Sandoval* hearing. Accordingly, it is ordered that immediately prior to trial a hearing shall be conducted pursuant to *People v Sandoval* (34 NY2d 371[1974]). At said hearing, the People shall be required to notify the 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 the defendant's credibility if he elects to testify at trial (CPL 240.43).

At the hearing, the 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. The 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 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 the defendant during its case in chief (see *People v Molineaux*, 168 NY2d 264 [1991]). If the People move to introduce such evidence, the defendant may renew this aspect of his motion.

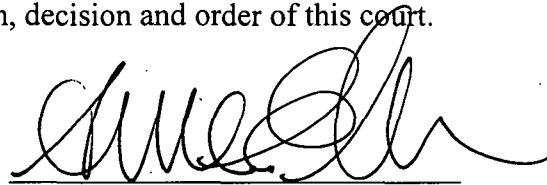
G.

MOTION for LEAVE to FILE FUTURE MOTIONS

This branch of defendant's 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 (see CPL 255.20[3]).

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

Dated: White Plains, New York
July 10, 2018



Honorable Anne E. Minihan
Acting Supreme Court Justice

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