

People v King
2018 NY Slip Op 34025(U)
December 20, 2018
County Court, Westchester County
Docket Number: 18-0828
Judge: George E. Fufidio
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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

KEVIN KING,

FILED
DEC 20 2018
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendants.

AMENDED

DECISION & ORDER

Indictment No.: 18-0828

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FUFIDIO, J.

This is an amended Decision and Order deemed *nunc pro tunc* to November 19, 2018. The only amendment is to the indictment number which was initially incorrectly written as 18-0282 instead of 18-0828.

Defendant, KEVIN KING, having been indicted on or about July 26, 2018 for two counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 (1)), one count of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03) and criminal possession of marihuana in the fifth degree (Penal Law § 221.10 (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 and H. MOTION FOR DISCOVERY, DISCLOSURE AND INSPECTION
CPL ARTICLE 240, MOTION FOR FURTHER BILL OF PARTICULARS

Except where the People have already disclosed or consented to the inspection and discovery of certain evidence, the Defendant's motion for discovery is granted to the extent provided for in CPL 240. If there any further items discoverable pursuant to Criminal Procedure Law Article 240 which have not been provided to defendant pursuant to this Order, they are to be provided forthwith or the People shall seek a protective order explaining to the Court why certain items have not been provided to the Defendant pursuant to CPL 240.

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]).

The Defendant's motion for a further bill of particulars is denied. The Defendant was given a bill of particulars as part of the Consent Discovery that was filed with the Court. The Court finds that this bill of particulars conforms to the requirement of CPL 200.95 and that the information set forth in the bill of particulars in conjunction with the information set forth in the indictment and other court filings is sufficient to give the Defendant adequate notice of the charges against him so as to be able to formulate a defense to the allegations (*People v Iannone*, 45 NY2d 589 [1978], CPL 200.95).

B. MOTION TO SUPPRESS PHYSICAL EVIDENCE

The Defendant moves to suppress any evidence obtained as a result of the arrest and search and seizure of evidence. This branch of the 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 evidence (see *Mapp v Ohio*, 367 US 643[1961]). The hearing will also address whether any evidence was obtained in violation of the defendant's Fourth Amendment rights (see *Dunaway v New York*, 442 US 200 [1979]).

C. MOTION FOR SANDOVAL AND VENTIMIGLIA HEARINGS

The 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 his 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 he elects to testify at trial (CPL 240.43). The Defendant shall then 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 him should he decide testify as a witness on his own behalf and thereby prevent him from exercising this right (see, *People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

The 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 [1991]; *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 his motion.

D. MOTION TO STRIKE PREJUDICIAL LANGUAGE

The defendant moves to strike certain language from the indictment on the grounds that it is surplusage, irrelevant or prejudicial. The language concluding the indictment merely identifies the defendant's acts as public, rather than private wrongs and such language should not be stricken as prejudicial. This motion is denied (*see, People v Gill*, 164 AD2d 867 [2d Dept 1990]; *People v Winters*, 194 AD2d 703 [2d Dept 1993]; *People v Garcia*, 170 Misc. 2d 543 [Westchester Co. Ct. 1996]).

E and F. 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]). This prong of the Defendant's motion is denied.

Additionally, the Court finds that the Defendant has not met his high burden of demonstrating that the integrity of the grand jury proceedings was impaired by any error, let alone one that would render the proceedings defective and prejudicial to the Defendant (*People v Darby*, 75 NY2d 449 [1990], *People v Thompson*, 22 NY3d 687 [2014]), nor does the Court find that there was any such error. Among other things the minutes reveal a quorum of the grand jurors was present during the presentation of evidence, that the Assistant District Attorney presented the evidence fairly and properly instructed the grand jury on the law and only permitted those grand jurors who heard all the evidence to vote the matter. Accordingly, this prong of the defendant's motion is also denied.

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]).

Finally, 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 him 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]).

G. MOTION TO STRIKE ALIBI NOTICE

The Defendant's motion to strike the alibi notice is denied. Contrary to the Defendant's contentions, it is well-settled that CPL 250.00 is indeed in compliance with the constitutional requirements (*see People v Dawson*, 185 AD2d 854 [2d Dept 1992]; *People v Cruz*, 176 AD2d 751 [2d Dept 1991]; *People v Gill*, 164 AD2d 867 [2d Dept 1990]) and provides equality in the required disclosure (*People v Peterson*, 96 AD2d 871 [2d Dept 1983]; *see generally Wardius v Oregon*, 412 US 470 [1973]).

I. MOTION TO STRIKE STATEMENT NOTICES

The motion to strike is denied. Said notices are in conformity with the statutory requirements of CPL 710.30 in that they set forth the date, manner, location of the identification procedures employed (*People v Sumter*, 68 AD3d 1701 [4th Dept. 2009]) and were served in the proper time frame (CPL 710.30). Finally, because the Defendant has filed a suppression motion based upon the notices that were served, he has waived his right to be heard on the sufficiency of the notices (*People v Kirkland*, 89 NY2d 903 [1996]).

J. MOTION TO SUPPRESS NOTICED STATEMENTS

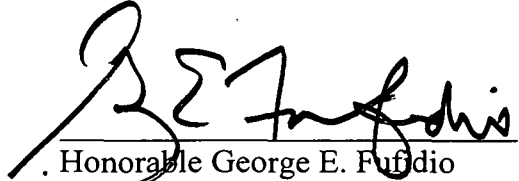
This branch of the Defendant's motion seeking to suppress statements on the grounds that they were unconstitutionally obtained is granted to the extent that a *Huntley* hearing shall be held prior to trial to determine whether any statements allegedly made by the Defendant, which have been noticed by the People pursuant to CPL 710.30 (1)(a) were involuntarily made by the Defendant within the meaning of CPL 60.45 (*see* CPL 710.20 (3); CPL 710.60 [3][b]; *People v Weaver*, 49 NY2d 1012 [1980]), obtained in violation of Defendant's Sixth Amendment right to counsel, and/or obtained in violation of the Defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

K. MOTION FOR THE DISCLOSURE OF INFORMANTS

The Defendant's motion for the disclosure of any informants used in this case is denied. The disclosure of informants is only required when the question of a defendant's guilt or innocence turns on an informant's testimony (*People v Goggins*, 34 NY2d 163 [1974]). The Defendant has not made any showing that an informant was used in this case, much less the requisite showing that an informant's testimony would have any bearing on his guilt or innocence (*id.*). Moreover, disclosure would not be required even if an informant had been instrumental in making the introduction between the defendant and law enforcement (*People v Vega*, 23 AD3d 504 [2nd Dept. 2005]).

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

Dated: White Plains, New York
December 20, 2018


Honorable George E. Fuffio
Westchester County Court Justice

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