People v Prince
2018 NY Slip Op 34404(U)
July 22, 2018
County Court, Westchester County
Docket Number: Indictment No. 19-0098
Judge: George E. Fufidio

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against- DECISION & ORDER

KIIUL PRINCE, Indictment No.: 19-0098

Defendants.

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FUFIDIO, J.

Defendant, KIIUL PRINCE, having been indicted on or about May 1, 2019 for burglary in the second degree (Penal Law § 140.25(2)), grand larceny in the fourth degree (Penal Law § 155.30(1)) and criminal possession of stolen property in the fourth degree (Penal Law § 165.45(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. In addition, the Defendant has filed a motion to dismiss pursuant to CPL 190.50 and the People have filed their Affirmation in Opposition. 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, 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]).

B. MOTION TO DISMISS PURSUANT TO CPL 190.50

The Defendant has also moved, pursuant to CPL 190.50, to have the indictment dismissed. He claims that although they discussed his testifying before the grand jury, he was never informed by his attorney from the Legal Aid Society of Westchester County about the waiver of immunity that is required by a defendant prior to testifying nor told the date of the grand jury presentation. During this discussion, his attorney at the time was trying to dissuade the Defendant from testifying. After this discussion that occurred on or about April 23, 2019, the Defendant told his lawyer that he had not made up his mind yet, but was leaning towards not testifying, but needed more time to decide. According to the Defendant, he ultimately decided to testify and decided that he would wait until he saw his lawyer again in order to tell them of his decision. He claims to have not seen his attorney before the case was presented and therefore never had the opportunity to explain that he wanted to testify and claims, "Had I testified before the Grand Jury, the outcome would have been different. I strongly believe that I would have been (sic) indicted if I had been given the opportunity to be heard in the Grand Jury."

The Defendant was initially arraigned on a felony complaint in the New Rochelle City Court on January 10, 2019 and was assigned the Legal Aid Society of Westchester to represent him. A week later, the Defendant executed an SCI waiver, however, the pre-indictment negotiations were fruitless and the case returned to the New Rochelle City Court on April 4, 2019 for it to proceed along the indictment track. On April 26, 2019, the People gave notice to the Defendant, through his lawyer, that his case was going to be presented to the grand jury on May 1, 2019. On April 29, 2019, the Legal Aid Society gave the People notice that the Defendant was not going to testify before the grand jury and on May 1, 2019 evidence was presented of the Defendant's alleged crimes and the grand jury returned its decision to indict the defendant on three counts, burglary in the second degree, grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree.

The right to testify before the grand jury is not a Constitutional one, rather it is a creation of the New York statutory scheme and one in which the decision to exercise it is an appropriate one for the lawyer and not the client to make (*People v Hogan*, 26 NY3d 779, 786 [2016]). In the instant case, it is clear that the Defendant and his attorney at the Legal Aid Society discussed the Defendant's right to testify, but it is equally evident from the Defendant's affidavit that his lawyer did not think it was a good

decision, given the facts of the case, for him to do so. Nor was the Defendant convinced that he necessarily should and delayed the decision, deciding that he would inform his lawyer later of his decision. The Defendant claims to have never had the opportunity to inform his lawyer that he wanted to testify. Whether he did or did not is largely immaterial because even if counsel *knew of*, yet did not act *at all* on the Defendant's desire to testify before the grand jury, a proposition that is not bourne out by the evidence before this Court on this issue, such failure does not necessarily amount to ineffective assistance of counsel (*People v Sain*, 111 AD3d 964 [2nd Dept. 2013]; *People v Milton*, 143 AD3d 918 [2nd Dept. 2016]). Morever, the Defendant has not even set forth bare allegations of what his testimony would have been had he testified and why, based on the evidence against him and the statements that he made to the police, he would not have been indicted. He certainly cannot say with a reasonable probability that he would not have been indicted (*Strickland v Washington*, 466 US 668 [1984]) and indeed, whether to allow the Defendant to testify is a decision that his lawyer is authorized to unilaterally make. Based on the forgoing, this part of the Defendant's motion is denied.

C. 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]).

D. MOTION TO PRECLUDE STATEMENTS AND
IDENTIFICATIONS NOT NOTICED

The People have not expressed any indication that they plan on using any statements made by or identifications made of the Defendant, but should they intend to and the statements and identifications are of the kind that would ordinarily require notice, they will have to show good cause as to why they were not noticed within fifteen days of arraignment (CPL 710.30) and if that showing is made, then the Court will rule on whether hearings should be held prior to trial.

E. MOTION TO SUPPRESS PHYSICAL EVIDENCE

The Defendant moves to suppress evidence seized from his person on the ground of illegal arrest and evidence that was located in his car, found by way of a search warrant. This branch of the defendant's motion is granted 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]).

Additionally, upon the Court's review of the four corners of the search warrant affidavit and order, the court finds that the warrant was adequately supported by probable cause to believe that evidence in the Defendant's car could tend to show that the offense was committed and that the defendant was the one who committed it (*see People v Keves*, 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]).

Regarding the Defendant's motion for a *Franks* hearing, the defendant has failed to demonstrate that the warrant was based upon an affidavit containing false statements made knowingly or intentionally, or with reckless disregard for the truth (*People v McGeachy*, 74 AD3d 989 [2d Dept 2010]). Accordingly, the Defendant's request for a *Franks* hearing is denied.

F. MOTION FOR SEVERANCE

The Defendant's motion for severance is moot at this point. Although the allegations are that he committed this burglary with another person, there is currently no other person charged in this indictment and thus no other defendant from whom to sever this case.

G. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY CPL ARTICLE 710

This motion is granted to the extent that a hearing shall be held to consider whether or not the noticed identifications made of the Defendant were unduly suggestive (*United States v Wade*, 388 US 218 [1967]). Specifically, the court shall determine whether the identifications were so improperly suggestive as to taint any in-court identification. In the event the identifications are 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.

H. 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 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]).

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 his motion.

I. MOTION FOR HEARING 20 DAYS PRIOR TO TRIAL

This motion is denied. The hearings will be conducted immediately prior to trial. The defendant has shown no reason nor offered any authority why hearings should be held 20 days prior to trial.

J. MOTION RESERVING THE RIGHT TO FILE ADDITIONAL MOTIONS

Defendant's motion reserving the right to file additional motions is denied. Should the Defendant file any other motions that were not raised in his *Omnibus* motion, then they will need to be in compliance with CPL 255.20(2).

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

Dated: White Plains, New York
July 22, 2018

Honorable George E. Fufidio
Westchester County Court Justice

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