People v Jackson
2018 NY Slip Op 34470(U)
May 30, 2018
County Court, Westchester County
Docket Number: Indictment No. 18-1090
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

RODNEY JACKSON,

Indictment No.: ~~19-1090~~ 18-1090

Defendants.

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FUFIDIO, J.

Defendant, RODNEY JACKSON, having been indicted on or about February 5, 2019 for one count of burglary in the third degree (Penal Law § 140.20) 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&B. MOTION FOR DISCOVERY, DISCLOSURE AND INSPECTION
CPL ARTICLE 240

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]).

C. 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 [2nd 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 [2nd 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 [2nd 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]).

D. 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 [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.

E. 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]).

F. MOTION TO STRIKE 710.30 IDENTIFICATION AND 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 and statements made (*People v Sumter*, 68 AD3d 1701 [4th Dept. 2009]) and were served within 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]).

G. MOTION TO SUPPRESS PHYSICAL EVIDENCE

Upon the Court's review of the four corners of the search warrant affidavit and order, the court finds that the warrant executed in this case was adequately supported by probable cause to believe that evidence at the location 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]).

The Court grants the Defendant's motion solely 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 from areas in which the Defendant can demonstrate a reasonable expectation of privacy (*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]).

H. MOTION TO SUPPRESS NOTICED STATEMENTS

The 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]).

I. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY CPL ARTICLE 710

Regarding the two CPL 710.30 notices referencing photographic arrays conducted on September 14, 2018 at the Mount Vernon Police Department, the motion is granted to the extent that a hearing shall be held to consider whether or not the noticed identifications 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.

Regarding the CPL 710.30 notice referencing identifications made during the grand jury proceeding from the restaurant surveillance video and still pictures taken from the video, the Court agrees with the People that there was no police arranged selection process, that the victim was simply dictating what he observed on the video tape that he had initially viewed before calling the police, specifically, that what was depicted was his restaurant and that someone, later known to be the Defendant, went inside of it at a certain time (*People v Gee*, 99 NY2d 158 [2002]).

The final CPL 710.30 notice that was served on the Defendant concerns someone who did not witness the crime, but who is otherwise familiar with the Defendant. The witness was shown a video and asked, in his opinion, whether that person depicted in the video he was shown was the Defendant. If the People simply wish to have the witness offer his opinion that the person in the video is someone he knows as the Defendant then he is permitted to do that without the need for a *Rodriguez* or *Wade* hearing (*People v Ray*, 100 AD3d 933 [2nd Dept. 2012]) however, it is in the discretion of the trial court whether to allow such testimony and the People must lay the proper foundation for eliciting such testimony (*People v Russell*, 165 AD2d 327, 336 [2nd Dept. 1991]).

J. MOTION FOR HEARING TWO WEEKS 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 on why hearings should be held two weeks prior to trial.

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

Dated: White Plains, New York
May 30, 2018

Honorable George E. Fufidio
Westchester County Court Judge

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