

People v Acosta

2019 NY Slip Op 30676(U)

March 15, 2019

Supreme Court, Bronx County

Docket Number: 2171/18

Judge: Ralph A. Fabrizio

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**SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, CRIMINAL DIVISION, PART 92**

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

**Ind No. 2171/18
Decision and Order**

-against-

DANNY ACOSTA,

Defendant

-----X
FABRIZIO, J.

Defendant moves to dismiss this indictment, arguing, inter alia, that testimony before the grand jury given by the attorney who represented him in a civil law suit, who is an assistant corporation counsel with the New York City Law Department (“Law Department”), violated his attorney-client privilege, and thereby tainted the overall presentation. The motion is denied.

This Court presided over the grand jury that began investigating charges of perjury against the defendant, a New York City Police Officer. That grand jury issued a subpoena duces tecum to the Law Department for their records in the civil matter. The items requested included documents memorializing the defendant’s statements to his attorney. The Law Department moved to quash that subpoena, and this Court conducted a lengthy fact-finding hearing and heard arguments from the Law Department, which included their position that any documents memorializing certain conversations between the defendant and his lawyer were privileged under CPLR 4503. The Court denied the motion to quash that subpoena in part, finding, inter alia, that the

defendant had waived his attorney-client privilege in a limited way based on a representation letter he received from the Law Department delineating the terms of their representation before he agreed to let them represent him.

The People argue that this Court's ruling in that related proceeding is the "law of the case" in terms of the defendant's motion to dismiss based on an allegation that his attorney-client privilege was violated. The issue litigated during the motion to quash the subpoena is not identical to the issue that is the subject matter of this motion. This motion concerns the substance of his civil attorney's testimony before the grand jury, and not the substance of disclosures of documents that were the subject of the motion to quash the subpoena seeking their production. Moreover, the defendant was not a party to the prior proceeding, and could not be due to secrecy surrounding all grand jury matters. Thus, he has a right to litigate the issue of the waiver of the privilege, as well as any prejudice he may have suffered from his prior attorney's testimony.

Defendant first takes issue with the existence of the "representation letter" the Law Department stated they sent the defendant in the civil matter. In that case, Colon v. The City of New York, Index No. 2011-021438 (Supreme Court Bronx County), the Law Department represented the defendant in his capacity as a police officer, and several other defendants, including the New York City Police Department ("NYPD"), and the City of New York ("City"). The civil suit sought damages from the defendant, the City, the NYPD, and others based on the defendant's having shot the plaintiff, Mr. Peter Colon, during Mr. Colon's apprehension and arrest in 2009. According to the Law Department, at the time the defendant agreed to be represented by their office, he

received a standard document advising him of the terms and limits of such the representation imposed by the Law Department. The representation letter has the following language, which, according to the Law Department as well as the Bronx District Attorney's Office's Civil Litigation Coordinator, is standard in all such letters:

If . . . we later receive information from which this Office concludes that you were not acting within the scope of your employment or in the discharge of your duties, or were in violation of any applicable law, regulation, or agency rule, we may be compelled to withdraw our representation of you. In addition, if we learn of facts indicating that you or any other City employee has acted criminally or otherwise in violation of any applicable law, regulation or agency rule, this information will be provided to the relevant city agency for such action as it deems appropriate.

At the time of the hearing, this Court was well aware that the Law Department could not locate the representation letter they sent to this defendant in their own files in the civil matter. Nonetheless, based on in part on representations about their office practices in all these matters, their multi-faceted role as the lawyers for the City and many city agencies, and the representation by the aforementioned civil litigation coordinator, the Court credited that such a letter existed and had been tendered to the defendant for his review and approval.

In defendant's affirmation in support of this motion to dismiss, he states the following in regard to the representation letter: "defendant does not possess such a letter and does not remember being given any letter with that language. Defendant does not remember being warned that what he would tell an attorney representing him at the Corporation Counsel could be brought to the authorities to be used against him in a criminal case." (Affirmation dated January 15, 2019 at page 13). Based on this

representation, as well as a host of legal arguments, defendant requests that this Court now hold another hearing to determine the validity of what it previously found to be a knowing and voluntary waiver of his attorney-client privilege. During the course of the civil litigation, after the defendant testified at a deposition about the detailed circumstances under which he fired his weapon at Mr. Colon, he disclosed that he had not testified accurately. Based on the details of this disclosure, the Law Department forwarded the information defendant disclosed to the NYPD's Internal Affairs Bureau. ("IAB"). Most relevant to this disclosure was the fact that the defendant had represented in his deposition, as well as in the departmental "GO-15" interview that is standard procedure in all police shootings, at which defendant was represented by different counsel, that he had been several feet away from Mr. Colon when he fired two shots in rapid succession. More than a year after his deposition, he revealed to his Law Department lawyer that he was actually straddling Mr. Colon's back when he placed the muzzle of his weapon to Mr. Colon's back and struck him at "point-blank" range. He told his lawyer that he had testified in this manner because, in substance, he did not believe his supervisors at the NYPD would think this was a "good shoot." This information would, at a minimum, be provided to the NYPD as representing a purported violation of NYPD rules.

Given the defendant's statements in the affirmation, however, there is no need for a hearing. Had defendant stated that he never received such a letter, the Court would have found that a factual issue was presented to be resolved at a hearing related to his current motion. A hearing would only disclose that the defendant has no

recollection of receiving this a letter. Even if true, that would not provides grounds for this Court to find he never actually was sent the letter or that he received and read it. More important, the Court had known about a second letter defendant did sign that supports finding he did receive, and read, the letter he now says only that he does not remember receiving or reading.

A second undated letter that defendant signed and sent to the Law Department states the following: "I have received your letter of June 15, 2011 regarding representation and indemnification in [Colon v. City of New York]. I choose to be represented by the Corporation Counsel under the terms and conditions of General Municipal Law 50-k and other relevant laws." As defendant concedes, this letter, which he signed and sent to the Law Department agreeing to their representation, references a letter dated June 15, 2011. Defendant has not produced that letter. Moreover, the Law Department provided this letter from their files to the Bronx District Attorney's Office, and those files were provided to the defendant as part of massive pre-motion discovery in this matter. The Court reviewed that letter in the litigation concerning the subpoena. Defendant has not indicated that he has a copy of this second letter in his possession; he also does not deny that it bears his signature.

Defendant argues that this letter represents only ambiguous evidence, at best, that he received and read the letter detailing the terms of the waiver. There is nothing at all ambiguous about defendant's understanding about his representation by the Law Department, according to the letter he signed. In that letter, defendant agreed that his representation would be subject to General Municipal Law § 50-k. According to that

statute, the Law Department is required to offer representation to any city employee, or indemnify them in case of liability, only where “the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained.” Municipal Law § 50-k(2). Thus, the Law Department has the right to refuse to represent any municipal employee based on an independent determination that the employee has violated any agency law, or committed any crime. See e.g. In re Bolusi v. City of New York, 249 AD2d 134 (1st Dept 1998). Under this statute, they have Law Department’s other client, the City, has the right not to indemnify a city employee where the cause of action implicates the employee’ action “was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained.” Municipal Law § 50-k(3). According to its terms, the letter defendant signed acknowledged that representation by the Law Department was conditioned on this statute, which concerns both terms of “representation” as well as “indemnification.”

While this statute does not implicate the waiver of a privilege in an established attorney-client relationship, it does provide ample grounds to find that the Law Department sent the defendant their standard representation letter outlining the conditions of representation to all clients under that statute, and memorialized in that letter that they could later be “compelled to withdraw representation” if the Law Department learned at a future date that the employee had acted “in violation of any applicable law, regulation, or agency rule.” In terms of their own legal and ethical obligations to their other clients, including, in this case, the City and the NYPD, it would

also be imperative for the Law Department to advise any prospective client that “if we learn of facts indicating that you . . . [have] acted criminally or otherwise in violation of any applicable law, regulation or agency rule, this information will be provided to the relevant city agency for such action as it deems appropriate.” Thus, the Court finds that the People have met their burden that defendant accepted representation by the Law Department after being advised that it would be pursuant to the terms of Municipal Law § 50-k(3), and that he did so after acknowledging receipt of a prior “representation and indemnification letter” which contained standard language about disclosure of any wrongdoing uncovered in the course of that representation to his employer, the NYPD.

As noted, the Law Department first disclosed the defendant’s alleged misconduct in firing his gun at point blank range to the Internal Affairs Bureau of the NYPD, consistent with the advisory letter given to the defendant that they would do so under the terms of their representation and under the law. Defendant argues that he was unaware that such letter would be provided to unspecified “authorities” to be used against him in a “criminal matter.” He does not argue that he was unaware that this information would be provided to the NYPD for their use. In fact, he expressed concern that the NYPD would view what happened to be a “bad shoot.” While the letter does not state that the information would be disclosed to be used in a criminal prosecution commenced by the Bronx District Attorney’s Office, his lawyers never made that disclosure. It was the IAB, another agency and another party to the civil action itself, that disclosed the information to the Public Integrity Bureau of the DA’s office. Given defendant’s status as a law enforcement officer, the proffered excuse that he did not

realize that this result would occur rings false. Moreover, once the documents were sent to the NYPD, they were no longer privileged. See People v. Bloom, 193 NY 1, 10 (1908).

Even if the defendant was not explicitly advised that evidence of his potential wrongdoing would be revealed to the NYPD, he waived the attorney-client privilege to the information that is at the center of the charges contained in this indictment. He is actually charged with, inter alia, multiple counts of Perjury in the First Degree. The allegations in the indictment are that he lied under oath on two separate occasions: (1) during his sworn testimony before a grand jury empaneled in October 2009 that was asked to consider voting charges against Peter Colon, and (2) during a sworn deposition in the civil matter itself on June 4, 2015. On both occasions, defendant testified that he was standing in a stairwell below where Mr. Colon was located when he fired his weapon. He estimated the distance between himself and Mr. Colon at the time he fired both shots to be about ten feet. He also testified that he was not aware that Mr. Colon had even been hit by his bullet, or that he had not even seen him fall after being shot. (See “talking language” in Indictment 2171/2018, Counts One, Two, Five and Six).

After his attorney at the Law Department began compiling police reports and other documents related to the shooting during the discovery phase of the civil proceeding, and met again with the defendant more than a year after his deposition, defendant signed a second sworn document called a “Diamond Errata Sheet.” In this document, which is part of the record in the civil law suit, and was provided to Mr. Colon’s civil attorney, Jeffrey Rizzo, defendant compiles a list of “corrections” he was

making to his prior sworn deposition testimony. For example, in his sworn deposition, defendant testified that he had been standing below Mr. Colon on the steps as Mr. Colon was struggling with defendant's partner, and that's where he was when he fired two shots at Mr. Colon. On the errata sheet, defendant swore that this testimony was "correct as to first shot only," and that he was making this correction for "clarification." In his deposition, defendant testified that he fired twice in rapid succession. On the errata sheet, defendant swore that he had "shot for the first time from the steps. I went to the landing and got on top of Mr. Colon and shot for the second time," a correction which he says he wrote for the purpose of "correcting prior inaccurate testimony." In his deposition, the officer testified that after he shot Mr. Colon, "I got on top of him." Once again, in the errata sheet, defendant swore, "Yes, I got on top of Mr. Colon after I shot the first time," and said that the reason for this correction was for the purpose of "correcting prior inaccurate testimony." (From Grand Jury exhibits 6 and 11).

The gravamen of the perjury charges is that defendant lied to the 2009 grand jury and during his 2015 deposition when he testified that he fired his gun twice while standing a distance away from Mr. Colon, testimony that appears to be flatly contradicted by his sworn "corrections" in the errata sheet which he says he did to correct what he publically characterized as "inaccurate testimony" during his deposition. It appears that the errata sheet was authored after the defendant was confronted with a police laboratory analysis report prepared in 2009, in connection with Mr. Colon's prosecution. That report concerns a forensic examination of the fibers surrounding a bullet hole in Mr. Colon's jacket, caused by a bullet fired by the defendant. The report

concludes that the area around that hole, “in the right side back panel of the jacket . . . was microscopically and chemically processed for the presence of gunshot residues. Residues and physical effects consistent with contact/near contact shot were found.” That report was placed in evidence as Exhibit 4 before the grand jury in this matter; that report was apparently unknown to or unreviewed by the prosecutors who presented the case to the 2009 grand jury.

Defendant’s Law Department attorney’s testimony before the grand jury concerned his review of the gunshot residue report, his confronting defendant with these findings, and defendant’s statements to him which were then memorialized in the public errata sheet. Defendant cannot assert any attorney-client privilege concerning this testimony, as his public disclosure of the same information in the public errata sheet waived any expectation that the statements defendant made to his attorney about these matters would remain privileged.

When an attorney-client privilege is asserted, “the burden of proving each element of the privilege rests upon the party asserting it.” Matter of Priest v. Hennesey, 51 NY2d 62, 69 (1980); Matter of Gavin, 39 AD2d 626, 628 (3rd Dept 1972); Matter of GJ Empaneled February 14, 1978, 603 F2d 469, 474 (3rd Cir 1979). Defendant focuses his argument on a claim that the Law Department violated his attorney-client privilege by revealing the information that defendant admitted he shot Mr. Colon while the defendant was already on top of Mr. Colon to the NYPD. Defendant never addresses the People’s argument that where “a communication is made in confidence but subsequently revealed to a third party,” the privilege is waived. (People’s Memorandum

of Law dated February 15, 2019 at page 15, citing Ambac Assur. Corp. v. Countrywide Home Loans, 27 NY3d 616, 624 (2016)). As noted, the errata sheet was sent to Mr. Colon's civil attorney. Mr. Rizzo testified before the grand jury that the errata sheet was first sent to the judge presiding over the civil case, and then to him. Other parties included not only the City and the NYPD, but six other named police officers. All defendants were represented by the Law Department. That public information, known to the DA's office prior to the issuance of the subpoena, is not protected under the attorney-client privilege.

This Court has now compared the defendant's deposition testimony, the errata sheet, the attorney's testimony, and all of the other evidence presented to the grand jury in this matter, as it is required to do in deciding the motion to dismiss the indictment. The testimony by the Law Department lawyer before the grand jury about concerned the same statements defendant himself published via the errata sheet. Those statements were no longer privileged at the time of that testimony, since defendant had revealed that same information in a public document to individuals other than his own attorney, including the notary public before whom the defendant swore that the factual disclosures in that document were true. See People v. Patrick, 182 NY 131, 175 (1905); Wigmore, Evidence § 2537 at 636 (McNaughton rev 1961).

The Court has carefully scrutinized the testimony of defendant's Law Department attorney, given the allegations that all of this testimony violated his attorney-client privilege. The early part of the testimony concerned the civil lawsuit, and the attorney authenticated the transcript of defendant's deposition, none of which constitutes

evidence of any privileged communication made by the defendant to his lawyer. He testified that when he met with the defendant prior to the drafting of the errata sheet, the case had been moved to the court's trial calendar, which was also not part of any privileged communication. Moreover, when the prosecutor asked the attorney a question that the attorney refused to answer because the attorney believed it related to a communication still protected by the attorney-client privilege, the prosecutor moved on and asked another question. As noted, the attorney also testified that defendant disclosed the statements to him that the defendant then disclosed to everyone else in the civil case, including the plaintiff, by including it in the errata sheet. This same evidence was presented to the Grand Jury in different ways, including through the deposition itself, parts of which were actually read into the record, the errata sheet, and the testimony of Mr. Rizzo. The Court reviewed disclosures made to the IAB by the Law Department when the Court did its in camera review of other Law Department documents pursuant to the waiver. Most of the information had already been previously disclosed in whole. Other information turned over to the Bronx District Attorney's Office pursuant to the subpoena was the same or substantially similar to the information disclosed to IAB, as well as what was contained, in substance, in the errata sheet. None of the testimony about this information violated defendant's attorney-client privilege.¹

Finally, even were there to have been some violation of the attorney-client

¹This Court's decision is limited to ruling on the defendant's motion to dismiss the indictment. It is not binding on the trial judge who may consider any arguments restricting or limiting any testimony from defendant's Law Department attorney.

privilege in this matter, that violation would not have, and did not, taint this grand jury proceeding. The evidence before the grand jury – the 2009 grand jury testimony, the deposition, defendant’s GO-15 interview, the errata sheet, the lab report, and testimony of other witnesses - overwhelmingly established reasonable cause to support each of the charges in this indictment. Thus, any prejudice from defendant’s Law Department attorney’s testimony was outweighed by all of the rest of the evidence presented to this grand jury. See e.g People v. Calbud, 49 NY2d 389 (1980).

The Court denies all other aspects of defendant’s motion to dismiss or reduce the charges in the indictment. The minutes of the grand jury reveal that a quorum of the grand jurors was present at all times during the presentation of this case. The Court further finds that the grand jury was provided with proper direction on the law. Release of the grand jury minutes to the defendant is not necessary at this time. Such release is authorized only when the court finds that disclosure is necessary to assist it in reviewing the grand jury action. See CPL § 210.30(3). Here, there is no such need.

Pursuant to CPL § 240.43, immediately prior to the commencement of jury selection, the People are directed to notify defendant of all specific instances of prior, uncharged, criminal, vicious, or immoral conduct of which the People have knowledge and which the People intend to use at trial for purposes of impeaching defendant’s credibility or on their direct case. Sandoval and Ventimiglia hearings will be conducted by the trial court.

The defendant’s request for a further Bill of Particulars is denied. The indictment itself is more detailed than any Bill of Particulars might be.

The Court today issues a separate order setting a timetable for disclosure of all exculpatory and impeachment evidence, as required by order of the chief administrative judge. The People are required to provide all other outstanding pre-trial discovery required by Article 240 of the Criminal Procedure Law no later than April 30, 2019.

All additional motions are precluded absent a showing of good cause. More than 45 days have passed since defendant's arraignment on the indictment. CPL § 255.20(3).

This is the Decision and Order of the Court.

Dated: March 15, 2019

Hon. Ralph Fabrizio