

People v Lyde

2019 NY Slip Op 34104(U)

March 18, 2019

County Court, Westchester County

Docket Number: 18-0540-01-02

Judge: Anne E. Minihan

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FILED
AND ENTERED
ON 3-19 2019
WESTCHESTER

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

DECISION & ORDER
Indictment No. 18-0540-01-02

KEVIN LYDE and KEVIN YOUNG A/K/A "FLATS"

Defendants.

-----X
MINIHAN, J.

FILED
MAR 20 2019
TIMOTHY C. JARRED,
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant KEVIN LYDE, by Westchester County Indictment No. 18-0540-01-02, acting in concert with codefendant, Kevin Young, with Grand Larceny in the Second Degree (Penal Law § 155.40[1]) (two counts), and Burglary in the Third Degree (Penal Law § 140.20) (four counts), and has filed an omnibus motion which consists of a Notice of Motion, and an Affirmation in Support, with exhibits. 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.

MOTION to INSPECT, 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, 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, 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]).

Contrary to defendant’s contention, the evidence before the grand jury was sufficient to establish, with respect to each count of grand larceny in the second degree, that the stolen property valued more than \$50,000 (see Penal Law § 155.40[1]). Additionally, the evidence before the grand jury was sufficient to show that defendant entered the subject locations with the intent to commit a crime therein (see Penal Law § 140.20).

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 (see *People v Jang*, 17 AD3d 693 [2d Dept 2005]; CPL 190.25[4][a]).

B.

MOTION to CONTROVERT the SEARCH WARRANTS and
SUPPRESS PHYSICAL EVIDENCE

Defendant moves to suppress all physical evidence as the fruits of his unlawful arrest without probable cause. The People oppose this branch of the motion arguing that probable cause for defendant’s arrest is set forth in the affidavit supporting the search warrants as to defendant’s residence, cell phone, and car. The People note that since the police had a valid search warrant for defendant’s residence, and probable cause to arrest him, they could have arrested him in the residence, but arrested him in the hallway outside of the residence. Defendant claims that the police unlawfully arrested him inside of his home, without an arrest warrant, and passed the threshold without exigent circumstances. The court grants the motion to the extent that a *Mapp/Dunaway* hearing shall be held prior to trial to determine the lawfulness of any search, not conducted pursuant to a search warrant, resulting in the seizure of property (see *Dunaway v New York*, 442 US 200 [1979]; *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]).

Additionally, the hearing will address the limited issue of whether the search warrant order (Minihan, J.) dated April 3, 2018, as to defendant's residence was executed outside of the 6:00 AM to 9:00 PM time period authorized therein.

As for defendant's arguments to controvert the search warrant orders (Minihan, J.) for his home and car (Ford Expedition), both dated April 3, 2018, the court finds those arguments unconvincing. Defendant argues that the supporting affidavit was based on stale information and failed to set forth probable cause, that the warrants were over-broad, and that the supporting affidavit failed to satisfy the *Aguilar-Spinelli* standard. Upon review of the four corners of the supporting affidavit dated April 3, 2018, the court finds that the search warrant orders as to defendant's home and car were adequately supported by probable cause (*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]). Additionally, the subject warrants were not overly broad, and were not based on stale information (*see Town of E. Hampton v Omabuild USA No. 1*, 215 AD2d 746, 748-749 [2d Dept 1995]; *People v Padilla*, 132 AD2d 578 [2d Dept 1987]). Defendant's reliance on *Aguilar-Spinelli* is misplaced as the probable cause for the subject warrants was not supplied by a confidential informant (*see generally People v Johnson*, 66 NY2d 398, 402 [1985]).

Defendant's attempt to controvert the GPS order (Cacace, J.) dated February 8, 2018, for his car is unconvincing, as the supporting application was supported by probable cause (*see People v Weaver*, 12 NY3d 433, 447 [2009]).

The court denies defendant's motion to controvert the N.J. wiretap order (Jerejian, J.) dated February 28, 2018. Contrary to defendant's contentions, the order was supported by probable cause and an adequate showing that other normal investigative procedures were either tried without success, or reasonably appeared unlikely to succeed if tried (*see* N.J. Stat. § 2A:156A-9; CPL 700.15). Defendant fails to demonstrate any prejudice which would warrant suppression of the wiretap evidence based on an alleged lack of statutory notice upon termination of the warrant (*see* N.J. Stat. § 2A:156A-16; CPL 700.50[3]; *see People v Rodriguez*, 19 NY3d 166, 173 [2012]). Defendant's challenge to the N.J. wiretap order on the basis that it was not applied for by N.Y. authorities and issued by a N.Y. judge is without merit, as the wiretap was issued under N.J. law. It is relevant to note that N.J.'s wiretap statute essentially mirrors, in relevant respects, New York's eavesdropping statute (*see* N.J. Stat. §§ 2A:156A-9, 2A:156A-16; CPL 700.15[3], [4]), and that defendant makes no claim that N.J.'s law offends N.Y.'s standards (*see generally People v Capolongo*, 85 NY2d 151, 164 [1995]).

The court finds defendant's challenges to the N.J. order for communications data warrant (Jerejian, J.) dated February 12, 2018, unconvincing. Contrary to defendant's claims, the supporting affidavit established probable cause and the warrant was sufficiently particular. Defendant's claim that the warrant was not timely executed within 10 days, as required by CPL 690.30(1), is belied by the sworn statement of Det. Holmsen in his affidavit supporting the N.J. wiretap order, that detectives

started receiving records from the cell phone carrier pursuant to the February 12, 2018 order on February 13, 2018 (*see* affidavit of Det. Carl Holmsen, dated February 28, 2018, ¶ 44). Finally, defendant's challenge to the warrant on the basis that it was not executed by a police officer, in violation of CPL 690.25, is without merit. The warrant, in pertinent part, authorized Det. Holmsen, as well as members of the Bergen County Prosecutor's Office, to install a pen register device, and directed the wireless carrier to provide certain records. The court finds no merit to defendant's claim regarding CPL 690.25.

C.

MOTION to SUPPRESS STATEMENTS

The People did not serve 710.30 notice of any statement by defendant. Thus, defendant's motion to suppress any statements he made to the police as unconstitutionally obtained is denied as premature, with leave to renew if appropriate.

D.

MOTION for SEVER COUNTS & for a SEPARATE TRIAL

The defendant moves to sever counts 1-3 (the December 11, 2017 incident) from counts 4-6 (the February 2, 2018 incident) arguing that the evidence against him is largely circumstantial and that allowing the jury to hear evidence regarding similar but unrelated charges would cause significant prejudice by suggesting that he had a propensity to commit burglaries and larcenies. The court finds that the counts were properly joined pursuant to CPL 200.20(2)(c), which authorizes joinder of charges that are based upon different criminal transactions when those charges are defined by the same or similar statutory provisions and, consequently, are the same or similar in law. Moreover, "a strong public policy favors joinder, because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses" (*People v Mahboubian*, 74 NY2d 174, 183 [1989]). The court finds that the charges are properly joined and the defendant has not demonstrated that he would be unfairly prejudiced by a trial on all of the joined charges. This branch of the motion is, therefore, denied.

The court denies, with leave to renew, defendant's motion for a separate trial. Whether to grant a separate trial is a matter vested to the sound discretion of the trial court (*People v Mahboubian*, 74 NY2d 174, 183 [1989]). Where, as here, the defendants are charged with acting in concert, and proof against them is supplied by the same evidence, only the most cogent reasons warrant a severance (*see People v Bornholdt*, 33 NY2d 75, 87 [1973]). "Severance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt" (*People v Mahboubian*, 74 NY2d at 184). The court agrees with the People's position that defendant's motion for a separate trial should be denied as premature on the issue of the right of confrontation (*see Bruton v United States*, 391 US 123). Defendant fails to otherwise show good cause for severance (CPL 200.40

[1]). After pretrial hearings as to the admissibility of codefendant's statements to law enforcement, defendant may renew this branch of the motion on the *Bruton* issue.

E.

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.

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).

Defendant's motion for a further Bill of Particulars is denied. The Bill of Particulars set forth in the Consent Discovery Order provided to the defendant has adequately informed the defendant of the substance of his alleged conduct and in all respects complies with CPL 200.95.

The People recognize their 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]).

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]).

F.

MOTION for SANDOVAL and VENTIMIGLIA HEARINGS

On the People's consent, the court grants defendant's motion for a pretrial hearing 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). 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]).

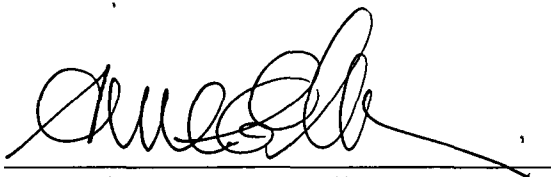
Defendant's application for a hearing, pursuant to *People v Ventimiglia* (52 NY2d 350 [1981]) is denied as premature since the People have not indicated an intention to use evidence of any prior bad act or uncharged crimes of the defendant during its case in chief (*see People v Molineaux*, 168 NY2d 264 [1991]). If the People move to introduce such evidence, the defendant may renew this aspect of his motion.

G.

MOTION for TIME to FILE FUTURE MOTIONS

This branch of the motion is denied. Any future motion must be brought by way of order to show cause setting forth reasons as to why said motion was not brought in conformity with CPL 255.20.

Dated: White Plains, New York
March 18, 2019



Honorable Anne E. Minihan
Acting Justice of the Supreme Court

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