People v Pettaway
2019 NY Slip Op 34192(U)
January 10, 2019
County Court, Westchester County
Docket Number: 18-0648
Judge: David S. Zuckerman

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

MADISYN PETTAWAY,

Ind. Nos.: 18-0648

Defendant.

ZUCKERMAN, J.

Defendant stands accused under Indictment No. 18-0648 of two counts of Robbery in the First Degree (one count each of Penal Law §160.15[3] and Penal Law §160.15[4]), two counts of Burglary in the First Degree (one count each of Penal Law §140.30[3] and Penal Law §140.30[4]), two counts of Robbery in the Second Degree (one count each of Penal Law §160.10[1] and §160.10[2b], one count of Burglary in the Second Degree (Penal Law §140.25[2b]), one count of Grand Larceny in the Third Degree (Penal Law §155.35[1]), one count of Criminal Possession of a Weapon in the Third Degree (Penal Law §265.02[1]) and one count of Criminal Possession of a Weapon in the Fourth Degree (Penal Law §265.01[2]). As set forth in the Indictment, it is alleged that, on or about January 18, 2018, Defendant, in Westchester County, New York, aiding and abetting and acting in concert with another, forcibly stole property from another, and during the course or commission thereof, or in immediate flight therefrom, he used or threatened the immediate use of a dangerous instrument and/or a firearm; knowingly entered or remained unlawfully in a dwelling with intent to commit a crime

therein, and during the course or commission thereof, or in immediate flight therefrom, he used or threatened the immediate use of a dangerous instrument and/or a firearm; forcibly stole property from another, while aided by another person, actually present; stole property from another in an amount exceeding $3,000.00; possessed a deadly weapon or dangerous instrument having been previously convicted of a crime, and with the intent to use same unlawfully against another. By Notice of Motion dated January 3, 2019, with accompanying Affirmation, Defendant moves for omnibus relief. In response, the People have submitted an Affirmation in Opposition dated January 8, 2019.

The motion is disposed of as follows:

A. MOTION FOR DISCOVERY AND INSPECTION

Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 240 and/or provided by the People. If any items set forth in CPL Article 240 have not been provided to Defendant pursuant to the consent discovery order in the instant matter, said items are to be provided forthwith. Further, the bill of particulars set forth in the voluntary disclosure form provided to Defendant has adequately informed her of the substance of her alleged conduct and in all respects complies with CPL §200.95.

The People acknowledge their continuing duty to disclose exculpatory material (see *Brady v Maryland*, 373 US 83 [1963] and *Giglio v United States*, 405 US 150 [1971]) at the earliest possible

date. If the People are or become aware of any material which is arguably exculpatory but they are not willing to consent to its disclosure, they are directed to disclose such material to the Court for its *in camera* inspection and determination as to whether such will be disclosed to the defendant.

To any further extent, including regarding the production of *Rosario* material at this time, the application is denied as seeking material or information beyond the scope of discovery (*see People v Colavito*, 87 NY2d 423 [1996]; *Matter of Catterson v Jones*, 229 AD2d 435 [2nd Dept 1996]; *Matter of Catterson v Rohl*, 202 AD2d 420 [2nd Dept 1994]; *Matter of Brown v Appelman*, 241 AD2d 279 [2nd Dept 1998]).

B. MOTION TO INSPECT THE GRAND JURY MINUTES AND TO DISMISS AND/OR REDUCE THE INDICTMENT

Defendant moves pursuant to CPL §§210.20(1)(b) and (c) to dismiss the indictment, or counts thereof, on the grounds that the evidence before the Grand Jury was legally insufficient and that the Grand Jury proceeding was defective within the meaning of CPL §210.35. On consent of the People, the Court has reviewed the minutes of the proceedings before the Grand Jury.

Pursuant to CPL §190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. Legally sufficient evidence is competent evidence which, if accepted as true, would establish each and every element of the offense charged and the defendant's

commission thereof (CPL §70.10[1]); *People v Jennings*, 69 NY2d 103 [1986]). "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 Bello*, 92 NY2d 523 (1998); *People v Ackies*, 79 AD3d 1050 (2nd Dept 2010). In rendering a determination, "[t]he reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of each element of the charged crimes and whether the grand jury could rationally have drawn the inference of guilt." *Bello, supra*, quoting *People v Boampong*, 57 AD3d 794 (2nd Dept 2008-- internal quotations omitted).

A review of the minutes reveals that the evidence presented, if accepted as true, would be legally sufficient to establish every element of the offenses charged (see CPL §210.30[2]). Accordingly, Defendant's motion to dismiss or reduce for lack of sufficient evidence is denied.

With respect to Defendant's claim that the Grand Jury proceeding was defective within the meaning of CPL §210.35, a review of the minutes supports a finding that a quorum of the grand jurors was present during the presentation of evidence and at the time the district attorney instructed the Grand Jury on the law, that the grand jurors who voted to indict heard all the "essential and critical evidence" (*see People v Collier*, 72 NY2d 298 [1988]; *People v Julius*, 300 AD2d 167 [1st Dept 2002], *lv den* 99 NY2d 655 [2003]), and that the Grand Jury was properly instructed (*see*

People v Calbud, 49 NY2d 389 [1980] and *People v. Valles*, 62 NY2d 36 [1984]).

In making this determination, the Court does not find that release of the Grand Jury minutes or certain portions thereof to the parties was necessary to assist the Court.

C. MOTION FOR A *WADE* HEARING

Defendant moves to suppress a noticed identification procedure pursuant to CPL §710.20(3). The People, in their Affirmation in Opposition, state that there was no impropriety in the identification procedure attributable to Defendant in the instant matter. Consequently, the motion to suppress a noticed identification procedure is granted to the extent that a *Wade/Dunaway* hearing is ordered to determine the propriety of the noticed identification procedure.

D. MOTION TO SEVER

Defendant moves to sever the trial of the instant Indictment from that of his co-defendant, asserting that his defense is in conflict with that of the co-defendant, and that a joint trial would result in undue prejudice to him. He also asserts that the co-defendant made statements which inculpate him and regarding which he would not have the right of cross-examination should one or both of those defendants decline to testify at trial.

(1) Conflicting Defenses

CPL §200.20 provides

1. An indictment must charge at least one crime and may,

in addition, charge in separate counts one or more other offenses, including petty offenses, provided that all such offenses are joinable pursuant to the principles prescribed in subdivision two.

2. Two offenses are "joinable" when:

(a) They are based upon the same act or upon the same criminal transaction, as that term is defined in subdivision two of section 40.10; or

(b) Even though based upon different criminal transactions, such offenses, or the criminal transactions underlying them, are of such nature that either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first; or

(c) Even though based upon different criminal transactions, and even though not joinable pursuant to paragraph (b), such offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law; or

(d) Though not directly joinable with each other pursuant to paragraph (a), (b) or (c), each is so joinable with a third offense contained in the indictment. In such case, each of the three offenses may properly be joined not only with each of the other two but also with any further offense joinable with either of the other two, and the chain of joinder may be further extended accordingly.

3. In any case where two or more offenses or groups of offenses charged in an indictment are based upon different criminal transactions, and where their joinability rests solely upon the fact that such offenses, or as the case may be at least one offense of each group, are the same or similar in law, as prescribed in paragraph (c) of subdivision two, the court, in the interest of justice and for good cause shown, may, upon application of either a defendant or the people, in its discretion, order that any such offenses be tried separately from the other or others thereof. Good cause shall include but not be limited to situations where there is:

(a) Substantially more proof on one or more such joinable offenses than on others and there is a substantial likelihood that the jury would be unable to consider separately the proof as it relates to each offense.

In order to effect a severance of counts of an indictment, a defendant "must either demonstrate that the counts were not joinable under the statutory criteria ... or seek a discretionary severance under CPL 200.20(subd. 3)." *People v. Lane*, 56 NY2d 1, 9 (1982). Where (unlike here) the crimes charged in the indictment are joined because they are the same or similar in law, applications for severance are addressed to the sound discretion of the Court *Lane, supra; People v. Jenkins*, 50 NY2d 981 (1980); *People v. Barnett*, 125 AD3d 878 (2nd Dept 2015); CPL §200.20(3). Where counts are properly joined, a trial court lacks authority to sever them. *People v Dobbins*, 123 AD3d 1140 (2nd Dept 2014).

The crimes alleged herein are, the People argue, properly joinable because they are part of the same criminal transaction--a single robbery and burglary. Defendant has failed to demonstrate that the counts are not part of the same criminal transaction.

The People are thus correct that the counts are joinable. Consequently, Defendant having failed to demonstrate that the counts were not properly joinable under CPL §200.20, the court has no choice but to decline to sever the trial of this defendant from the trial of the co-defendant.

(2) Co-Defendant Statements

Defendant also asserts that the People have given notice of statements made by the co-defendant, which inculpate Defendant, and in regard to which he would not have the right of cross-examination should one or both of those defendants decline to testify at trial.

See generally Bruton v US, 391 US 123 (1968). In response, the People assert, and Defendant does not thereafter contest, that the co-defendant actually did not make statements which inculpate Defendant. In any event, as they also properly assert, it is premature to seek suppression where the People have not yet sought to introduce any such statements, nor, in fact, has the court even ruled on their admissibility. Consequently, the motion to sever is denied in all respects.

E. MOTION FOR *SANDOVAL/VENTIMIGLIA/MOLINEUX* HEARING

1. *Sandoval* - Granted, solely to the extent that a *Sandoval* hearing shall be held immediately prior to trial at which time:

A. The People must notify the Defendant of all specific instances of the Defendant's 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 the credibility of the Defendant (*see*, CPL §240.43); and

B. Defendant must then sustain his burden of informing the Court of the prior misconduct which might unfairly affect him as a witness in his own behalf (*see*, *People v. Malphurs*, 111 A.D.2d 266 [2nd Dept. 1985]).

2. *Ventimiglia/Molineux* - Upon the consent of the People, in the event that the People determine that they will seek to introduce evidence at trial of any prior bad acts of the Defendant, including acts sought in their case in chief such as the prior crime used to elevate Count 1 of the Indictment to a Felony, they

shall so notify the Court and defense counsel and a *Ventimiglia*/Molineux hearing (*see People v Ventimiglia*, 52 NY2d 350 [1981]; *People v Molineux*, 168 NY 264 [1901]) shall be held immediately prior to trial to determine whether or not any evidence of uncharged crimes may be used by the People, including to prove their case in chief. The People are urged to make an appropriate decision in this regard sufficiently in advance of trial to allow any *Ventimiglia/Molineux* hearing to be consolidated and held with the other hearings herein.

All other motions are denied.

Dated: White Plains, New York
January 10, 2019

HON. DAVID S. ZUCKERMAN, J.C.C.

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