People v Calhoun
2019 NY Slip Op 34197(U)
July 29, 2019
County Court, Westchester County
Docket Number: 18-0724
Judge: David S. Zuckerman
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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
-----------------------------------X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

FILED
AUG - 7 2019
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

LETROY CALHOUN,

Ind. No.: 18-0724
Ind. No.: 19-0430

Defendants.
-----------------------------------X

ZUCKERMAN, J.

Defendant stands accused under Indictment No. 18-0724 of four counts of Criminal Sale of a Controlled Substance in the Third Degree (Penal Law §§220.39[1]), four counts of Criminal Possession of a Controlled Substance in the Third Degree (Penal Law §§220.16[1]), one count of Criminal Sale of Marihuana in the Fourth Degree (Penal Law §§221.40), and Unlawful Possession of Marihuana (Penal Law §§221.05). As set forth in the Indictment, it is alleged that, on or about September 28, 2017, October 20, 2017, October 25, m2017, and November 6, 2017, Defendant, in Westchester County, New York, sold, and possessed with the intent to sell, a narcotic drug, namely cocaine; and on or about September 28, 2017, Defendant sold, and unlawfully possessed, Marihuana. Defendant also stands accused under Indictment No. 19-0430 of two counts of Criminal Possession of a Controlled Substance in the Third Degree (Penal Law §§220.16[1]), and two counts of Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law §§220.03). As set forth

in this Indictment, it is alleged that, on or about March 1, 2019, Defendant, in Westchester County, New York, possessed a narcotic drug, namely cocaine, with the intent to sell it. By Notices of Motion dated July 17, 2019, with accompanying Affirmations, Defendants move for omnibus relief. In response, the People have submitted Affirmations in Opposition dated July 1, and June 24, 2019, respectively.

The motions are disposed of as follows:

INDICTMENT #18-724

A. DISCOVERY AND INSPECTION

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 are reminded of 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.

B. MOTION FOR A *MAPP/DUNAWAY* HEARING

Defendant moves to suppress all physical evidence which the People seek to introduce at trial. The People, in their Affirmation in Opposition, state that there was no search except one authorized by a search warrant. With respect to physical evidence recovered pursuant to execution of the search warrant, Defendant's motion for a *Mapp* hearing is denied. The results of a search conducted pursuant to a facially sufficient search warrant are not subject to a suppression hearing. *People v. Arnau*, 58 NY2d 27 (1982).

While not clearly denominated in Defendant's moving papers as a motion to controvert the search warrant herein, with respect to physical evidence recovered pursuant to execution of that search warrant, the court has also reviewed the affidavit in support of the search warrant and finds it provided the issuing magistrate with ample probable cause to support issuance of the warrant. Further, this court reviewed the search order and finds it to be proper in all respects. This court notes that according to the Voluntary Disclosure Form and People's Affirmations filed in this case, the People have provided defense counsel with access to the search warrant and supporting affidavit.

C. 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.

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D. MOTION TO SEVER COUNTS

Defendant moves to sever the "various counts[1]" of the indictment, asserting that the charging of four separate incidents in a single indictment will prejudice Defendant.

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;
>
> 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

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[1] Defendant does not state the precise relief sought, whether it be four separate indictments or merely into a number less than four but not one.

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> 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.

Defendant concedes the counts are joinable. 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, like here the crimes charged in the indictment are joined because they are the same or similar in law, and as to proof, 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 in Count One and Five, , Two and Six, Three and Seven, and Four and Eight of the instant indictment, relate to alleged sales/possessions with intent to sell of narcotics on four separate days. However, the dates are close in time-the longest 22 days apart, the closest five. The People properly argue that the counts are joinable because the offenses are defined by the same or similar statutory provisions, and because proof in one set of counts would be sought to be introduced in the other set of

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counts-namely, similar sales with and possessions near the same undercover police officer. Indeed, the counts sought to be severed all relate to the same sale/possession conduct by Defendant, and thus are the same or similar. Their also appears to be some commonality of proof and witnesses. Counsel for Defendant has merely argued that Defendant might be prejudiced, as to the joint trial of several incidents, by proof admitted regarding the latter incidents, and vice versa. Defendant however has failed to articulate the exact nature of the prejudice sought to be avoided by severance. Defendant having failed to meet its burden to demonstrate that the counts were not properly joinable under CPL §200.20, or that good cause to sever them exists, the court declines to sever the counts 1, 2, and 3 from counts 4 and 5 for the purposes of trial.

E. 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 © 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

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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.

F. 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, and that it was in fact a confirmatory identification by a police officer approximately one and one-half hours after a narcotics transaction involving the officer and Defendant. Consequently, the motion to suppress noticed identification procedures is granted to the extent that a *Wade* hearing is ordered to determine the propriety of the noticed identification procedures.

INDICTMENT #19-0430

A. DISCOVERY AND INSPECTION

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 are reminded of 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.

B. MOTION FOR A *MAPP/DUNAWAY* HEARING

Defendant moves to suppress all physical evidence which the People seek to introduce at trial. The People, in their Affirmation in Opposition, state that there was no search except one authorized by an arrest (i.e. bench) warrant. With respect to physical evidence recovered pursuant to execution of the warrant, Defendant's motion for a *Mapp* hearing is denied. The results of a search conducted pursuant to a lawful arrest is proper (*People v DeSantis*, 46 NY2d 82 [1979]), while a search conducted pursuant to a facially sufficient warrant is not in any event subject to a suppression hearing. *People v. Arnau*, 58 NY2d 27 (1982). The court has also reviewed the warrant and finds it provided ample probable cause to arrest Defendant, who was known to the police

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officers who arrested him.

C. 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]).

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any *Ventimiglia/Molineux* hearing to be consolidated and held with the other hearings herein.

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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.

E. 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 identification procedure attributable to Defendant in the instant matter. Consequently, the

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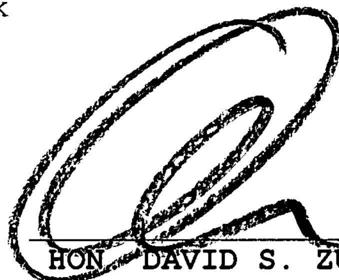
motion to suppress noticed identification procedures is denied as moot.

All other motions are denied.

Dated: White Plains, New York
July 29, 2019



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