

People v Aveni

2019 NY Slip Op 34384(U)

April 18, 2019

Supreme Court, Westchester County

Docket Number: Indictment No.18-1329

Judge: Susan M. Capeci

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

DECISION & ORDER

- against -

PAUL AVENI,

Defendant.

Indictment No:18-1329

FILED
APR 24 2019

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CAPECI, J.,

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The defendant, having been charged by indictment with four counts of criminal contempt in the first degree (P.L. 215.51 (B)(II), 215.51 (B)(III), 215.51 (B)(IV), and 215.51 (B)(VI)), menacing in the second degree (P.L. 120.14 (2)), stalking in the third degree (P.L. 120.50 (3)), criminal mischief in the fourth degree (P.L. 145.00 (1)), and criminal trespass in the second degree (P.L. 140.15 (1)), now makes this motion seeking omnibus relief.

The defendant has submitted an affirmation and memorandum of law from his attorney in support of his omnibus motion, in which he seeks the following relief: 1) a further bill of particulars; 2) disclosure of materials not previously provided through consent discovery, and Brady material; 3) a Sandoval/Ventimiglia hearing; 4) suppression of statements alleged to have been made by the defendant, or a Huntley hearing; 5) motion to suppress evidence of his identification, or a Wade hearing; 6) inspection of the grand jury minutes by the Court and the defendant, and thereafter, for the dismissal of the indictment and/or reduction of the charges contained therein, and specifically with respect to the criminal contempt charges, on the ground that the

underlying order of protection was never properly modified and served upon him following the appeal and vacatur of all the convictions on which it was based, except for criminal contempt in the first degree; and 7) leave to make further pre-trial motions as necessary.

The People have submitted an affirmation in opposition in which they consent to provide discovery limited to the parameters of CPL article 240, as well as Brady material. They also consent to a Huntley hearing, to a Sandoval hearing, and to an in camera inspection of the grand jury minutes by the Court to assess legal sufficiency, but otherwise oppose the motion. The Court now finds as follows.

1. MOTION FOR A FURTHER BILL OF PARTICULARS

The People have served the defendant with a bill of particulars as part of consent discovery. The function of a bill of particulars is to define more specifically the crime charged, or in other words, to clarify the pleading, not to serve as a discovery device (People v Davis, 41 NY2d 678 (1977); People v Kyoung Ja Choi, 259 AD2d 423 (1st Dept 1999). The indictment or bill of particulars must state such specifics "as may be necessary to give the defendant and the court reasonable information as to the nature and character of the crime charged" (People v Morris, 61 NY2d 290, 294 (1984)).

The bill of particulars provided which was served pursuant to and simultaneously with the consent order was sufficient to adequately inform the defendant of the substance of his alleged conduct and to enable him to prepare and conduct a defense (see People v Sanchez, 84 NY2d 440 (1994); People v Byrnes, 126 AD2d 735, 736 (2d

Dept 1987)). The defendant's motion for any further bill of particulars is denied.

2. MOTION FOR DISCOVERY AND INSPECTION/ BRADY

The defendant has been provided with consent discovery in this case, as well as a bill of particulars. Therefore, the defendant's demand for disclosure of items or information to which he is entitled pursuant to the provisions of CPL 240.20(1) (a) through (k) is granted upon the People's consent. The application is otherwise denied as it seeks items or information which are beyond the scope of discovery and the defendant has failed to show that such items are material to the preparation of his defense (CPL 240.40 (1) (a); People v Bianco, 169 Misc2d 127 (Crim. Ct, Kings Co. 1996)).

The defendant's demand for the production of Rosario material at this time is premature (see CPL 240.45(1); Catterson v Rohl, 202 AD2d 420 (2d Dept 1994)). Further, there is no statutory right to disclosure of all police reports concerning an ongoing investigation (Brown v Grosso, 285 AD2d 642 (2d Dept 2001); see also Pirro v LaCava, 230 AD2d 909 (2d Dept 1996)).

The People have acknowledged their continuing obligation to provide exculpatory information to the defendant (Brady v Maryland, 373 US 83), and are directed to disclose any such information to the defense.

3. MOTION FOR A SANDOVAL/VENTIMIGLIA HEARING

The defendant's motion for a Ventimiglia hearing is denied at this time since the People do not represent that they are seeking to introduce any of defendant's prior bad acts on their direct case. The defendant's motion may be renewed in the event the People later seek to offer such evidence at trial. The motion for a Sandoval hearing is

granted and shall be renewed before the trial Judge.

4. MOTION TO SUPPRESS STATEMENTS

The defendant's motion for suppression of oral statements, as set forth in the two CPL 710.30 notices, is granted to the extent that the Court will conduct a Huntley hearing prior to trial concerning the statements allegedly made by the defendant for the purpose of determining whether Miranda warnings were necessary and, if so, whether he was so advised and made a knowing, intelligent and voluntary waiver thereof, or whether the statements were otherwise involuntarily made within the meaning of CPL 60.45.

5. MOTION TO SUPPRESS IDENTIFICATION EVIDENCE

The People served the defendant with a CPL 710.30 notice with respect to his identification, which pertains to an identification made from a video, on January 20, 2019 at 11 am, at 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York. Although they did not specify who made the identification in the notice, the People now indicate in their Affirmation in Opposition that the victim, who is the mother of the defendant, made the noticed identification in the course of the grand jury proceeding. The People assert that the defendant's mother identified him in the video, which was taken from her home security system and had been recorded on April 18, 2018. The People argue that this represented a ratification of events rather than an identification procedure and that no Wade hearing is warranted.

"In cases in which the defendant's identity is not in issue, or those in which the protagonists are known to one another, 'suggestiveness is not a concern and hence, [CPL 710.30] does not come into play'" (People v Rodriguez, 79 NY2d 445, 449 (1992))

citing People v Gissendanner, 48 NY2d 543, 552 (1979)). In this case, since the identifying witness of the defendant in the video was the mother of the defendant, and they are well known to each other, the identification was confirmatory. Therefore, no Wade or Rodriguez hearing is required with respect to this identification (People v Tas, 51 NY2d 915 (1978); People v Rodriguez, *supra*).

Moreover, since the victim was merely asked to view the film of the actual incident, and thus review the very event she herself had experienced, there is no danger that she identified defendant by unduly suggestive means (People v Gee, 99 NY2d 158, 163–64 (2002)). The defendant's motion to suppress identification evidence is therefore denied.

6. MOTION TO INSPECT/DISMISS/REDUCE

The defendant argues that the charges of criminal contempt in the first degree in the indictment should be dismissed since the underlying order of protection he is alleged to have violated was never properly modified with respect to the expiration date, and served upon him following the appeal and vacatur of his related convictions, apart from the criminal contempt conviction.

The defendant was initially convicted, upon a jury verdict on June 8, 2010, of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, criminal contempt in the first degree and criminal possession of a controlled substance in the seventh degree, and was sentenced on September 7, 2010, (Cacace, J.), to a determinate term of imprisonment of 15 years on the burglary count, an indeterminate term of 2 to 4 years on the criminally negligent homicide count, a determinate term of 2 years on the count of criminal injection of a narcotic drug, an

indeterminate term of 2 to 4 years on the criminal contempt count, and a definite term of 1 year for criminal possession of a controlled substance in the seventh degree¹. The sentencing court also issued an order of protection, directing the defendant to refrain from assault, stalking, harassment, menacing, reckless endangerment, disorderly conduct, criminal mischief, sexual abuse/misconduct, intimidation, and other threatening and criminal behavior towards his mother, Mary Aveni, which extended through September 7, 2038, less his jail time credit.

The defendant appealed his conviction, and on appeal, each of the underlying convictions were vacated, except for his conviction on the charge of criminal contempt in the first degree (see People v Aveni, 100 AD3d 228 (2d Dept 2012), aff'd 22 NY3d 1114 (2014)). In ruling on the defendant's appeal, the appellate courts did not modify, or address, the order of protection that had been issued at sentencing, the duration of which was based upon the length of his initial sentence. The defendant did not raise the issue on appeal, and did not seek modification of the order of protection from the sentencing court.

The defendant now contends that because the order of protection was never modified to reflect the proper duration of the order, he did not have actual notice of the legal end date of the order of protection. Thus, he contends the criminal contempt charges must be dismissed, as there could not have been sufficient evidence before the grand jury that he violated a valid order of protection of which he had knowledge.

The Court finds the defendant's argument without merit. First, even had defendant's order of protection been properly modified to reflect the shorter expiration date, it would have been in effect on the date he was charged with the counts of

¹ All terms were to run concurrently, except for the sentence imposed on criminally negligent homicide, which was to run consecutively with the sentence for criminal contempt.

criminal contempt in this case. Following the defendant's appeal, his prison sentence was reduced to an indeterminate term of 2 to 4 years based on his remaining conviction on the criminal contempt in the first degree charge. Pursuant to CPL 530.13(4), in the case of a felony conviction, as exists here, the length of an order of protection shall not exceed the greater of 8 years from the date of sentencing, or 8 years from the date of the expiration of the maximum term of an indeterminate term of imprisonment imposed, less the defendant's jail time credit (see CPL 530.13 (4)).

Since the defendant was sentenced on September 7, 2010, to a term of 2 to 4 years on the criminal contempt charge, the order of protection would extend until 8 years following his maximum indeterminate prison term of 4 years, or until September 7, 2022, less jail time credit. The counts of criminal contempt in the first degree the defendant stands charged with in this case occurred on April 18, 2019, and April 19, 2019, well within the time the order of protection would have been in effect if it had been properly modified with respect to the expiration date.

The defendant's argument requires the conclusion that the order of protection issued at sentencing was not a valid court order on the date he violated it, because it did not contain a legal expiration date. However, "[e]ven an erroneous court order must be obeyed if the issuing court had jurisdiction over the matter and the order is not void on its face...Individuals are not free to disregard a court order they believe is misguided or mistaken, but must instead move in the issuing court for modification or vacatur of the allegedly erroneous order" (People v Malone, 3 AD3d 795, 797 (3d Dept 2004); see also People v Harden, 26 ADd 887, 888 (4th Dept. 2006)).

For example, in People v Loverde, (151 AD3d 1738 (4th Dept 2017)), the defendant's conviction was vacated on a CPL 440.10 motion, and the associated order

of protection was vacated with it. However, his conviction for criminal contempt for violation of the order of protection was upheld, since it had been based on an order of protection issued by a court possessed of jurisdiction and the order was not void on its face (People v Loverde, (151 AD3d 1738 (4th Dept 2017)).

In this case, the sentencing court had jurisdiction to issue the order of protection, and there has been no argument that it was void on its face, for reasons such as having been issued in favor of a protected party who was not a victim or a witness (see, e.g., People v Raduns, 70 Ad3d 1355 (4th Dept. 2010)). The defendant in this case did not appeal the order of protection, and since it was never subsequently modified by any court, it remained a valid order (see People v Nieves, 2 NY3d 310, 315 (2004) [orders of protection may be appealed, or challenged on an appeal from a conviction, although they are not a part of a defendant's sentence]). Accordingly, as the order of protection remained in force on the date of the charges of criminal contempt, as set forth in the indictment, the defendant's motion to dismiss the counts of criminal contempt on this basis is denied.

The defendant's application is otherwise granted to the extent that the Court has conducted an in camera inspection of the minutes of the Grand Jury proceedings. Upon review of the evidence presented, this Court finds that all counts of the indictment were supported by sufficient evidence and that the instructions given were appropriate. There was no infirmity which would warrant a dismissal of the instant indictment. Accordingly, that branch of the motion which seeks dismissal of the indictment is denied. The Court further finds no facts which would warrant releasing any portion of the minutes of the grand jury proceedings to the defense (CPL 210.30 (3)).

7. MOTION FOR A RESERVATION OF RIGHTS TO MAKE FURTHER MOTIONS

The defendant seeks to reserve the right to make further motions as necessary. This motion is denied. CPL 255.20 is controlling with respect to the time frame for making pre-trial motions and there have been no allegations of good cause for making further motions outside of those time constraints.

This decision constitutes the Order of the Court.

Dated: White Plains, New York
April 18, 2019



HON. SUSAN M. CAPECI
A.J.S.C.

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