People v Herring
2019 NY Slip Op 34831(U)
August 9, 2019
County Court, Westchester County
Docket Number: Indictment No. 19-0257
Judge: Anne E. Minihan

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER
Indictment No. 19-0257

KALEY HERRING and
RAFAEL (a/k/a "RALPH") OLIVERA

Defendants.

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MINIHAN, J.

Defendant KALEY HERRING, by Westchester County Indictment No. 19-0257, is charged with Criminal Sale of a Controlled Substance in the Third Degree (Penal Law § 220.39[1]) (three counts), and Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (three counts), and is charged as aiding, abetting, and acting in concert with codefendant, Rafael Olivera, with Conspiracy in the Fourth Degree (Penal Law § 105.10[1] (two counts).

Defendant has filed an omnibus motion which consists of a Notice of Motion, an Affirmation in Support, and a Memorandum of Law. 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:

I.

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 indictment contains a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's commission thereof with sufficient precision as to clearly apprise the defendant of the conduct which is the subject of the indictment (CPL 200.50). The indictment charges each and every element of the crimes, and alleges that the defendant committed the acts which constitute the crimes at a specified place during a specified time period and, therefore, is sufficient on its face (*People v Cohen*, 52 NY2d 584 [1981]; *People v Iannone*, 45 NY2d 589 [1978]).

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]).

Defendant's request to dismiss the indictment in furtherance of justice is denied. The defendant has cited no persuasive or compelling factor, consideration or circumstances under CPL 210.40 warranting dismissal of this indictment.

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

II.

MOTION FOR a SEVERANCE and
FOR a SEPARATE TRIAL

The defendant moves for a severance from his co-defendant and for a separate trial. Defendant presents no sworn allegations of fact or evidence to support the assertion that undue prejudice will result by joinder nor does he particularize the reasons as to why he would be prejudiced by a joint-trial with co-defendant. Defendant's speculation that a co-defendant would pursue an antagonistic defense is an insufficient basis to proceed with separate trials (*People v Chaplin*, 181 AD2d 828 [2d Dept 1992]).

Defendant has failed to show good cause for severance (CPL 200.40 [1]). The defendant was properly joined in the indictment (CPL 200.40[1][d]). While the court may, in its discretion and for good cause shown, order that defendant be tried separately, defendant failed to demonstrate good cause for severance. Where the proof against all defendants is supplied by the same evidence, "only the most cogent reasons warrant a severance" (*People v Bornholdt*, 33 NY2d 75, 87 [1973]; *People v Kevin Watts*, 159 AD2d 740 [2d Dept 1990]). "[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]).

Defendant's motion to sever on the ground that there would potentially be prejudice arising from a *Sandoval* or *Huntley* ruling is denied as premature, with leave to renew after a *Sandoval* or *Huntley* ruling, and upon a showing that a joint trial will result in unfair prejudice to him and substantially impair his defense. Notably, a limiting instruction at trial would properly direct the jury to separately consider the proof as to each crime charged, thereby eliminating any prejudice to the defendant (*see People v Veeny*, 215 AD2d 605 [2d Dept 1995]).

III.

MOTION to SUPPRESS PHYSICAL EVIDENCE and
to CONTROVERT THE EAVESDROPPING WARRANT(S)

Defendant moves to suppress all physical evidence including communications intercepted pursuant to the eavesdropping orders dated August 21, 2018, September 4, 2018, September 19, 2018, October 18, 2018, November 26, 2018 and December 24, 2018, including any evidence resulting therefrom, on the basis that the seizure of property occurred in violation of defendant's Fourth Amendment rights and that the wiretap orders lacked probable cause for their issuance, were defective, and generally violated defendant's constitutional rights. The motion to controvert the August 13, 2018 is denied as no calls were intercepted as a result of the warrant. The court has examined all the eavesdropping warrants pertaining to the instant case and the affidavits in support thereof and finds the following:

Probable Cause

"[T]he probable cause necessary for the issuance of an eavesdropping warrant is measured by the same standards used to determine whether probable cause exists for the issuance of a search warrant" (*People v Tambe*, 71 NY2d 492, 500 [1988]). Upon review of the four corners of the search warrant affidavits, the warrants 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]). The allegations in the instant motion provide no basis upon which this court should alter the earlier determinations that normal investigative techniques had been exhausted and that there existed probable cause as the issuing court's orders are given deference (*see Franks v Delaware*, 438 US 154, 171 [1978]; *People v Traymore*, 241 AD2d 226 [1st Dept 1998]). The applications and supporting papers established that there was probable cause to believe that certain phones were being used in the commission of the offenses designated in the warrants.

Normal Investigation Procedures

The affidavits sufficiently set forth the normal investigative procedures that had been tried and that had failed to achieve the goals of the investigation (*see People v Rabb*, 16 NY 3d 145 [2011]).

Minimization

New York Criminal Procedure Law Section 700.30 (7), requires that an eavesdropping warrant contain a provision that the authorization to intercept shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under the Criminal Procedure Law (CPL 700.30 [7]). Minimization has been defined as a good faith and reasonable effort to keep the number of nonpertinent calls intercepted to the smallest practicable number (*People v Floyd*, 41 NY2d 245 [1976]). This court has analyzed defendant's contentions and the parties' submissions and has determined that defendant has failed to satisfy his burden to demonstrate that the eavesdropping warrants did not meet the requirements set forth in CPL 700.30 (7) since each warrant was supported by an affidavit that contained a provision explaining to the court the minimization procedure that would be followed throughout the course of the eavesdropping. The court was kept apprised of the People's minimization efforts through regular progress reports. The court finds that the People have satisfied their burden of making a prima facie showing of compliance with the minimization requirement (*see People v DiStefano*, 38 NY 2d 640 [1976]) and the defendant's motion to the extent it challenges the alleged failure to comply with the minimization requirement, it is denied.

Sealing/Inventory Notice

To the extent defendant moves for suppression of the contents of any intercepted conversations on the ground that the sealing requirements of CPL 700.50 (2) were not satisfied, it is denied. "Immediately upon the expiration of the period of an eavesdropping or video surveillance warrant, the recordings of communications or observations made pursuant to subdivision three of section 700.35 must be made available to the issuing judge and sealed under his directions" (CPL 700.50[2]). It is well settled that "the sealing requirement must be strictly construed to effectuate its purposes of preventing tampering, alterations or editing, aiding in establishing a chain of custody and protecting the confidentiality of the tapes" (*People v Gallina*, 95 AD2d 336 [2d Dept 1983]). In fact, CPL 700.50 (2) does not require sealing of "the original" so long as the People identify "an" original and seal it, tampering, alteration, or editing of that original is prevented, and chain of custody of the original is also maintained. All of the sealing orders were also signed on or before the date the warrants and/or extensions terminated. Defendant has failed to demonstrate any facts showing, how the People failed to comply with the statute. Based upon the People's submissions, the People wholly complied with the statutory sealing requirements pursuant to CPL 700.50 (2).

Geographic Jurisdiction

An eavesdropping warrant may be issued by "any justice of the supreme court of the judicial department . . . in which the eavesdropping device is to be executed" (CPL 700.05 [4].) Similarly, a Supreme Court justice may issue an order authorizing the use of a pen register and trap and trace device in the judicial district in which the order is to be executed (CPL 705.00 [6]). An eavesdropping warrant is "executed" when and where telephonic communications are intercepted or heard (*People v Perez*, 18

Misc. 3d 582 [2007]; *see also United States v Rodriguez*, 968 F2d 130 [1992]). As long as the issuing court is in the jurisdiction of the execution, the location of the intercepted phone is not pertinent (*United States v Rodriguez*, 968 F2d 130 [1992]). Since all of the eavesdropping warrants were issued by a New York State Supreme Court Justice (s) in Westchester County and place used by law enforcement to intercept the communications was located in Westchester County, the warrants were properly executed in the issuing jurisdiction.

Therefore, the court finds that the eavesdropping warrants and supporting documents were proper in all respects, the defendant's motion is denied.

Notwithstanding the foregoing, this branch of defendant's motion is granted to the extent of ordering that a pre-trial *Mapp* hearing be held to determine the propriety of any search, not conducted pursuant to warrant, and to the extent that defendant establishes standing, which resulted in the seizure of property (*see 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]).

IV.

MOTION for *SANDOVAL* and *VENTIMIGLIA* HEARINGS

Defendant has moved for a pre-trial hearing to permit the trial court to determine the extent, if at all, to which the People may inquire into the defendant's prior criminal convictions, prior uncharged criminal, vicious or immoral conduct. The People have consented to a *Sandoval* hearing. Accordingly, it is ordered that immediately prior to trial a hearing shall be conducted 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 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 [1901]). If the People move to introduce such evidence, the defendant may renew this aspect of his motion.

V.

MOTION for DISCOVERY, DISCLOSURE and INSPECTION
CPL ARTICLE 240

The parties have entered into a stipulation by way of a Consent Discovery Order dated April 30, 2019 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 her alleged conduct and in all respects complies with CPL 200.95.

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]).

VI.

MOTION for TIME to FILE FUTURE MOTIONS

To the extent that the motion seeks leave to bring additional motions, that branch 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
August 9, 2019

Honorable Anne E. Minihan
Acting Justice of the Supreme Court

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