People v Herring
2019 NY Slip Op 34832(U)
July 31, 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-

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

Defendants.

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DECISION & ORDER
Indictment No. 19-0257

MINIHAN, J.

Defendant RAFAEL OLIVERA, 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]) (two counts), and Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16[1]) (two counts), and is charged, acting in concert with codefendant, Kaley Herring, with Conspiracy in the Fourth Degree (Penal Law § § 105.10[1]/220.39[1]) and Conspiracy in the Fourth Degree (Penal Law § § 105.10[1]/220.16[1]). Codefendant is charged individually 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).

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:

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.

To the extent that defendant claims that the grand jury proceedings were defective, that claim fails. Defendant 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]), but has

offered no sworn factual allegations to show that the grand jury proceedings were defective. The minutes reveal that a quorum of the grand jurors was present during the presentation of evidence, and 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 claim, the evidence supporting the charges against him did not consist solely of the intercepted communications and was not otherwise legally insufficient. The People presented evidence of an extensive police surveillance operation which extended beyond wiretaps and, if accepted as true, established every element of the charges (*see* CPL 70.10[1]). The police testimony as to the meaning of certain language used by defendant in the intercepted telephone calls was not speculative but based on experience and, as instructed by the prosecutor, was considered in context of the communications as a whole.

Contrary to defendant's contention, the counts of the indictment alleging conduct which occurred in the Bronx should not be dismissed for lack of geographic jurisdiction. "The defendant has the right at common law and under the United States Constitution to be tried in the county where the crime was committed unless the Legislature has provided otherwise" (*People v Ribowsky*, 77 NY2d 284, 291 [1991]). CPL 20.40 provides, in relevant part, that a County Court has jurisdiction over an offense where, inter alia, conduct occurred within that county which was sufficient to establish an element of the offense (*see People v Guzman*, 153 AD3d 1273, 1275 [2d Dept 2017]). The burden is on the People to establish before the Grand Jury, by a preponderance of the evidence, that the county where the crime is prosecuted is the proper venue because either the crime was committed there or one of the statutory exceptions is applicable (*People v Ribowsky*, 77 NY2d at 291-292). Here, the People sufficiently established jurisdiction. Counts seven through ten of the indictment allege defendant's unlawful sale of heroin, and unlawful possession of heroin with intent to sell. As specified in the indictment and amplified by the Bill of Particulars, on September 9, 2018, and September 21, 2018, defendant, while in the Bronx, had communications with codefendant, who was located in Westchester County, wherein defendant "offered and agreed" to sell heroin to codefendant. "'Sell' means to sell, exchange, give or

dispose of to another, or to *offer or agree to do the same*" (Penal Law § 220.00[1]) (emphasis added). CPL 20.60(1) provides, in relevant part, that an oral statement "made by a person in one jurisdiction to a person is another jurisdiction by means of telecommunication... is deemed to be made in each such jurisdiction." Based on the foregoing, and given the evidence presented to the Grand Jury as to the telephonic communications between defendant and codefendant as to the alleged sales, defendant's jurisdiction claim is without merit. Moreover, given the "offer or agree" language in the definition of "sell," defendant's claim that the criminal sale counts as to defendant should be dismissed because the Bill of Particulars alleged communications but not an "actual sale" is without merit.

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]).

B.

MOTION TO SUPPRESS IDENTIFICATION TESTIMONY

The People served CPL 710.30 notice of four identifications of defendant - - two from single photographs and two from video recordings. Even though in every instance noticed by the People, the identifying police witness was previously familiar with defendant from the undercover operation and/or present for the events depicted in the surveillance video, so that CPL 710.30 is not invoked, defendant's motion is granted to the limited extent of ordering a pretrial hearing to determine whether the identifying witness(es) had a sufficient prior familiarity with defendant as to render the witness impervious to police suggestion (*see People v Rodriguez*, 79 NY2d 445 [1992]). If the court finds that there was not a sufficient prior familiarity with defendant on the part of the witness, the court will then consider whether or not the noticed identification was unduly suggestive (*United States v Wade*, 388 US 218 [1967]). Specifically, the court shall determine whether the identification was so improperly suggestive as to taint any in-court identification. If the identification is found to be unduly suggestive, the court shall then go on to consider whether the People have proven by clear and convincing evidence that an independent source exists for such witness' proposed in-court identification.

C.

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.

D.

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]). If the People are or become aware of any material which is arguably exculpatory and they are not willing to consent to its disclosure to 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 defendant.

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]).

E.

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
July 31, 2019

Honorable Anne E. Minihan
Acting Justice of the Supreme Court

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