

People v Abualteen

2019 NY Slip Op 34888(U)

January 25, 2019

County Court, Westchester County

Docket Number: Indictment No. 18-843

Judge: David S. Zuckerman

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This opinion is uncorrected and not selected for official publication.

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

OMAR ABUALTEEN,

-----X
ZUCKERMAN, J.

FILED

JAN 25 2019

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

DECISION & ORDER

Ind. No.: 18-843

Defendant stands accused under Indictment No. 18-843 of (in the order set forth therein) Burglary in the Third Degree (Penal Law §140.20), Attempted Grand Larceny in the Third Degree (Penal Law §110/155.35[1]), two counts of Attempted Grand Larceny in the Fourth Degree (Penal Law §155.30[1]), Criminal Mischief in the Second Degree (Penal Law §145.10), and Possession of Burglar's Tools (Penal Law §140.35]; Burglary in the Third Degree (Penal Law §140.20), Grand Larceny in the Third Degree (Penal Law §155.35[1]), Criminal Mischief in the Second Degree (Penal Law §145.10) and Possession of Burglar's Tools (Penal Law §140.35]; Petit Larceny (Penal Law §155.25); Grand Larceny in the Fourth Degree (Penal Law §155.30[1]) and Criminal Possession of Stolen Property in the Fourth (Penal Law §165.45[1]); and two counts of Unlawful Fleeing a Police Officer in a Motor Vehicle in the Third Degree (one count each of Penal Law §270.25), and Reckless Driving (Vehicle and Traffic Law §1212). As set forth in the Indictment, it is alleged that, on or about June 15, 2018, Defendant, in Westchester County, New York, knowingly and unlawfully entered a building with the

intent to commit a crime therein, did attempt to steal property from three persons valued in excess of \$3,000.00, \$1,000.00, and \$1,000.00, damaged property of another in an amount exceeding \$500.00, and possessed burglar's tools. As set forth in the Indictment, it is further alleged that, on or about and between March 3 and March 4, 2018, Defendant, in Westchester County, New York, knowingly and unlawfully entered a building with the intent to commit a crime therein, possessed burglar's tools, stole property from a person valued in excess of \$3,000.00, and damaged property of another person in an amount exceeding \$500.00. As set forth in the Indictment, it is also alleged that, on or about April 27, 2018, Defendant, in Westchester County, New York, did steal property from a person. Finally, as also set forth in the Indictment, it is alleged that, on or about March 24, 2018, Defendant, in Westchester County, New York, did steal property from another person in excess of \$1,000.00, and possessed said stolen property, as well as attempted on that same date to flee a uniformed police officer or marked police vehicle by driving at speeds which equal or exceed 25 miles per hour above the speed limit or engaged in reckless driving, and engaged in reckless driving. By Notice of Motion, dated November 29, 2018, with accompanying Affirmation, Defendant moves for omnibus relief. In response, the People have submitted an Affirmation in Opposition and an Amended Affirmation in Opposition, dated December 12, 2018.

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 © 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 particular, Defendant alleges that he elected to and did testify before the Grand Jury under a waiver of immunity, but that he waived immunity and testified without benefit of counsel post-arrest. However, the people assert, in Opposition, Defendant does not thereafter contest, and the Grand Jury minutes make clear, that Defendant waived immunity in consultation with counsel, and was afforded the right to testify with counsel present, but that he elected to have counsel present outside the Grand Jury Hearing Room rather than inside. Thus there was no deprivation of his right to counsel in the Grand Jury.

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 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.

D. MOTION FOR A WADE HEARING

Defendant moves to suppress evidence of an identification procedure which the People seek to introduce against him at trial. The People, in their Affirmation in Opposition, state that there was no impropriety in the identification procedure conducted with regard to defendant. Consequently, the motion to suppress identification evidence is granted to the extent that a pre-trial *Wade* hearing is ordered to determine the propriety of the identification procedure employed.

E. MOTION FOR A HUNTLEY HEARING

Defendant moves to suppress noticed statements pursuant to CPL §710.20(3). The People, in their Affirmation in Opposition, state that there was no impropriety in obtaining the statements attributable to Defendant. Consequently, the motion to suppress noticed statements is granted to the extent that a *Huntley* hearing is ordered to determine the voluntariness of the noticed statements.

All other motions are denied.

Dated: White Plains, New York
January 25, 2019



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

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