

People v Holmes

2019 NY Slip Op 34894(U)

August 15, 2019

County Court, Westchester County

Docket Number: Ind. No. 18-0888

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

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

FILED

SEP 6 2019

DECISION & ORDER

DAVID HOLMES,

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER
Defendants.

Ind. No.: 18-0888

-----X
ZUCKERMAN, J.

Defendant stands accused under Indictment No. 19-0888 of Criminal Sale of a Controlled Substance in the Third Degree (Penal Law §220.39[1]) and Criminal Possession of a Controlled Substance in the Third Degree (Penal Law §220.16[1]). As set forth in the Indictment, it is alleged that, on or about May 23, 2018, Defendant, in Westchester County, New York, did knowingly and unlawfully sell a controlled substance, namely heroin, and possessed said substance with the intent to sell it. By Notice of Motion dated July 24, 2019, with accompanying Affirmation, Defendant moves for omnibus relief. In response, the People have submitted Affirmations in Opposition dated July 30, 2019.

The motions are disposed of as follows:

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 WADE HEARING

Defendant moves to preclude the noticed identification procedure pursuant to CPL §710.20(1). The People, in their Affirmation in Opposition, state that the notice was superfluous, because the photographic identification noticed was merely an inquiry from one police officer to another, in which the first officer showed the second officer Defendant's photograph solely to determine whether he was the person suspected in another incident, not the current matter. Defendant also moves to suppress the 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, in fact, it was unnecessary

since it was not an identification procedure for the instant matter, as set forth above. Consequently, the motion to strike the notice and preclude is denied, and the motion to suppress the noticed identification procedures is likewise denied, the latter with leave to renew should the People seek to introduce, at trial, the identification of the defendant by the second police officer.

**C. 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 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.

D. 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:

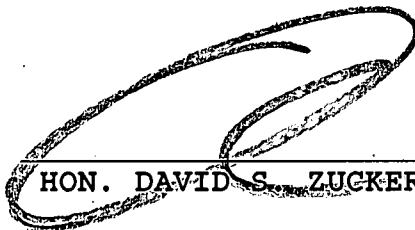
A. The People must notify the Defendant of all specific instances of the Defendant's prior uncharged criminal, vicious or immoral conduct of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the Defendant (see, CPL §240.43); and

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.

All other motions are denied.

Dated: White Plains, New York
August 15, 2019

A handwritten signature in dark ink, consisting of a large, stylized 'D' followed by a smaller 'S' and a flourish, written over a horizontal line.

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

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