People v Brito
2019 NY Slip Op 34895(U)
May 6, 2019
County Court, Westchester County
Docket Number: Ind. No. 18-1370
Judge: David S. Zuckerman

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
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THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION & ORDER

HASSEN BRITO and DIAMOND MILLS,

Ind. No.: 18-1370

Defendant.
----------X

ZUCKERMAN, J.

Defendants stand accused under Indictment No. 18-1370 of Robbery in the First Degree (Penal Law §160.15[4]), Robbery in the Second Degree (Penal Law §160.10[1]), Attempted Robbery in the First Degree (Penal Law §110/160.15[4]), Attempted Robbery in the Second Degree (Penal Law §110/160.10[1]), and two counts of Menacing in the Second Degree (Penal Law §120.05[2]). As set forth in the Indictment, it is alleged that, on or about December 4, 2018, Defendants, in Westchester County, New York, while aiding and abetting and acting in concert with another and at least one other person, forcibly stole property from one person, and attempted to forcibly steal property from another person, and in the course or commission thereof, or immediate flight therefrom, displayed what appeared to be a firearm, and was aided by another in said actions, which other person was actually present, and did intentionally place said persons in reasonable fear of physical injury. By Notice of Motion dated March 25, 2019, with accompanying Affirmation, Defendant Brito moves for omnibus relief. By Notice of Motion dated April 2, 2019, with accompanying Affirmation,

Defendant Mills also moves for omnibus relief. In response, the People have submitted Affirmations in Opposition to the motions dated April 5, 2019.

The motion is disposed of as follows:

I. DEFENDANT BRITO

A. MOTION FOR A *WADE* HEARING

Defendant moves to suppress noticed identification procedures pursuant to CPL §710.20(3). The People, in their Affirmation in Opposition, state that there was no impropriety in conducting the identification procedures noticed to Defendant, that the identification involving the victim's brother was not police-arranged, and that, even if the victim's police-arranged show-up was suggestive, the victim was very familiar with Defendant. Defendant has not contested these factual allegations. Consequently, the motion to suppress noticed identification procedures is granted to the limited extent that a haring is ordered to determine whether the identifying witnesses had a sufficient prior familiarity with the defendant as to render them impervious to police suggestion *(People v Rodriguez*, 79 NY2d 445[1992]). In the event the court finds that there was not a sufficient familiarity with the defendant on the part of the witnesses, the court will then consider whether the noticed identifications were unduly suggestive *(United States v Wade*, 388 US 218 [1967]). Specifically, the court shall determine whether the identifications were so improperly suggestive as to taint any

in-court identification. In the event the identifications are 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 witnesses' proposed in-court identification.

B. 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]).

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 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.

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. They do, however, consent to a hearing on the issue. Consequently, the motion to suppress noticed statements is granted to the extent that a *Huntley* hearing is ordered to determine those issues.

F. MOTION FOR A *MAPP/DUNAWAY* HEARING

Defendant moves to suppress all physical evidence which the People seek to introduce against her at trial, including an allegation that it was recovered after a search that was not based on probable cause. The People, in their Affirmation in Opposition, state that there was no impropriety in the search conducted and seizure made and add, in particular, that it was based on probable cause. Consequently, the motion to suppress physical evidence is granted to the extent that a pre-trial *Mapp/Dunaway* hearing is ordered to determine the propriety of the search and seizure.

F. MOTION TO SEVER

Defendant moves to sever the trial of the instant Indictment from that of his co-defendants, asserting that a joint trial would result in undue prejudice to him, due to his prior criminal record, and the possibility that counsel for his co-defendants would not be bound by any *Sandoval/Ventimigila* ruling which this court may issue with regard to the prosecution.

As an initial matter, this court has made no

Sandoval/Ventimigila ruling, but has rather referred the matter to the trial court, making the application premature. Further, the crimes alleged herein are, the People argue, properly joinable because they are part of the same criminal transaction--a pair of robbery and attempted robbery incidents. Defendant has failed to demonstrate that the counts are not part of the same criminal transaction.

The People are thus correct that the counts are joinable. Consequently, Defendant having failed to demonstrate that the counts were not properly joinable under CPL §200.20, the court has no choice but to decline to sever the trial of this defendant from the trial of the co-defendant.

I. DEFENDANT MILLS

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.

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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]).

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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]).

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ordered to determine whether the identifying witnesses had a sufficient prior familiarity with the defendant as to render them impervious to police suggestion *(People v Rodriguez*, 79 NY2d 445[1992]). In the event the court finds that there was not a sufficient familiarity with the defendant on the part of the witnesses, the court will then consider whether the noticed identifications were unduly suggestive *(United States v Wade*, 388 US 218 [1967]). Specifically, the court shall determine whether the identifications were so improperly suggestive as to taint any in-court identification. In the event the identifications are found to be unduly suggestive, the court shall then go on to consider whether the People have proven that an independent source exists for such witnesses' proposed in-court identification.

E. MOTION TO SEVER

Defendant moves to sever the trial of the instant Indictment from that of his co-defendants, asserting that a joint trial would result in undue prejudice to her, due to antagonistic defenses, and the possibility that co-defendant's statements might lead to a Bruton issue (Bruton v US, 391 US 123 [1968]).

As an initial matter, this court has only made a preliminary ruling on the admissibility of Defendants' statements, deferring the matter instead to a pre-trial *Huntley* hearing. It is thus premature to seek suppression where the People have not yet sought to introduce any such statements, nor, in fact, has the court even ruled on their admissibility. Further, the crimes alleged herein

are, the People argue, properly joinable because they are part of the same criminal transaction--a pair of robbery and attempted robbery incidents. Defendant has failed to demonstrate that the counts are not part of the same criminal transaction.

The People are thus correct that the counts are joinable. Defendant also asserts that a joint trial would result in undue prejudice to him, including that their defenses are antagonistic, and that if the co-defendant's statement were to be admitted at trial, his right to a fair trial would be violated, and his right to cross-examine witnesses impaired. As the People properly note, Defendant has failed to specify how his right to a fair trial would be violated by joinder with another defendant whose trial strategy might differ from his, nor has concrete proof (as opposed to assertion and speculation) of such trial strategy differences been offered by this defendant. Consequently, Defendant having failed to demonstrate that the counts were not properly joinable under CPL §200.20, the court has no choice but to decline to sever the trial of this defendant from the trial of the co-defendant.

F. 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
May 6, 2019

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

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