

People v Rosado

2019 NY Slip Op 34906(U)

October 11, 2019

County Court, Westchester County

Docket Number: Indictment No. 19-451

Judge: George E. Fufidio

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COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

-against-

ANIBAL ROSADO, JR.,

Defendant.

-----X
FUFIDIO, J.

DECISION & ORDER
Indictment No.: 19-451

FILED

OCT 15 2019

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant, ANIBAL ROSADO, JR., having been indicted on or about June 21, 2019 for two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39[1]) and two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16[1]) 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 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]). 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 the material must be disclosed to the 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]).

B. MOTION TO INSPECT, DISMISS AND/OR REDUCE

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 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.

The grand jury was properly instructed (*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]).

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]).

C. MOTION FOR SANDOVAL AND VENTIMIGLIA HEARINGS

The 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 act, and vicious or immoral conduct (*see, People v Sandoval*, 34 NY2d 371[1974]). The People have consented to, and it is now ordered that immediately prior to trial the court will conduct a *Sandoval* hearing.

At the hearing, the People are required to notify the Defendant of all specific instances of his criminal, prior uncharged criminal acts and 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). The Defendant shall then 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 him should he decide testify as a witness on his own behalf and thereby prevent him from exercising this right (*see, People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

The Defendant's application for a *Ventimiglia* hearing is denied as premature, because the People have not indicated an intention to use any evidence of prior bad act or uncharged crimes of the Defendant in its case in chief (*see, People v Molineaux*, 168 NY2d 264 [1901]; *People v Ventimiglia*, 52 NY2d 350 [1981]). The People have stated that if they do intend to use any *Molineaux* evidence that they will inform the defense and the court of their intention and at that point the Defendant may renew this aspect of his motion.

D. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY CPL ARTICLE 710

This motion is granted to the extent that a hearing shall be held to consider whether or not the noticed identifications were unduly suggestive (*United States v Wade*, 388 US 218 [1967]). The Court has insufficient evidence before it to conclude whether or not the noticed identification made by the undercover officer, "the buyer" was in fact "confirmatory" as the People contend. Specifically, the court shall determine whether that identification was so improperly suggestive as to taint any in-court identification. In the event that 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 witness' proposed in-court identification (*People v Adelman*, 36 AD3d 926 [2nd Dept. 2007]).

With respect to the identification that was noticed to the defendant regarding Detective Gardner, the Court orders a hearing to determine the prior familiarity that would render him impervious to suggestion (*People v Rodriguez*, 79 NY 2d 445 [1992]). In the event that there is insufficient familiarity the Court will conduct a *Wade* hearing as above.

E. MOTION FOR THE DISCLOSURE OF INFORMANTS

The Defendant's motion for the disclosure of any informants used in this case is denied. The disclosure of informants is only required when the question of a defendant's guilt or innocence turns on an informant's testimony (*People v Goggins*, 34 NY2d 163 [1974]). The Defendant has not made any showing that an informant was used in this case, much less the requisite showing that an informant's testimony would have any bearing on his guilt or innocence (*id.*). Moreover, disclosure would not be required even if an informant had been instrumental in making the introduction between the defendant and law enforcement (*People v Vega*, 23 AD3d 504 [2nd Dept. 2005]).

F. MOTION TO STRIKE ALIBI NOTICE

The Defendant's motion to strike the alibi notice is denied. Contrary to the Defendant's contentions, it is well-settled that CPL 250.00 is indeed in compliance with the constitutional requirements (*see People v Dawson*, 185 AD2d 854 [2d Dept 1992]; *People v Cruz*, 176 AD2d 751 [2d Dept 1991]; *People v Gill*, 164 AD2d 867 [2d Dept 1990]) and provides equality in the required disclosure (*People v Peterson*, 96 AD2d 871 [2d Dept 1983]; *see generally Wardius v Oregon*, 412 US 470 [1973]).

G. MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS

The Defendant has made no showing of a delay under CPL 30.30 (*People v Allard*, 28 NY3d 41 [2016]; *People v Luperon*, 85 NY2d 71 [2006] [A defendant simply needs to allege that the People exceeded the time by which they need to declare readiness]) so the court will consider the motion to dismiss the instant indictment on Constitutional speedy trial grounds.

Constitutional Speedy Trial

Defendant has moved to have his case dismissed because the People allowed approximately one year to pass between the alleged crime and the filing charges. This type of pre-charge delay is framed as a due process violation and thus generally requires a showing of actual prejudice before relief may be granted. Additionally, in cases where there has been a lengthy delay, the People must show good cause for such a delay (*People v Singer*, 44 NY2d 241 [1975]). Acknowledging that there is no specific length of time after which a dismissal is required, the Court of Appeals has developed a 5 part test to determine whether or not a defendant's due process rights were violated by the People's inaction (*People v Taranovich*, 37 NY2d 442 [1975]). The factors to be considered are 1. Length of delay, 2. Reasons for the delay, 3. Nature of the underlying charges, 4. Extent of pretrial incarceration and 5. Prejudice to the defendant.

Applying these factors to the instant case, it appears as though the People have met their burden. While the People have a wide berth in deciding when to bring charges against a defendant, they are necessarily restricted by the statute of limitations pertaining to the individual charges, however, under special circumstances, a shorter time period may impair a defendant's right to a fair trial (*People v Fuller*, 57 NY2d 152 [1982]; CPL 30.10). In this case, the People are well within the statute of limitations and while any delay has the potential to cause prejudice to the defendant appellate courts have held that a four and a half year delay in bringing a criminal possession of a weapon in the third degree charge (*People v Johnson*, 134 AD3d 1388 [4th Dept 2015]) and a three and a half year delay in bringing a burglary in the second degree charge (*People v Velez*, 78 AD3d 867 [2nd Dept 2010]) were not unreasonably long, indeed, the Court of Appeals has even found no prejudice in a 15 year delay in bringing murder charges against a defendant (*People v Decker*, 13 NY3d 12 [2009]).

In this case, a year long delay while the Defendant is at liberty is not unreasonable given that this particular set of sales was part of a larger drug interdiction operation in Yonkers, New York that involved multiple undercover officers, multiple police agencies and multiple targets over a long period of time. It is not unreasonable for such a delay to allow for the gathering of intelligence and evidence and so that the identities of the undercover police officers remain undercover in order for them to successfully and safely execute the operation.

Under the third factor, the sale of controlled substances is an inherently serious crime punishable by a State Prison sentence.

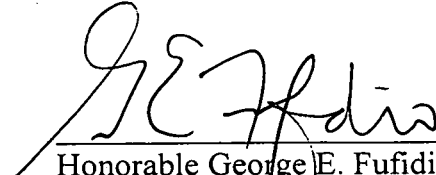
Finally, and most importantly, the Defendant has made no concrete showing of prejudice by being charged approximately one year after the alleged incident, he merely speculates that there may be some prejudice as a result.

Weighing all of the factors together, the Court does not find that the Defendant was denied due process (*People v Romero*, 173 AD2d 654 [2nd Dept. 1991]). Should the Defendant discover at some point in preparation for trial that he has suffered an actual prejudice as a result of this delay, he is free to

attempt to reopen this portion of his motion. Until that day, however, this branch of the defendant's motion is denied as well.

The foregoing constitutes the opinion, decision and order of this Court.

Dated: White Plains, New York
October 11, 2019


Honorable George E. Fufidio
Westchester County Court Justice

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