

People v Jordan

2019 NY Slip Op 34937(U)

March 25, 2019

County Court, Westchester County

Docket Number: Indictment No. 18-0978

Judge: George E. Fufidio

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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-

KERA JORDAN,

Defendant.

FUFIDIO, J.

DECISION & ORDER
Indictment No.: 18-0978

FILED

MAR 25 2019

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant, KERA JORDAN, having been indicted on or about November 26, 2018 for burglary in the second degree (Penal Law § 140.25 [1][c]), one count of criminal possession of a weapon in the third degree (Penal Law § 265.02[1]), one count of menacing in the second degree (Penal Law § 120.14[1]) and one count of attempted petit larceny (Penal Law § 110/155.25) 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 filed an Affirmation in Opposition together with a Memorandum of Law. The Defendant then filed a Reply. Upon consideration of these papers, the stenographic transcript of the grand jury minutes and the Consent Discovery Order entered in this case, the Court sent a letter to the People pursuant to CPL 210.30 [3] and *People v. Coleman*, 131 AD3d 705 [2nd Dept. 2015) and both the People and the Defendant replied. Upon all of these submissions, this Court disposes of this motion as follows:

A. MOTION TO DISMISS IN THE INTERESTS OF JUSTICE

CPL 210.40 (a-j) sets forth a series of factors that the courts must consider, individually and collectively, when determining a motion brought under this section. Upon consideration of all of the listed factors, this Court does not find that the indictment against the Defendant should be dismissed. The Court finds that the allegations against the Defendant and the circumstances surrounding the allegations are serious, the evidence against the Defendant is sufficient to sustain the indictment, the Defendant's criminal history is not such that she should get the benefit of a dismissal in the interests of justice in this situation.

The Court relies upon the facts as set forth in all of the aforementioned submissions it has reviewed in reaching this determination, but does not agree with the Defendant's assertion that the video, especially when taken in conjunction with the testimony adduced at before the grand jury, proves, by any stretch of the imagination, that she is innocent of all charges, which the Defendant emphatically claims it does. The Court does agree with the Defendant that the People have been somewhat careless in this prosecution, but does not find that this carelessness has risen to the level that a dismissal in the interests of justice should be considered.

Turning towards the store surveillance video that the Defendant has made the keystone to her argument, the Court has had the opportunity to have viewed this video numerous times and has reached the only conclusion it can, specifically, that the video is ambiguous and does not conclusively prove guilt or innocence.

The video, which is a split screen, depicting the view from two separate cameras surveilling two

different parts of the store, shows the Defendant walking into the store with a blue bag over her shoulder. Shortly after, without touching anything in the camera's view, she disappears behind an aisle divider until she reappears in the other screen by what the Court presumes is, based on the submissions and its own experience with grocery stores, the frozen foods aisle.

She begins in the forefront of the screen and then walks towards the back of the screen pushing a shopping cart with her back towards the camera until she is at the back of the screen and near a wall of the store. There she is seen interacting with one of the store employees.

Most of the remaining action in the video takes place at the rear of the screen, away from where the camera is located and shows the Defendant interacting with store employees in what can be interpreted as argumentatively and tumultuously; making slashing motions with her hands, taking items out of a display case and placing them into her cart, in which it was difficult for the Court to discern where they were going and if there was anything else in the cart into which they might have been placed; finally she is shown walking back down the aisle with store employees appearing to escort her out of the store. She, again, disappears from that camera's view and is seen a short time later on the other camera by the front of the store where she had first entered, still being escorted by the store employees to the door where she was removed from the store. She does not appear to have touched anything while being escorted out of the door. The Court was unable to discern a knife in the Defendant's hand, but she was making actions that the Court considers consistent with using a pocket knife of the kind that was ultimately found on her person and a movement consistent with placing the knife in her bra where it was found. However, the video is far from clear as to what, if anything the Defendant was holding at any given time, what she was putting into her cart and where it was going once it was in the cart. However, all of those things and more are ultimately issues for trial.

Considering the enumerated factors set forth in CPL 210.40, the Court finds that these allegations, in particular the menacing and weapons aspects of it, makes it more serious than the garden variety shoplifting or petit larceny case that it would be without them and the allegations that the Defendant was willing to use such violence over a relatively minor case is also troubling. The Court does not feel as though the Defendant was improperly charged and is not persuaded that the amount of time she spent in jail for want of bail constitutes the type of harm contemplated by CPL 210.40 in this instance. The evidence of guilt is certainly sufficient to sustain the charges at this stage of the proceeding. The Defendant's history, although minor is comprised primarily of larceny convictions. At this juncture in the proceedings, the Court does not find that there is any misconduct on the part of law enforcement, at any level, in the prosecution of this case.¹ The purpose and effect of a sentence on this case would have the usual effects of punishment, future deterrence and rehabilitation whereas a dismissal would send a message that is it alright to steal, and then when caught, to fight your way out of trouble with a weapon. The remaining factors are irrelevant to this Court's consideration of this case.

Considering all of the enumerated factors both collectively and individually, the Defendant's motion for a dismissal in the interests of justice is denied. Counsel has ample material to work with from the video should the Defendant opt to go to trial, however, what is actually depicted in the video is far from the video that was hyperbolically described in the Defendant's papers.

¹Nor, it should be noted, is the Court particularly impressed with Counsel's tenor in his Reply to the People's Affirmation in Opposition, where he accuses the People and individual prosecutors of racially motivated prosecutorial misconduct. The Court understands zealous representation, but wantonly throwing baseless accusations of this nature over a video, which is far from compelling for one side or the other's position, goes beyond the pale.

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]).

The Defendant, in particular, has challenged two elements of crimes that were presented to the grand jury. The first is whether the People were able to prove that she unlawfully entered the store in which these charges arose and the second is whether the People were able to prove an intent to steal.

The People, though testimony that the Defendant had been caught shoplifting at that store in the past and as recently as two days prior to this incident and had been told by the store management that she was no longer permitted to shop in the store because of those incidents, have proven that she had unlawfully entered the store (*People v Polite*, 302 AD2d 227 [1st Dept. 2003], *lv. denied* 99 NY2d 657 [2003]).

Second, with respect to her larcenous intent, the People have stated that they, "do not rely on defendant's action in placing items in her cart to show her larcenous intent," what they instead rely upon is a series of *Molineaux* evidence of which purpose the grand jury was never instructed and thus inadmissible for the purposes argued,² unproven allegations that the Defendant grabbed wildly at items on the shelves as she was being escorted out of the store and statements that the Defendant made while being escorted out of the store and then again in police custody and that frozen food items were found

² The only instructions that the grand jury received regarding *Molineaux* type evidence was on page 36 and 78-79 of the grand jury testimony that any testimony of prior shoplifting was for the express purpose of showing the element of unlawful entry and could not be used for any other purpose against the Defendant.

inside the defendant's blue bag she was seen wearing on her way into the store.³ Disregarding the portion of the People's argument that is comprised of inadmissible evidence and unproven assertions (*People v Huston*, 88 NY2d 400 [1996]), what the Court is left with is the Defendant's statements to the effect that she was stealing, which in and of itself is insufficient for an indictment (*People v Booden*, 69 NY2d 185 [1987]), the fact that she entered the store after being told not to (but specifically, not the reasons why she was barred from entry) and the fact that frozen food was found in her bag after she was escorted out of the store.

Given the law, as stated above; that the Defendant has not had the opportunity to confront or cross-examine the evidence; that Court has made no judgement as to the quality or weight of the evidence that was before the grand jury, having cast any innocent explanations aside and there being one reasonable inference that can be made pointing towards guilt, based upon the evidence before the grand jury, the Court is constrained to uphold Counts 1 and 4 of the indictment. The Court does advise the People that it finds no evidence in the grand jury testimony that supports a theory that she was grabbing at items on the shelves as she was being escorted to the door.

The Court does not take issue with the evidence presented in support of Counts 2 and 3.

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 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*

³ The Court remains somewhat confused as to the People's arguments regarding the Defendant placing items in the cart. On the one hand they clearly argue that putting items in the cart was not the basis for proving larcenous intent, but on the other their witnesses have clearly testified that the blue bag in question was in the cart and that the defendant was placing items in the cart as she was shopping and as a result thought that she was stealing.

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]).

D. MOTION FOR FURTHER BILL OF PARTICULARS

The Defendant's motion for a further bill of particulars is granted. The Defendant was given a Bill of Particulars as part of the Consent Discovery that was filed with the Court. The Court finds that this Bill of Particulars insufficiently conforms to the requirement of CPL 200.95 and that the information set forth in the Bill of Particulars in conjunction with the information set forth in the indictment and other court filings is insufficient to give the Defendant adequate notice of the charges against her so as to be able to formulate a defense to the allegations (*People v Iannone*, 45 NY2d 589 [1978], CPL 200.95).

In particular the Bill of Particulars reads, "After the defendant unlawfully entered the store...and put items of merchandise in a cart that she intended to steal...." This is in direct contradiction to the statement argued in the *Omnibus* Memorandum of Law wherein the People's position there was that they, "do not rely on defendant's action in placing items in her cart to show her larcenous intent...." Moreover, the Bill of Particulars goes on to inform that, "On the way out, the defendant attempted to steal merchandise off the shelves." The Court, even given the People's low threshold at this stage, found no evidence presented to the grand jury that this happened and indeed, if this is, in fact, the People's theory of how the attempted petit larceny was committed, upon a filing of a further Bill of Particulars stating this, the Defendant will be permitted to re-open his motion to dismiss as to that charge. Again, the Court finds no issue with the factual underpinnings as presented in any of the filings or in the Bill of Particulars concerning the weapon and menacing charges.

E. MOTION TO SUPPRESS NOTICED STATEMENTS

The Defendant's motion seeking to suppress statements on the grounds that they were unconstitutionally obtained is granted to the extent that a *Huntley* hearing shall be held prior to trial to determine whether any statements allegedly made by the Defendant, which have been noticed by the People pursuant to CPL 710.30 (1)(a) were involuntarily made by the Defendant within the meaning of CPL 60.45 (*see* CPL 710.20 (3); CPL 710.60 [3][b]; *People v Weaver*, 49 NY2d 1012 [1980]), obtained in violation of Defendant's Sixth Amendment right to counsel, and/or obtained in violation of the Defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

F. MOTION TO SUPPRESS IDENTIFICATION TESTIMONY CPL ARTICLE 710

Regarding the noticed identifications occurring subsequently to the incident, although the People have put forth evidence before the grand jury of a prior familiarity between the people making the identification and the Defendant, the Defendant has not had the opportunity to cross-examine these witnesses as to the quality and nature of the prior familiarity. Accordingly, this motion is granted to the extent that a hearing shall be held, first, to consider whether or not the witness's prior familiarity with the Defendant was sufficient enough to render them impervious to suggestion and misidentification (*People v Rodriguez*, 79 NY2d 445 [1992]) and, second, depending on the outcome of the first part of the hearing, 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 witness' proposed in-court identification (*People v Riley*, 70 NY2d 523 [1987]).

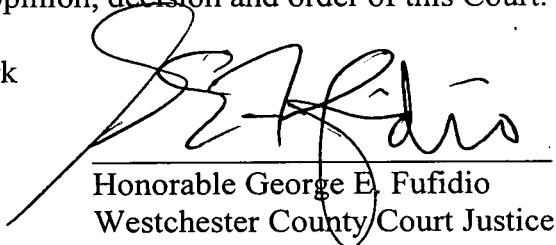
As to the remaining noticed identifications made during the grand jury presentation, the Court agrees with the People's argument that these were ratifications, in which the witnesses were shown video in which they were participants in the events depicted and in which the Defendant is also depicted as a participant and hence outside the ambit of CPL 710.30 (*People v Gee*, 99 NY2d 158 [2002]).

G. MOTION RESERVING THE RIGHT TO FILE ADDITIONAL MOTIONS

Defendant's motion reserving the right to file additional motions is denied. Should the Defendant file any other motions that were not raised in his *Omnibus* motion, then they will need to be in compliance with CPL 255.20(2).

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

Dated: White Plains, New York
March 25, 2019



Honorable George E. Fufidio
Westchester County Court Justice

To:

HON. ANTHONY A. SCARPINO, JR.
District Attorney, Westchester County
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, New York 10601

BY:

ANNE H. STARK, ESQ.
Assistant District Attorney

MARIA I. WAGER, ESQ.
Assistant District Attorney

Anthony Giordano, ESQ.
Attorney for the Defendant
23 Spring Street, Suite 204A
Ossining, New York 10562