

**People v Rivera**

2019 NY Slip Op 35003(U)

December 9, 2019

County Court, Westchester County

Docket Number: Ind. No. 19-0808

Judge: Anne E. Minihan

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COUNTY COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

FILED  
AND ENTERED  
ON 12-9 2019  
WESTCHESTER

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

**FILED**

-against-

DEC 10 2019

DECISION & ORDER

Ind No.: 19-0808

JACOB RIVERA,

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

Defendant.

-----X  
MINIHAN, J.

Defendant, charged by Westchester County Indictment No. 19-0808 with Burglary in the Second Degree (Penal Law § 140.25[2]), has filed an omnibus motion consisting of a Notice of Motion, an Affirmation, and a Memorandum of Law. In response thereto, 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 dated October 22, 2019, entered in this case, the court disposes of this motion as follows:

I.

MOTION for DISCOVERY, DISCLOSURE and INSPECTION  
CPL ARTICLE 245

To whatever extent material that is discoverable under Criminal Procedure Law Article 245 has not already been provided to the defense by the People, the defendant's motion is granted and such discovery, including both *Brady* material<sup>1</sup> and *Rosario* material, shall be provided forthwith. Leave is granted for either party to seek a protective order (CPL Article 245). If the defense has a particularized reason to believe that there remains outstanding discovery with which he has not been provided, he is directed to contact the assigned Assistant District Attorney upon receipt of this order. If the issue remains unresolved within two days of receipt of this order, counsel for the defendant shall contact the court to request an immediate compliance conference.

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<sup>1</sup> The People acknowledge their continuing duty to disclose exculpatory material (*Brady v Maryland*, 373 US 83 [1963]; see *Giglio v United States*, 405 US 150 [1971]). If the People are or become aware of any such material which is arguably subject to disclosure under *Brady* and its progeny and Criminal Procedure Law Article 245 which they are unwilling to consent to disclose, they are directed to bring it to the immediate attention of the court and to submit it for the court's in camera inspection and determination as to whether it constitutes *Brady* material discoverable by the defendant.

If the People have fulfilled their discovery obligations but have not yet filed a Certificate of Compliance, they are directed to do so forthwith and they are reminded of their continuing obligation to remain in compliance with the discovery mandates set forth in CPL Article 245 and to file supplemental Certificates of Compliance as the need arises.

Further, the Bill of Particulars set forth in the voluntary disclosure form provided to defendant has adequately informed defendant of the substance of the alleged conduct and in all respects complies with CPL Article 245 and Section 200.95.

II.

MOTION to INSPECT and DISMISS  
CPL ARTICLE 190

Defendant moves pursuant to CPL 210.20(1)(b) and (c) to dismiss the indictment 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. The court has reviewed the minutes of the proceedings before the Grand Jury.

The indictment contains a plain and concise factual statement which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's commission thereof with sufficient precision as to clearly apprise the defendant of the conduct which is the subject of the indictment (CPL 200.50). The indictment charges each and every element of the crime, and alleges that the defendant committed the acts which constitute the crime at a specified place during a specified time period and, therefore, is sufficient on its face (*People v Cohen*, 52 NY2d 584 [1981]; *People v Iannone*, 45 NY2d 589 [1978]).

Pursuant to CPL 190.65(1), an indictment must be supported by legally sufficient evidence which establishes that the defendant committed the offenses charged. The evidence presented, if accepted as true, is legally sufficient to establish every element of the 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]).

A review of the minutes reveals that the evidence presented, if accepted as true, would be legally sufficient to establish every element of the offense charged (CPL 210.30 [2]). Accordingly, defendant’s motion to dismiss the indictment is denied.

Defendant’s claim that the Grand Jury proceeding was defective within the meaning of CPL 210.35 is without merit. A review of the minutes reveals that a quorum of the grand jurors was present during the presentation of evidence, and 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 (*see People v Collier*, 72 NY2d 298 [1988]; *People v Calbud*, 49 NY2d 389 [1980]; *People v Valles*, 62 NY2d 36 [1984]; *People v Burch*, 108 AD3d 679 [2d Dept 2013]).

In making the present determination, the court does not find it necessary to order release of those portions of the Grand Jury minutes as constitute colloquy or instructions.

III.

MOTION for SANDOVAL and VENTIMIGLIA HEARINGS

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, vicious or immoral conduct. On the People’s consent, the court orders a pre-trial hearing pursuant to *People v Sandoval* (34 NY2d 371[1974]). At said hearing, the People shall notify the defendant, *in compliance with CPL Article 245, and in any event not less than 15 days prior to the first scheduled trial date*, of all specific instances of defendant’s criminal, prior uncharged criminal, vicious or immoral conduct of which they have knowledge and which they intend to use to impeach defendant’s credibility if he elects to testify at trial.

At the hearing, the defendant shall 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 his ability to testify as a witness on his own behalf (*see People v Matthews*, 68 NY2d 118 [1986]; *People v Malphurs*, 111 AD2d 266 [2d Dept 1985]).

Upon the consent of the People, if the People determine that they will seek to introduce at trial evidence in their case-in-chief of any prior uncharged misconduct and criminal acts of the defendant, the People shall notify the court and defense counsel, *in compliance with CPL Article 245, and in any event not less than 15 days prior to the first scheduled trial date*, 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 any such evidence

may be used by the People 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 any other hearings ordered herein.

IV.

MOTION to STRIKE STATEMENT NOTICE &  
PRECLUDE STATEMENT TESTIMONY  
CPL 710

The People served CPL 710.30(1)(a) notice of a statement which defendant allegedly made on May 10, 2019, at approximately 3:00 p.m., at the Yonkers Police Department Headquarters to a Member of the Yonkers Police Department, and which was electronically recorded.

The motion to strike the statement notice is denied, as said notice is in conformity with the statutory requirements of CPL 710.30.

Defendant's motion to suppress the noticed statement as unconstitutionally obtained is granted to the extent that a *Huntley* hearing shall be held prior to trial to determine whether the statement was involuntarily made by 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]).

V.

MOTION to STRIKE IDENTIFICATION NOTICE &  
PRECLUDE IDENTIFICATION TESTIMONY  
CPL 710

The People served CPL 710.30(1)(b) notice of an identification of defendant on May 10, 2019, at approximately 2:30 p.m., at 10 Coyle Place, Yonkers, NY.

The motion to strike the identification notice is denied, as said notice is in conformity with the statutory requirements of CPL 710.30.

Defendant's motion to suppress identification testimony is granted to the limited extent of ordering a pre-trial *Wade* hearing (see *United States v Wade*, 388 US 218 [1967]). At the hearing, the People bear the initial burden of establishing the reasonableness of the police conduct and the lack of any undue suggestiveness (see *People v Chipp*, 75 NY2d 327, 335 [1990]).

*cert. denied* 498 US 833 [1990]; *People v Berrios*, 28 NY2d 361 [1971]). Once that burden is met, the defendant bears the ultimate burden of proving that the procedure was unduly suggestive. Where suggestiveness is shown, the People must show the existence of an independent source by clear and convincing evidence.

VI.

MOTION to STRIKE ALIBI NOTICE

Defendant's motion to strike the alibi notice is denied. Contrary to the defendant's contentions, it is well-settled that CPL 250.20 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]).

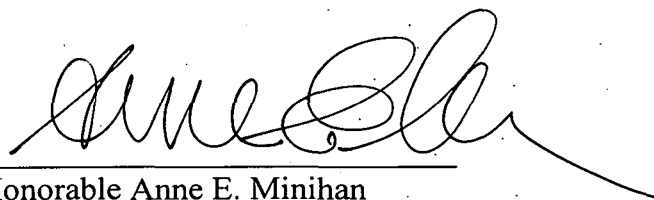
VII.

MOTION to STRIKE PREJUDICIAL LANGUAGE

The Defendant moves to strike certain language from the last paragraph of the indictment charging defendant's crime as being "against the peace and dignity of the People of the State of New York" on the grounds that it is surplusage, irrelevant or prejudicial. The language merely identifies defendant's alleged acts as public, rather than private wrongs. Such language should not be stricken as prejudicial, and this branch of the motion is, thus, denied (*see People v Gill*, 164 AD2d 867 [2d Dept 1990]; *People v Winters*, 194 AD2d 703 [2d Dept 1993]).

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

Dated: White Plains, New York  
December 9, 2019



Honorable Anne E. Minihan  
Acting Supreme Court Justice