People v Glover
2020 NY Slip Op 34907(U)
September 8, 2020
County Court, Westchester County
Docket Number: Indictment No. 19-1263-02
Judge: George E. Fufidio

COUNTY COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

KASHAWN GLOVER,

Defendant.

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FUFIDIO, J.

DECISION & ORDER
Indictment No.: 19-1263-02

Defendant, KASHAWN GLOVER, having been indicted on or about December 6, 2019, for aiding, abetting and acting in concert with co-defendant Akim McCallop with two counts of robbery in in the first degree (Penal Law § 160.15 [3] & [4]), two counts of burglary in the first degree (Penal Law § 140.30 [3] & [4]); one count of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and one count of criminal possession of a weapon in the third degree (Penal Law § 265.02 [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 this Court disposes of this motion as follows:

A. MOTION FOR BILL OF PARTICULARS

The Defendant's motion for bill of particulars is granted. The People have argued that this defendant's request for a bill of particulars is untimely, yet, the People said they would provide the co-defendant, Akim McCallup with a bill of particulars, in response to his request for one that they have deemed similarly untimely. Accordingly, the People are ordered to provide one for this defendant as well.

B. MOTION TO INSPECT AND THE GRAND JURY MINUTES AND TO DISMISS AND/OR REDUCE THE INDICTMENT

Defendant moves pursuant to CPL §§210.20(1)(b) and (c) 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. 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]). The Court did find one instance of a potential mis-instruction wherein the People instructed the Grand Jury on Penal Law 265.02[1] that, "under our law, a firearm needs to be loaded under Penal Law Section 265.02, subdivision 1 and it must be operable." That is an incorrect instruction, however, it is more restrictive than what is actually required, which is that the gun simply be operable (*People v Saunders*, 85 NY2d 339 [1995], *People v Zakrzewski*, 7 AD3d 823 [3rd Dept. 2004]). The Court finds no infirmity with the Grand Jury finding more than they were required to. Other than 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 such portions of the Grand Jury minutes as have not already been disclosed pursuant to CPL Article 245 to the parties was necessary to assist the Court.

C. MOTION FOR *SANDOVAL/VENTIMIGLIA/MOLINEUX* HEARING

Granted, solely to the extent that *Sandoval/Ventimiglia/Molineux* hearings, as the case may be, shall be held immediately prior to trial, as follows:

I. Pursuant to CPL §245.20, the People must notify the Defendant, not less than fifteen days prior to the first scheduled date for trial, of all specific instances of Defendant's uncharged misconduct and criminal acts of which the People have knowledge and which the People intend to use at trial for purposes of impeaching the credibility of the Defendant, or as substantive proof of any material issue in the case, designating, as the case may be for each act or acts, the intended use (impeachment or substantive proof) for which the act or acts will be offered; and

II. Defendant, at the ordered hearing, 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 AD2d 266 [2nd Dept. 1985]).

D. MOTION 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.

E. MOTION FOR SEVERANCE

The Defendant's motion to sever is denied. When charges against co-defendants are properly joined in a single indictment, motions for separate trials are addressed to the discretion of the trial court (*see People v Mahboubian*, 74 NY2d 174, 183 [1989]). Where, as here, the proof against both defendants is supplied by the same evidence, "only the most cogent reasons warrant a severance"(*People v Bornholdt*, 33 NY2d 75, 87 [1973]; *People v Kevin Watts*, 159 AD2d 740 [2d Dept 1990]), and, ". . . a strong public policy favors joinder, because it expedites the judicial process, reduces court congestion, and avoids the necessity of recalling witnesses. . . ." In this case, the defendant was properly joined in the same indictment (CPL 200.40[1]). The evidence underpinning the indictment, which is pertinent to proving the allegations in which both defendants are charged with aiding, abetting and acting in concert is common to both of the co-defendants.[1] Nevertheless, the Court may, for good cause shown, order that defendant be tried separately. Good cause includes a showing that defendant would be "unduly prejudiced by a joint trial" (CPL 200.40[1]). The Defendant claims that he and his co-defendant have antagonistic defenses but has not shown how the two are in irreconcilable conflict with one another, nor how this conflict would lead a jury to infer guilt upon him (*People v Mahboubian*, 74 NY2d 174 [1989]). Mere inconsistency in defenses is not enough to warrant a severance (*People v Allaway*, 172 AD2d 617 [2nd Dept. 1991]). The Defendant has not made a showing that a joint trial would be unduly prejudicial to him.

F. MOTION TO STRIKE STATEMENT NOTICES OR ALTERNATIVELY SUPPRESS STATEMENTS

The Court denies the Defendant's motion to strike the statement notices. They are in conformity with the requirements of CPL 710.30 in so far as they give notice of the time, place and substance of the statements sought to be used, in order for the Defendant to challenge them (*People v Rodney*, 85 NY2d 289 [1995]; *People v Lopez*, 84 NY2d 425 [1994]; CPL 710.30). Moreover, a motion made to suppress such statements effectively waives any claim of deficiency in the notices (*Lopez, supra*).

The Court grants the Defendant's motion 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

[1] Akim McCallup is charged in this indictment with several other crimes that occurred after the incident in which this Defendant is implicated.

counsel, and/or obtained in violation of the Defendant's Fourth Amendment rights (*see Dunaway v New York*, 442 US 200 [1979]).

G. MOTION TO STRIKE IDENTIFICATION NOTICES OR ALTERNATIVELY SUPPRESS IDENTIFICATIONS

As in POINT F above the Defendant's motion to strike is denied. The notices are in conformity with CPL 710.30 and the Defendant has moved to suppress the identifications noticed thus effectively waiving his right to challenge any deficiency (*People v Lopez*, 84 NY2d 425 [1994], *People v Kirkland*, 89 NY2d 903 [1996]).

With respect to the suppression motion, the Court decides as follows:

1. Single Photo Identification: The People argue that this was a picture that one of the victims showed the police that was taken from a social media account. This factual scenario is described in greater detail in the victim's grand jury testimony. This was not a police arranged identification procedure and thus there is nothing to be suppressed (*People v Marte*, 12 NY3d 583 [2009]).

2. The remaining two photographic array identifications: A hearing shall be held to consider whether or not the noticed identifications were unduly suggestive (*United States v Wade*, 388 US 218 [1967]). 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 victim's proposed in-court identification *(People v Adelman*, 36 AD3d 926 [2nd Dept. 2007]).

The Defendant has claimed in his motion that he has not received a copy of the photographic arrays. If the People have not provided them, they are ordered to do so.

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

Dated: White Plains, New York
September 8, 2020

Hon. George E. Fufidio
Westchester County Court Justice

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