

People v Graham

2020 NY Slip Op 35450(U)

June 26, 2020

County Court, Westchester County

Docket Number: Indictment No. 19-1217

Judge: George E. Fufidio

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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-

AUTUMN GRAHAM,

Defendant.

-----X
FUFIDIO, J.

DECISION & ORDER
Indictment No.: 19-1217

FILED

JUN 26 2020

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Defendant, AUTUMN GRAHAM, having been indicted on or about December 17, 2019, for one count of attempted murder in the second degree (Penal Law § 110/125.25[1]), one count of assault in the first degree (Penal Law § 120.10[1]); 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:

**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. The Court of Appeals has not construed the identity theft statute as narrowly as the Defendant argues here and has found that the crime may be committed by a defendant evincing intent to

defraud by assuming the identity of another, which may be accomplished by using another person's personal identifying information (*People v Roberts*, 31 NY3d 406 [2018]). The two checks that the Defendant used to perpetrate his alleged fraud had the victim's name, address and bank account number on them. The Court finds that a sufficient assumption of someone else's identity, despite being real checks actually made out to the Defendant (*id.*).

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 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.

B. MOTION FOR DISCOVERY, DISCLOSURE AND INSPECTION

On January 19, 2020, the Defendant was arraigned. On January 28, 2020, the People filed their statement of discovery compliance and readiness stating that all of the discoverable material in their actual possession had been provided to the Defendant except the answers to one question in the People's so called, "1K Questionnaire" designed to elicit information from the police officers involved in the case in conformity with the People's disclosure requirements under CPL 245.20 (1)(k)(iv). The People told the Defendant that, "police witnesses have answered all questions except about complaints contained in their personnel file relying on Civil Rights Law 50-a." After January 28, 2020, discoverable material continued to trickle into the District Attorney's Office and as that information was received it was promptly given to the Defendant. On February 20, 2020 the People filed a supplemental Certificate of Compliance. On February 27, 2020 this Court ordered the New Rochelle Police Department to answer the questions they had theretofore refused to answer in the 1K Questionnaire by March 10, 2020, in addition, the People continued to turn over police reports as they were being received.

The Defendant, in her *Omnibus* motion has asked the Court to strike the certificate of compliance and statement of readiness, stating in essence that the People should not be permitted to declare readiness though discovery compliance until they have complied with CPL 245.35(3), which requires the People to file an *additional* Certificate of Compliance once they've inquired "of all police officers and other person who have participated in investigating or evaluating the case about the existence of any favorable evidence or information" as contemplated by CPL 245.20(1)(k)(CPL 245.35(3)). On March 10, 2020 the People once again declared readiness.

CPL 245.80 lists several sanctions for the People's non-compliance with discovery, however, none of them are to strike the certificate of compliance and statement of readiness. Accordingly, Defendant's motion for discovery is granted to the extent provided for in Criminal Procedure Law Article 245 and/or already provided by the People and at this point, any question of sanctions under CPL 245.80 has not been raised and in any event is premature. If any items

set forth in CPL Article 245 have not already been provided to Defendant pursuant to that Article, said items are to be provided forthwith. Any party is granted leave, if required, to apply for a Protective Order in compliance with CPL Article 245, upon notice to the opposing party and any party affected by said Protective Order. The People are directed to file a Certificate of Compliance with CPL Article 245 and the instant Order upon completion of their obligations thereunder. In particular they are directed to comply with CPL 245.35(3) with respect to any question that had been previously refused to have been answered by any member of the New Rochelle Police Department. The People are given 2 weeks from the date of this decision by which to comply with this Order and CPL 245.35(3). Any cross-motion for reciprocal discovery is likewise granted to the extent provided for in Criminal Procedure Law Article 245, and/or already provided to the People.

Notwithstanding the orders above, turning toward the extent of discovery required by CPL 245.20(1)(k)(iv) as it pertains to information that would tend to impeach the credibility of testifying police officers. At the time the Defendant filed her motion and the People responded, the People had relied upon what had been called the "1k Questionnaire" that had been created in response to the newly enacted discovery procedures under CPL Article 245 as a mechanism to get from the police information that would tend to impeach their testimony. The Police, in response, refused to answer question number 6 contained in that questionnaire which asked, "is the witness aware of any other administrative, personnel or civilian complaints implicating the witness's honesty and integrity?" While this is information that in this Court's estimation cuts right to the heart of the purpose of CPL 245.20(1)(k)(iv), the police, in several other cases, though not in the instant case, argued that this information was protected from disclosure under Civil Rights Law section 50-a and rather than willingly provide that information, they argued that the only way that information could be obtained was by subpoena *duces tecum* for an *in camera* inspection of those documents, only once it had been established there existed a "factual nexus between the requested documents and relevant and exculpatory evidence, as opposed to general impeachment material" (*Matter of Certain Police Officers*, 67 Misc3d 458). This abject refusal to turn this material over the very agency tasked with actually following through on the arrests made by the various police departments left the People unable to comply with their obligations under CPL Article 245 and required the courts to take creative measures in an attempt to get the police to disclose this information and in turn, potentially put those arrests in jeopardy by invoking at a minimum sanctions set forth in CPL 245.80. However, as history will show, in March 2020 the world was and at this writing, still is in the midst of the global COVID-19 pandemic, which had initially halted all but essential court proceedings and coincidentally in June 2020, in response to global protests concerning police brutality and general law enforcement practices, New York State repealed Civil Rights Law section 50-a. What this means is that the police may no longer use Civil Rights Law 50-a as a shield protecting them from disclosing that information to the People in the "1k Questionnaire." However, it would also appear that this information is no longer in the *exclusive* control of the police and prosecutors and that the Defendant may be able to obtain this information through the Freedom of Information Laws procedure. Nevertheless, CPL 245.20 put the burden on the prosecution to obtain and disclose this information, "the prosecution shall disclose to the defendant...all items and information that relate to the subject matter of the case and are in the possession, custody or

control of the prosecution or person under the prosecution's direction or control, including but not limited to:..." (245.20(1)). The list in CPL 240.20 is not exhaustive and naturally that leads to the contemplation of more liberal disclosure. Once the People have the answers from the questionnaire, assuming that the answer to any of the questions is in the affirmative, the People will then be in a position to determine for themselves how to best respond to that information under the law and how to obtain the material from the police personnel files, should they need to, in order to disclose that information to the Defendant. Ironically, in the haste to repeal Civil Rights Law 50-a, the legislature also repealed subdivision 4 of that section which essentially granted prosecutors access to that information in furtherance of their official duties. Furthermore, there is nothing preventing the Defendant from seeking the material on her own in order check the accuracy of what has been disclosed by the People.

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.

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 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]). 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 Marshall*, 26 NY3d 495 [2015]).

E. MOTION TO SUPPRESS STATEMENTS

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

F. MOTION FOR BILL OF PARTICULARS

The Defendant's motion for bill of particulars is denied. The Defendant never requested a bill of particulars and the request is now untimely (CPL 200.95[2]&[3]). In any event, the Defendant has received ample discovery in this case in order to be able to formulate her defense (CPL 200.95[5]).

G. MOTION FOR HEARING TWO WEEKS PRIOR TO TRIAL

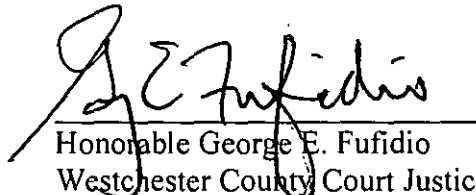
This motion is denied. The hearings will be conducted immediately prior to trial. The defendant has shown no reason nor offered any authority why hearings should be held two weeks prior to trial.

h. 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.

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

Dated: White Plains, New York
June 26, 2020


Honorable George E. Fufidio
Westchester County Court Justice